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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAY 18 2005
WAC 03 209 53072

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Japanese food business consisting of a restaurant, café, and catering service. It seeks to employ the beneficiary permanently in the United States as a general manager. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that the beneficiary possessed the requisite work experience specified on the labor certification. The director also found that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel contends that the petitioner has demonstrated its continuing financial ability to pay the proffered wage and has demonstrated that the beneficiary qualifies for the certified position.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The petitioner must also show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, Form ETA 750 was accepted for processing on July 2, 1998. The proffered wage as stated on Form ETA 750 is \$4,000 per month or \$48,000 per year. On Form ETA 750B, signed by the beneficiary in June 1998, the beneficiary claims to have worked for the petitioner since August 1997.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must possess. In this matter, item 14 states that an applicant must have four years of college culminating in a bachelor's degree. The major field of study must be "business or economics or equivalence." Additionally, the applicant for general manager must have two years of experience in the position offered or in a related occupation described only as "Japanese foods business." The duties of the job to be performed are described in Item 13. The applicant will be in charge of the general management of the company. His duties will include, hiring and supervising employees at all levels, purchasing from local vendors or importing food and beverages from Japan, developing marketing plan to improve company business, meet with Japanese organizations and individuals to sell high volume catering services, organize banquets, and advise on financial and tax matters.

On Part 5 of the petition, the petitioner claims to have been established in 1983, have a gross annual income of \$2,100,000, a net annual income of \$1,200,000, and to currently employ thirty workers.

In support of its ability to pay the proffered salary, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 1999, 2000, and 2001. They indicate that the petitioner files its taxes using a fiscal year running from April 1st until March 31st of the following year. Thus, its 1999 return reflects the petitioner's financial data from April 1, 1999 to March 31, 2000. These tax returns contain the following information:

Year	1999	2000	2001
Net taxable income before net operating loss (NOL) deduction	\$24,018	\$23,407	\$ 20,862
Current Assets	-\$10,317	-\$22,773	-\$ 54,942
Current Liabilities	\$49,819	\$41,338	\$ 88,028
Net Current Assets	-\$60,136	-\$64,111	-\$142,970

As shown above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, CIS will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end net

current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

In support of the beneficiary's prior employment experience, the petitioner provided a letter, dated June 12, 2003, from [REDACTED]. It is written in English and signed by [REDACTED] President. He certifies the beneficiary's experience with Kirin Brewery abroad and in Los Angeles. He states that the beneficiary worked from April 1985 until December 1988 for [REDACTED] in Osaka, Japan where the beneficiary was "in charge of 3 distributors, 200 liquor stores and 500 restaurants. Making plans and retailer services." He further states that from January 1989 until February 1990, the beneficiary worked in Hong Kong and Singapore for [REDACTED] as a regional manager, where he developed a feasibility study and developed and implemented a marketing plan. Finally, [REDACTED] states that the beneficiary worked as a regional manager for Kirin U.S.A. in Los Angeles from March 1990 until June 1993, where he was in charge of developing [REDACTED] products for the United States.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to establish that the beneficiary possesses the requisite work experience, on October 14, 2003, the director requested additional evidence pertinent to those issues.

Relevant to the ability to pay the beneficiary's proposed wage offer of \$48,000, the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date of July 2, 1998. The director also instructed the petitioner to submit evidence of its ability to pay for 1998 through 2002. The director further advised the petitioner that Service records show that it had filed at least three I-140 petitions. The director instructed the petitioner to provide evidence that it has the ability to pay the proffered wages of all employment based immigrant petitions or that it had been paying the proffered wages to these beneficiaries. The director also requested the petitioner to supply copies of the beneficiary's Wage and Tax Statements (W-2s) that it had issued to the beneficiary for 1998 through 2002.

The director also requested that the petitioner provide additional evidence to support the beneficiary's accrual of the required two years of experience as specified on the ETA 750. The director advised the petitioner that the letter verifying the beneficiary's employment with [REDACTED] did not contain the number of hours worked or a clear description of the beneficiary's duties. The director informed the petitioner that a letter describing the beneficiary's past employment should include a clear description of the duties, dates of employment and number of hours worked per week.

In response to the director's request for financial data pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner submitted a letter from its president, [REDACTED], indicating that the petitioner's gross revenue and gross profit supported its ability to add additional employees. [REDACTED] also suggests that many deductions on the tax returns are paper deductions and therefore the petitioner's ability to pay the proposed wage offer has been established. The petitioner further provides copies of its corporate tax returns for 1998 and 2002. They reveal the following:

Year	1998	2002
Net taxable income before		
NOL deduction	\$50,078	\$16,448
Current Assets	-\$25,716	- \$ 47,289
Current Liabilities	\$31,601	\$ 98,653
Net Current Assets	-\$57,317	-\$145,942

The petitioner also provided copies of the beneficiary's W-2s. In 1998, the petitioner paid the beneficiary \$36,750 in wages. In 1999, the petitioner paid the beneficiary \$42,450. In 2000 and 2001, the petitioner paid the beneficiary \$47,500 and \$45,250, respectively. In 2002, the W-2 shows that the petitioner worked for another employer named [REDACTED] with a different employer identification number and a different address as that of the petitioner. The beneficiary received \$21,000 in compensation from this employer.

With reference to evidence establishing the beneficiary's two years of qualifying experience, the petitioner submitted another letter from [REDACTED] in this letter, dated December 15, 2003, Mr. Shimura states that the beneficiary worked full-time as a regional manager for [REDACTED] during a total period from April 1985 until March 1990. He states that this company manufactures and sells Japanese beverages and foods. As regional manager [REDACTED] states that the beneficiary's duties were to develop and implement marketing plans to sell products to distributors and retailers at the Osaka branch in Japan. He then formulated feasibility and marketing plans and supervised import operation of products from Japan to Hong Kong and Singapore from January 1989 to February 1990. In March 1990 [REDACTED] states that the beneficiary was transferred to the U.S. branch of [REDACTED] as regional manager where he supervised three district managers and developed marketing strategies for the sale of [REDACTED] products in the United States.

On May 30, 2003, the director denied the petition, concluding, in part, that the petitioner had failed to persuasively demonstrate that the beneficiary had obtained the requisite two years of qualifying experience in the certified position as general manager or experience in a related occupation involving the Japanese foods business. The director determined that the petitioner's duties for the [REDACTED] firm did not match the duties described on the ETA 750A for a general manager of the petitioning business.

The director also concluded that the petitioner's evidence failed to establish its continuing ability to pay the proposed wage offer of \$48,000 per year as of the priority date of July 2, 1998. The director noted that the petitioner had filed another I-140 (Wac0205252864), with the same classification, which had been already been approved based on a 1997 priority date and for which the beneficiary had not yet immigrated. The director reasoned that the annual proffered wage of \$24,024 for Wac0205252864 had already been earmarked as funds necessary to be included in the consideration of the petitioner's ability to pay the proffered salary of the beneficiary in the instant case. The director determined that the petitioner must demonstrate its ability to pay the proffered wage of \$48,000 per year over and above the wages already earmarked for the above-listed beneficiary in Wac0205252864.

On appeal, counsel contends that the verification of the beneficiary's prior employment as a regional manager was sufficiently specific to fulfill the terms of the labor certification. He asserts that the position of a manager

inherently requires hiring, supervising, developing marketing plans and meeting with company vendors and customers and that the beneficiary's employment with the [REDACTED] firm meets the terms of the ETA 750.

Counsel's point is well taken. The jurisdiction of CIS encompasses a review of whether a petitioner is making a realistic job offer by evaluating the qualifications of a beneficiary for the designated position. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984).

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). In cases where the required experience must be determined from prior jobs, it is appropriate for CIS to look to job duties of previous employment, not just job titles. *See Matter of Maple Derby, Inc.*, 89-INA-185 (BALCA 1991) (*en banc*). In this case, as noted above, the position requires a baccalaureate degree in addition to two years experience in the job offered as a general manager or two years of experience in a related occupation in the Japanese food business. The documentation in the record reflects that the beneficiary has the requisite academic credentials. Because the required qualifying experience allows an alternative related occupation in the Japanese food business, it creates sufficient latitude to conclude that, while the beneficiary's duties were not exactly the same as that described for the position offered, his job as a regional manager, as confirmed by [REDACTED] involved several substantially similar supervisory duties, so as to reasonably conclude that the beneficiary's past work experience meets the terms of the labor certification.

Regarding the petitioner's ability to pay the proffered wage, counsel asserts that the combination of the wages already paid to the beneficiary by the petitioner and its net income establishes the petitioner's ability to pay the proffered wage. Counsel also asserts that the officer compensation as set forth on the petitioner's tax returns should also be factored into the petitioner's ability to pay the proffered wage as it represents sums distributed to the petitioner's owners.

In this case, CIS will not consider the officer compensation amounts presented on the petitioner's tax returns simply because they belong to the principal shareholders. They represent monies already expended and not available to pay the proffered wage. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Moreover, there was no officer compensation claimed in 2001. Even if it were included in the calculation of the petitioner's ability to pay a proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate a *continuing* ability to pay the proposed wage offer beginning at the priority date established when the labor certification was first accepted for processing by the DOL.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of its ability to pay the certified wage during a given period. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the beneficiary's W-2s indicate that the petitioner paid him \$11,250 less than the proffered wage to in 1998. In 1999, the petitioner paid \$5,550 less than the certified wage to the beneficiary. The petitioner paid the beneficiary \$500 less in 2000, and the shortfall in 2001 was \$2,750 less than the proffered salary of \$48,000 per annum. As mentioned above, and by the director, the record does not contain any evidence that the petitioner issued a W-2 in 2002 to the beneficiary. The only W-2 contained in the documentation is one from a different employer, as stated above. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The petitioner also did not address the other approved petition as noted prominently in the director's discussion. The director's analysis in considering the petitioner's ability to pay the proffered wage for this beneficiary in the same visa classification, who has not yet immigrated, is rational. If a petitioner files for multiple beneficiaries, it must show that it had sufficient income to pay all the proffered wages beginning at the individual priority dates and continuing until the beneficiary's wages are incorporated as part of the petitioner's cumulative salaries shown on line 13 of its federal tax return. In this respect, the director's inclusion of the proffered wage of \$24,024, under Wac0205252864, as a deduction from the petitioner's available funds in this case, is correct.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that wages paid to other employees reached a specified level or exceeded the proffered wage is not sufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid, rather than net income.

As set forth above, the petitioner's net current assets in each of the relevant years amounted to losses. As such, none of the figures in this category could cover any portion of the proffered wage of \$48,000 per year. It is noted that the petitioner's net taxable income reflected on the 1998, 1999, 2000, and 2001 tax returns show, that after deducting the designated proffered wage of \$24,024 for Wac0205252864, the petitioner's net taxable income available to pay the difference between the actual wages paid and the proffered wage, in this case, was \$26,054 in 1998; -\$6 in 1999; -\$617 in 2000, and -\$3,162 in 2001.

The remaining net taxable income was sufficient to cover the \$11,250 shortfall in 1998 and demonstrates the petitioner's ability to pay the proposed wage offer during this period.

In 1999, -\$6 would not cover the difference of \$5,550 between the proffered wage and the actual salary paid to the beneficiary here.

In 2000, the shortfall of \$500 between the actual salary paid to the beneficiary and the proffered salary could not be met by the -\$617 remaining after factoring in the certified wage of \$24,024 needed to pay the beneficiary in Wac0205252864.

Similarly, in 2001, the difference between the actual wages paid to the beneficiary and the proffered wage was \$2,750. This could not be covered out of the petitioner's remaining -\$3,162 in net taxable income after considering the proffered wage in Wac0205252864.

Finally, in 2002, even without considering the other beneficiary's certified wage under Wac0205252864, the net taxable income of \$16,448 was insufficient to pay the proffered salary of \$48,000. Thus, except for 1998, the record does not establish that either the petitioner's net current assets or its net taxable income could pay the proffered wages of more than one beneficiary.

Although these comparisons cannot be calculated to a certainty because of the time period designated by the petitioner's fiscal year, it can be concluded, based on the underlying record and the argument submitted on appeal, that the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage for this beneficiary as well as the one named in Wac0205252864. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.