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U.S. Citizenship
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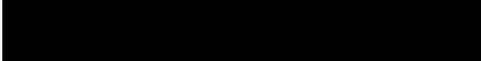


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FILE: 
WAC 03 150 53825

Office: CALIFORNIA SERVICE CENTER

Date: **MAY 23 2005**

IN RE: Petitioner: 
 Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3)
 of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 restaurant/catering corporation. It seeks to employ the beneficiary permanently in the United States as a food designer decorator (hand). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined 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. The director denied the petition accordingly.

On appeal, petitioner is self-represented. The petitioner submitted no additional evidence or brief.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The regulation 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 8 C.F.R § 204.5(l)(3)(ii) states in pertinent part:

(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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on November 14, 2000. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour or, as calculated, \$24,024.00 per year. The Form ETA 750 states that the position requires three years experience.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date,¹ the California Service Center on July 14, 2003 and October 3, 2003, requested evidence pertinent to that issue.

¹ The qualifications of the beneficiary are not an issue on appeal.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

“ Ability to Pay: The petitioner must demonstrate this ability [to pay the beneficiary's wage] at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of the ability shall be either in the form of copies of annual reports, federal tax returns ... or audited financial statements. Provide evidence of the petitioner's ability to pay the beneficiary's wage for fiscal years 2000, 2001, and 2002”

“ Quarterly Wage Report: Submit copies of the U. S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last [three] quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees.”

In response to the Requests for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted U.S. Internal Revenue Service Form 1120 tax returns for years 2000, 2001, and 2002. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,024.00 per year from the priority date:

- In 2002, the Form 1120 stated taxable income² of a loss of <\$32,420.00>.
- In 2001, the Form 1120 stated taxable income of \$3,901.00.
- In 2000, the Form 1120 stated taxable income of \$1,609.00.

Petitioner submitted copies of the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for the four quarters of tax year 2002 with a list of employees, and, W-2 Wage and Tax Statements for the beneficiary from 1995 to 2002.

The director denied the petition on January 22, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, petitioner asserts:

“Petitioner is hereby appealing your [the California Service Center's] denial on the grounds that when this alien [the beneficiary] was hired your rules and regulations were very different. He [the beneficiary] is a “grandfather employee” and when I commenced this paper work I understood that this was an “offer” of employment. That all the wages offered were to be paid after he was legalized...I am in urgent need of this worker. If his work permit is granted I will place him on my payroll with the amount of salary offered but I have complied with all your requests ... I would like your good offices to consider this denial and instruct me of any remedies that could be done ... We are trying to do everything as per your rules. Also at present he is paid that amount of money....”³

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary

² IRS Form 1120, Line 28.

³ There is an addendum attached to Form I-290B appeal form that contains language that relates to the beneficiary's working conditions and the certified Alien Employment Application.

during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The proffered wage is \$\$24,024.00 per year

In the employ of the petitioner, the beneficiary received the following wage ;⁴

- In 2000 the beneficiary received \$16,468.00.
- In 2001 the beneficiary received \$17,294.00.
- In 2002 the beneficiary received \$22,157.00.

According to the above information, the petitioner has not employed the beneficiary at a salary equal to or greater than the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, equal the amount of the proffered wage, then the petitioner will be found to have the ability to pay the proffered wage (i.e. \$24,024.00).

- In 2002, the Form 1120 stated taxable income⁵ of a loss of <\$32,420.00>. In 2002 the beneficiary received \$22,157.00 in wages
- In 2001, the Form 1120 stated taxable income of \$3,901.00. In 2001 the beneficiary received \$17,294.00
- In 2000, the Form 1120 stated taxable income of \$1,609.00. In 2000 the beneficiary received \$16,468.00

Based upon the above information, the petitioner could not pay the proffered wage for the years 2000 to 2002.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. Petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered

⁴ Wages are those stated on the beneficiary's W-2 Wage and Tax Statements.

⁵ IRS Form 1120, Line 28.

wage. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

Examining the three Form 1120 U.S. Income Tax Returns submitted by petitioner, Schedule "L" found in each of those returns indicates current assets never exceeded current liabilities as reported by petitioner.

- In 2002, petitioner's Form 1120 return stated current assets of \$3,609.00 and \$3,833.00 in current liabilities. Therefore, the petitioner had a negative <\$224.00> in current net assets for 2002. Since the proffered wage was \$24,024.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of a negative <\$1,621.00> and \$00.00 in current liabilities. Therefore, the petitioner had a negative <\$1,621.00> in current net assets for 2001. Since the proffered wage was \$24,024.00 per year per year, this sum is less than the proffered wage.
- In 2000, petitioner's Form 1120 return stated current assets of a negative <\$16,029.00> and \$00.00 in current liabilities. Therefore, the petitioner had a negative <\$16,029.00> in current net assets for 2000. Since the proffered wage was \$24,024.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2000 through 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it did have the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Petitioner indicated in Section Three of Form I-290B that, "He [the beneficiary] is a "grandfather employee" and when I commenced this paper work I understood that this was an "offer" of employment. That all the wages offered were to be paid after he was legalized...." Proof of ability to pay begins on the priority date, that is November 14, 2000, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor.

Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. 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.

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.