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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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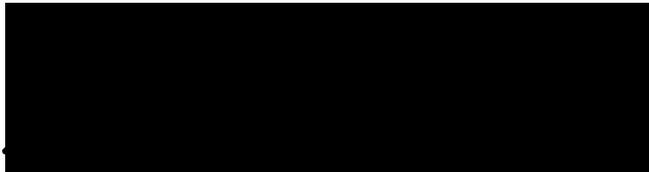
Office: NEBRASKA SERVICE CENTER

Date: **MAY 25 2005**

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 Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 granting 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 16, 2002. The proffered wage as stated on the Form ETA 750 is \$35,411 per year.

On the petition, the petitioner stated that it was established during 1997. The petitioner did not state, in the space provided, the number of workers it employs. The petitioner also failed to state its gross annual income and its net annual income in the spaces provided. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Hoffman Estates, Illinois.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner reports taxes based on the calendar year and that it declared ordinary income of \$13,363 during 2001. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. Because the priority date is September 16, 2002, however, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In a letter dated March 18, 2003 counsel explained that, in performing the job of manager, the beneficiary would replace the petitioner's president. Counsel also provided a copy of a 2001 W-2 form showing that the petitioner paid wages of \$26,000 during that year to [REDACTED] whom counsel states is the petitioner's president. Counsel noted that the petitioner's 2001 ordinary income added to the amount it paid to its president during that year was sufficient to pay the proffered wage.

On July 24, 2003 the Director, Nebraska Service Center, issued a Request for Evidence in this matter. The director requested that the petitioner state its current number of employees, its gross annual income, and its net annual income. The director also noted that the evidence of the petitioner's ability to pay the proffered wage pertains to 2001, whereas the priority date of the petition is September 16, 2002. The director observed that, therefore, the evidence submitted was not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director requested that the petitioner submit copies of annual reports, federal tax returns, or audited financial statements to show that its continuing ability to pay the proffered wage beginning on the priority date. The director also specifically requested a copy of the petitioner's 2002 tax return and, if it employed the beneficiary during 2002, a copy of the W-2 form showing wages paid to the beneficiary during that year.

In response, counsel submitted (1) a cover letter, dated October 13, 2003, (2) copies of the petitioner's 1998, 1999, 2000, and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, (3) copies of three 2002 W-2 forms, (4) copies of 2003 pay stubs, (5) a copy of a computer-generated payroll earnings report, and (5) copies of bank statements pertinent to the petitioner's account during various months.

The petitioner's 1998, 1999, and 2000 tax returns are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, which is September 16, 2002. The petitioner's 2002 return shows that the petitioner declared ordinary income of \$3,198 during that year. At the end of that year the petitioner's current liabilities exceeded its current assets.

Two of the 2002 W-2 forms submitted show that the petitioner paid \$25,000 to [REDACTED] and \$15,859.54 to [REDACTED] during that year. The third W-2 form shows that HNP Incorporated, dba Subway, of Rolling Meadows, Illinois, paid wages of \$20,350 to the beneficiary during 2002.

Of the four 2003 pay stubs submitted, two show that on September 19, 2003 the petitioner paid gross wages of \$1,000 to [REDACTED] and \$677.25 to [REDACTED]. The other two pay stubs show another \$1,000 paid to [REDACTED] and \$748 paid to [REDACTED].

The payroll earnings reports submitted show that, by August 31, 2003, the petitioner had paid year-to-date totals of \$17,000 to [REDACTED] and \$11,650.27 to [REDACTED].

In his letter, counsel stated that the petitioner has three full-time and three part-time employees. Counsel explained that the petitioner has no audited financial statements or annual reports. Further, counsel stated in that letter that two part-time employees [REDACTED] and [REDACTED] have worked as the petitioner's managers. Finally, counsel stated that the petitioner's Schedule K, Line 20 shows Total property distributions of \$13,112. Counsel implied that those funds were also available to pay the proffered wage. Counsel also

stated that the wages paid to the beneficiary during 2002 were for managing a Subway other than the petitioner's.¹

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 9, 2004, denied the petition.

On appeal, counsel reiterates that the petitioner has no audited financial statements or annual reports available. Counsel also reiterates the assertion that the petitioner has been paying the two part-time managers as stated above, and that their wages will be available to pay the proffered wage when the beneficiary is able to work legally in the United States. In support of that assertion counsel submitted the affidavits of the petitioner's two shareholders and of the other part-time manager. All of those affidavits attest to the facts as stated by counsel.

Counsel has repeatedly noted that the petitioner does not have annual reports or audited financial statements with which to demonstrate the ability to pay the proffered wage. The effect of the petitioner not having that evidence at its disposal is that the petitioner is obliged, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate its ability to pay the proffered wage with its tax returns.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.² Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

In his March 18, 2003 letter counsel stated that the petitioner's president, [REDACTED] had been working as the petitioner's manager. Counsel demonstrated that the petitioner had paid Ms. Trivedi \$26,000

¹ If counsel is correct that the beneficiary worked for HNP Incorporated as a Subway manager during 2002 then the beneficiary did not complete the Form ETA 750, Part B accurately. That form requests that the beneficiary "List all jobs held during the last three (3) years." The instructions continue, "Also list any other jobs related to the occupation for which the alien is seeking certification . . ." The beneficiary completed and signed that form on August 21, 2002. That the beneficiary was paid \$20,352 during 2002 for working as a Subway manager beginning sometime after August 21, 2002 is unlikely, as it would represent an annual wage of approximately \$80,000 annually, an amount much greater than the proffered wage in this case and the predominant wage for similar positions. The beneficiary began his employment for HNP prior to filing that form and the employment was related to the proffered position. That employment should therefore have been listed on the Form ETA 750, Part B. On that form, however, the beneficiary indicated that he had not been employed since May of 1999.

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

during that year and noted that those wages, together with the petitioner's 2001 ordinary income, were sufficient to pay the proffered wage.

During 2002, when the petitioner's ordinary income added to the amount it paid to Ms. [REDACTED] would have been insufficient, by themselves, to demonstrate the petitioner's ability to pay the proffered wage, counsel provided evidence that the petitioner had paid \$15,859.54 to Ms. [REDACTED] whom counsel stated had also worked as the petitioner's manager. Counsel stated that the additional \$15,859.54 also represented the funds available to pay the proffered wage during 2002.

Those two statements are not *necessarily* contradictory. During 2001 Ms. [REDACTED] may have performed all of the duties of the petitioner's manager for \$26,000, whereas during 2002 she may have continued to be paid \$26,000 for working only part-time as the petitioner's manager, while the petitioner paid an additional \$15,859.54 to Ms. [REDACTED] to also serve as a part-time manager and perform the balance of the petitioner's managerial duties.

That petitioner paid Ms. [REDACTED] \$26,000 for managing the petitioning company full-time during 2001, and continued to pay her \$26,000 for managing it part-time during 2002, while paying Ms. [REDACTED] another \$15,859.54 for part-time management, is, on its face, unlikely. The evidence submitted in support of that assertion includes affidavits from the petitioner's owners and an affidavit from Ms. [REDACTED] who is a friend of Ms. [REDACTED].

Under these circumstances, those statements, absent additional more objective evidence, are insufficient to demonstrate that the \$26,000 paid to Ms. [REDACTED] and the \$15,895.54 paid to her friend, Ms. [REDACTED] both represent amounts paid for management that would be available to pay the proffered wage. Those amounts, therefore, will not be considered in the determination of the petitioner's ability to pay the proffered wage in this case.

Counsel's assertion that the petitioner's Schedule K, Line 20, "Total property distributions (including cash) other than dividends" should be considered a fund available to pay the proffered wage is unconvincing. Counsel has demonstrated neither that the amount shown on that line represented cash nor that the amount paid was discretionary. In order to demonstrate that the amount shown was available to pay wages, counsel was obliged to demonstrate both.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is insufficient. 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$35,411. The priority date is September 16, 2002.

During 2002 the petitioner declared ordinary income of \$3,198. That amount is insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to pay the proffered wage.

The petitioner has not demonstrated the ability to pay the proffered wage during 2002. 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.