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U.S. Citizenship
and Immigration
Services

Blo



FILE: [Redacted] Office: VERMONT SERVICE CENTER
EAC 0226151111

Date: NOV 02 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:

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a donut bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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, the petitioner submits a statement and further documentation as to the petitioner's financial resources in 2003. The petitioner also submits a letter from an attorney based in New York City who comments on the petitioner's present business operations.¹

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$19.55, and an annual salary of \$40,664. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

¹ Although attorney Jed David Philwin signed this letter, there is no G-28 Form in the record; therefore, the petitioner is viewed as self-represented.

On the petition, the petitioner claimed to have been established in December 1995, and to have 22 employees. In support of the petition, the petitioner submitted a letter of employment verification that established the beneficiary worked in the Avari Lahore hotel as a baker from April 23, 1996 to July 31, 1998. The petitioner also submitted its 2001 federal income tax return, Form 1120S, which indicated an ordinary income of -\$12,814, along with \$28,000 in officer compensation, and salaries and wages of \$235,826.

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, on July 2, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 2002 federal income tax return with all schedules and attachments, or annual reports for 2002 that are accompanied by audited or reviewed financial statements. The director also requested the petitioner to submit the beneficiary's W-2 forms if the petitioner employed the beneficiary. Finally the director requested that the petitioner establish whether the beneficiary would fill a newly created position, and if not, what wage had been previously paid to the incumbent in the position. The director asked the petitioner to identify any former employees in the position, to submit evidence of the salary paid to any such employees, and to document that the position was vacated. To this end, the director requested copies of the petitioner's Form 941 for the period of time in question.

In response, the petitioner's owner states that the petitioner is a franchise that manufactures and supplies donuts and other bakery products to various Dunkin Donuts franchises, including 11 franchise network stores. The petitioner also stated that the beneficiary had been hired after he obtained his work authorization to replace two part-time employees, Amarjeet Singh and Jaspal Singh. The petitioner stated that the beneficiary's salary would not be an extra burden on its finances, and that it had been able to pay all its employees in the past, and that the company presently was making a profit after all expenses. As evidence of the employment and termination of Amarjeet Singh and Jaspal Singh, the petitioner enclosed a copy of the New York State Form 45 Earnings and Withholding Report for the first and second quarter of 2003. The petitioner stated that it also enclosed a copy of the current earnings statement for the beneficiary as proof of his employment with the petitioner.

In addition the petitioner provided a breakout of the petitioner's financial position for the years 2000, 2001, and 2002. This breakout indicated that the petitioner's profits after taxes were paid were \$10,836 in 2000, -\$12,814 in 2001, and \$17,302 in 2002. The petitioner asked that the profits before taxes be considered when reviewing the petitioner's ability to pay the proffered wage. The petitioner also stated that it was enclosing its federal income tax return for 2002 that demonstrated the growth of the petitioner, and would demonstrate the petitioner's need for a skilled baker like the beneficiary. The petitioner also submitted Form 941 for 2002 for the petitioner.

With regard to the documents submitted by the petitioner, the wage statements for the beneficiary indicated that from September 13 to September 19, 2003, the beneficiary earning wages of \$20 an hour, or \$800 for a week's work. The Form 941, Statement of Filings and Wages, for the first quarter of 2002 indicated the petitioner had 19 employees and paid \$80,940.52 in wages, salaries, and other compensation, during this quarter. The Form 941 for the second quarter dated July 2002 indicated a payroll of \$57,948. The third quarter's payroll was \$79,798.79, and fourth quarter payroll was \$74,830.11. The petitioner also submitted

New York State Form 45 for the first quarter of 2003 that included total wages of \$68,183.63. The combined total wages for Amarjeet Singh and Jaspal Singh for the first quarter of 2003 were identified as \$8,580. For the second quarter of 2003, the petitioner submitted Form NYS-45 that identified the total wages of Amarjeet Singh and Jaspal Singh as \$240 and \$420, respectively. Finally the petitioner's federal income tax return, IRS Form 1120S, for 2002 indicated an ordinary income of \$17,302 for the tax year, along with \$24,500 in officer compensation and \$269,017 in salaries and wages.

On May 28, 2004, the director denied the petition. The director stated that the petitioner's 2001 Form 1120S indicated a net loss of \$12,814 and net current assets of \$10,874. The director stated that both the net income and net current assets for 2001 were less than the proffered wage. With regard to the petitioner's federal tax return for 2002, the director stated that it showed \$17,302 net income and net current assets of \$6,453. Once again, the director determined that the petitioner's ordinary income and net current assets were not sufficient to pay the proffered wage.

The director then examined the wages established for the two part-time employees that the petitioner had stated the beneficiary would replace. According to the director, the evidence submitted by the petitioner showed that the two workers earned \$8,580 in combined salaries for the first quarter of 2003 and \$660 during the second quarter of 2003. The director stated that in order to show the petitioner had the ability to pay the proffered wage in 2001 and 2002, evidence would have had to indicate that the two replaced workers earned at least a combined salary of \$29,790 in 2001, and \$23,362 in 2002.² The director noted that the petitioner while it submitted evidence of quarterly wages paid in 2002; it did not show wages paid to specific employees. The director then stated that without evidence of the wages paid to the workers being replaced during these years, the petitioner's federal income tax returns were the sole evidence of ability to pay the beneficiary's salary during 2001 and 2002.

On appeal, the petitioner submits the petitioner's tax return for 2003 that indicates an ordinary income of \$72,841. The petitioner also submits the beneficiary's W-2 forms for 2003 which show he earned \$15,000 with the petitioner and \$4,250 for Valpar Corporation, a company also located at the petitioner's address. The petitioner states that the beneficiary's personal tax return shows earnings of \$19,250 for the year, although he only worked for half of the year.

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 employed and paid 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 petition, the petitioner submitted W-2 salary statements for the beneficiary for the year 2003, the beneficiary's 2003 individual income tax return, NYS-45 forms that show the beneficiary worked for the petitioner during three quarters of 2003, and a wage statement for September 2003 that indicated the beneficiary earned \$20 an hour. These documents, at a minimum, establish that the beneficiary was paid the hourly rate of the proffered wage as of September 2003, and that

² The director calculated the combined salary for 2001 by subtracting the petitioner's net current assets, namely, \$10,874, from the proffered wage of \$40,664. For the projected 2002 combined salary, the director subtracted the petitioner's ordinary income, namely, \$17,302, from the proffered wage of \$40,664.

the petitioner employed the beneficiary in 2003. The petitioner did not establish that it paid the beneficiary the entire proffered wage during 2003. In addition, the priority date for the petition is April 30, 2001, and the petitioner has submitted no documentation with regard to any employment of the beneficiary as of that date and onward. Therefore the petitioner can not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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 next 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 the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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 the Service should have considered income before expenses were paid rather than net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. As previously noted by the petitioner and by the director, the petitioner's ordinary income for the years 2001 to 2003 was the following: -\$12,814 in 2001, \$17,302 in 2002, and \$72,841. While the petitioner's ordinary income for 2003 is sufficient to pay the proffered wage, the petitioner has to establish that it has the ability to pay the proffered wage as of the April 2001 priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner's ordinary income for 2001 and 2002 is not sufficient to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 out of those net current assets. The petitioner submitted the following information for tax years 2001 and 2002:

	2001	2002
Ordinary Income	\$ -12,814	\$ 17,302
Current Assets	\$ 15,617	\$ 12,355
Current Liabilities	\$ 4,743	\$ 5,902
Net current assets	\$ 10,874	\$ 6,453

These figures fail to establish the ability of the petitioner to pay the proffered wage. In 2001, the petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. The petitioner shows a net income of \$-12,814, and net current assets of \$10,874, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

In 2002, the petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. The petitioner shows a net income of \$17,302 and net current assets of \$6,453, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

As stated previously, based on its ordinary income in 2003, the petitioner has established that it has the ability to pay the proffered wage in 2003. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Without more persuasive evidence, the petitioner has not established that it has the ability to pay the proffered wage as of the 2001 priority date and in 2002.

In addition, the petitioner has not demonstrated that any other funds were available in 2001 and 2002 to pay the proffered wage. Although the petitioner stated that the beneficiary replaced two part-time employees, as previously stated, the combined wages of these two part time employees during 2001 and 2002 are unknown, and therefore can not be used to establish that the wages paid to them in 2001 and 2002 were sufficient to cover the beneficiary's proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and 2002. Therefore, the petitioner has not established that it has the ability to pay the proffered wage as of the priority date.

³ 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.

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.