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U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC-03-218-51375

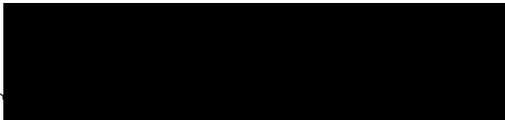
Office: VERMONT SERVICE CENTER

Date: 01/15/2016

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

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:



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 Acting Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a cheese manufacturer. It seeks to employ the beneficiary permanently in the United States as a cheese processor. 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 statement and additional evidence.

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 other 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 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 December 29, 2000. The proffered wage as stated on the Form ETA 750 is \$8.52 per hour, which amounts to \$17,721.60 annually. On the Form ETA 750B, signed by the beneficiary in December 2000, the beneficiary claimed to have worked for the petitioner from April 1996 to August 2000¹.

In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date.

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 December 11, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically 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. The director specifically requested evidence for 2000, 2001, and 2002, as well as any evidence of wages actually paid to the beneficiary from the petitioner during that same timeframe.

¹ On Form G-325, Biographic Information sheet, submitted in connection with the beneficiary's application to adjust status to lawful permanent resident, the beneficiary indicated that he worked for the petitioner from May 1997 until the "present time," and signed that form on May 1, 2003.

In response, counsel submitted Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2000, 2001, 2002, and 2003. The Forms W-2 reflect wages of \$10,431.75 in 2000, \$7,785.75 in 2001, \$9,775.50 in 2002, \$15,913.51 in 2003, which is \$7,289.85, \$9,935.85, \$7,946.10, and \$1,808.09 less than the proffered wage in each year, respectively. The petitioner did not submit its tax returns as requested.

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 May 4, 2004, denied the petition because the petitioner had been paying the beneficiary wages below the proffered wage.

On appeal, counsel asserts that the wages reflected on the W-2 forms were for part-time work and not full-time work. The petitioner also submits a letter stating that “[a]s of January of 2004, [the beneficiary] has been working full time and will earn the proffered wage at the end of the year. [The beneficiary] did not previously earned [sic] the proffered wage because he was working part time due to personal reasons.” The petitioner submits four pay stubs from 2004 showing wages being paid at a rate of \$7.50 per hour and cumulative earnings as of May 27, 2004 of \$952.50 and hours worked varying between 28 and 36 per week². The petitioner also submits its Form 1120, U.S. Corporation Income Tax Return for 2002. The tax return reflects the following information:

	<u>2002</u>
Net income ³	-\$36,321
Current Assets	\$227,432
Current Liabilities	\$248,901
Net current assets	-\$21,469

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 case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any relevant year, but did establish that it paid partial wages, in the amounts of \$10,431.75 in 2000, \$7,785.75 in 2001, \$9,775.50 in 2002, \$15,913.51 in 2003, which is \$7,289.85, \$9,935.85, \$7,946.10, and \$1,808.09 less than the proffered wage in each year, respectively.

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

² The Form ETA 750A requires 40 hours per week at \$8.52 per hour.

³ Taxable income before net operating loss deduction & special deductions as reported on Line 28.

court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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.⁴ 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 has not demonstrated that it paid the full proffered wage to the beneficiary in any relevant year⁵. In 2000, the petitioner paid the beneficiary \$10,431.75, which is \$7,289.85 less than the proffered wage in that year. The petitioner did not provide regulatory-prescribed evidence of its ability to pay the proffered wage in 2000, such as a corporate income tax return, audited financial statements, or an annual report. Thus, the AAO cannot analyze its ability to pay the difference between the wages actually paid and the proffered wage for that year out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2000.

In 2001, the petitioner paid the beneficiary \$7,785.75, which is \$9,935.85 less than the proffered wage in that year. The petitioner did not provide regulatory-prescribed evidence of its ability to pay the proffered wage in 2001, such as a corporate income tax return, audited financial statements, or an annual report. Thus, the AAO cannot analyze its ability to pay the difference between the wages actually paid and the proffered wage for that year out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

⁴ 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.

⁵ Aside from a letter, the record of proceeding lacks corroborating evidence that the beneficiary was only employed part-time by the petitioner prior to January 2004, and in any event reflects a pay rate lower than the proffered wage even at that time. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In 2002, the petitioner paid the beneficiary \$9,775.50, which is \$7,946.10 less than the proffered wage in that year. The petitioner's net income and net current assets were both negative in 2002, and thus it cannot show an ability to pay the difference between the wages actually paid and the proffered wage for that year out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002.

In 2003, the petitioner paid the beneficiary \$15,913.51, which is \$1,808.09 less than the proffered wage in that year. Although the petitioner did not submit regulatory-prescribed evidence of its continuing ability to pay the proffered wage in 2003, presumably its corporate tax return was unavailable at the time the director issued her decision. Thus, the petitioner's continuing ability to pay the proffered wage in 2003 is unclear.

The petitioner failed to submit evidence that demonstrates that it had the ability to pay the proffered wage during 2000, 2001, 2002, or 2003. 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.