



U.S. Citizenship  
and Immigration  
Services

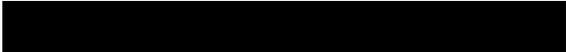
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FILE: WAC-02-025-57451 Office: CALIFORNIA SERVICE CENTER Date: **OCT 20 2005**

IN RE: Petitioner:   
Beneficiary: 

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 bakery/restaurant. It seeks to employ the beneficiary permanently in the United States as a Filipino 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, 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 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 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 13, 2001. The proffered wage as stated on the Form ETA 750 is \$11.95 per hour, which amounts to \$24,856 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from July 1998 to September 2000.

On the petition, the petitioner claimed to have been established in October 1997, to have a gross annual income of \$211,631, and to currently employ one worker. In support of the petition, the petitioner submitted the first page of its Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 1998 and 1999<sup>1</sup>.

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 February 8, 2002, 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 from 2001 to the present.

In response to the director's request for evidence, the petitioner submitted unaudited financial statements.

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<sup>1</sup> Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's 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 June 3, 2002, the director issued a notice of intent to deny. The director noted that the petitioner failed to submit regulatory-prescribed evidence of its continuing ability to pay the proffered wage beginning on the priority date in 2001 onwards, such as complete and signed federal corporate tax returns, audited financial statements, or annual reports.

In response, counsel asserted that the petitioner did previously submit complete tax returns<sup>2</sup> and that the financial statements submitted previously were unaudited because an audit "is cost prohibitive" and takes too long in order to timely respond to the director's request for evidence. Additionally, counsel asserted that the petitioning entity is privately held and does not have annual reports available. Finally, counsel points out that the petitioner reports its income on a fiscal year beginning in November, so its 2000 corporate tax return covers the priority date timeframe, but its 2001 corporate tax return is unavailable since it was not due by the time the petitioner's response was to be submitted to the director's notice of intent to deny the petition. Counsel states that depreciation expenses should be factored into the income available to the petitioner to pay the proffered wage

The petitioner submitted Form 1120-A, U.S. Corporation Short-Form Income Tax Return for the petitioner for 2000, showing that the petitioner's fiscal calendar year began in November 2000 and ran through October 31, 2001 for that year. The tax return reflects the following information:

|                                | <u>2000</u> |
|--------------------------------|-------------|
| Net income <sup>3</sup>        | \$20,448    |
| Current Assets                 | \$8,956     |
| Current Liabilities            | \$1,202     |
| End of year net current assets | \$7,754     |

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 August 16, 2002, denied the petition without discussing the petitioner's tax return but stating that the petitioner failed to provide regulatory-prescribed evidence of its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts arguments asserted previously and resubmits the petitioner's 2000 short-form corporate tax return.

The unaudited financial statements that the petitioner submitted in response to the director's request for evidence are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

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<sup>2</sup> The record of proceeding does not reflect that the petitioner submitted complete tax returns previously but only the first page of two returns.

<sup>3</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 24.

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 2001.

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, contrary to counsel's assertion. 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.

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.<sup>4</sup> On a short-form corporate tax return, a corporation's year-end current assets are shown on Part III, lines 1 through 6. Its year-end current liabilities are shown on lines 13 through 15. 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 director erred in failing to consider the petitioner's short-form corporate tax return, however, the AAO concurs that the petitioner has failed to establish its continuing ability to pay the proffered wage beginning on the priority date.

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<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of only \$20,448 and net current assets of only \$7,754 and has not, therefore, demonstrated the ability to pay the proffered wage 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.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. 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.