

PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



B6

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **SEP 06 2005**
EAC 02 266 51022

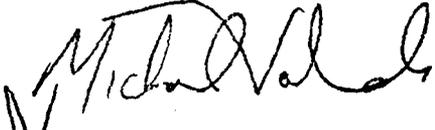
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian-cuisine cook. 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 May 2, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which amounts to \$39,291.20 per annum. On the Form ETA 750B, signed by the beneficiary on April 30, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, the petitioner claims to have been established in July 1998, have a gross annual income of \$338,028, a net annual income of \$161,647, and to currently employ five workers. In support of its ability to pay the beneficiary's proposed wage offer of \$39,291.20 per year, the petitioner initially submitted a

copy of its Form 1065, U.S. Return of Partnership Income for 2000. It reflects that the petitioner, a limited liability company, files its federal returns using a standard calendar year. In 2000, the petitioner reported ordinary income of -\$16,589. Schedule L of the return shows that the petitioner had \$30,693 in current assets and \$23,467 in current liabilities, resulting in net current assets of \$7,226. Besides net income, as an alternative method of evaluating a petitioner's ability to pay a proffered salary, CIS will review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period and a possible source out of which a proposed wage offer could be paid.¹ A limited liability company's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 15 through 17 of Schedule L of its federal return. If its 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.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On April 28, 2003, the director instructed the petitioner to provide copies of its 2001 and 2002 federal income tax returns. The director also requested the petitioner to provide a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001 and 2002 if it employed the beneficiary during this period.

In response, the petitioner provided a copy of an Internal Revenue Service (IRS) form indicating that it had requested an extension of time to file its 2002 tax return, but provided a copy of its 2001 return. It shows that the petitioner reported \$4,108 in ordinary income. Schedule L reflects that it had \$34,010 in current assets and \$33,136 in current liabilities, yielding \$874 in net current assets.

A letter from the petitioner, signed by [REDACTED] also accompanied these submissions. He states that while the IRS regulations allow various deductions as book losses, it does not affect the petitioner's ability to pay the proffered wage. He also states that the petitioner does not employ the beneficiary.

The director reviewed the petitioner's ordinary income of \$4,108, as stated on its 2001 federal return, and found that it failed to establish the ability to pay the proffered salary beginning on the priority date of May 2, 2001.

On appeal, the petitioner submits a partial copy of its 2002, Form 1065, Return of Partnership Income. This return reflects that the petitioner reported ordinary income of -\$41,341. Schedule L indicates that the petitioner had \$14,399 in current assets and \$6,698 in current liabilities, resulting in \$7,701 in net current assets. The petitioner also provides a copy of a letter dated December 2, 2003, from [REDACTED] the accounting firm Deguzman & Associates, PC. [REDACTED] states that the petitioner's gross receipts of \$377,636 and total assets of \$178,891, as reported on its 2001 partnership return, support its ability to pay the certified wage. He also asserts that the depreciation deduction of \$28,827 should be considered. [REDACTED] further claims that

¹ 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.

[REDACTED] is identified as an "owner" on some of the documents contained in the record, however his name is not included among the members' names on the federal tax returns.

the modest cumulative salary expense of \$6,000, paid out in 2001, reflects the necessity of the owner and his family members to help out in the restaurant, and that the sponsorship of the beneficiary reflects the owner's desire to expand.

Also provides a letter on appeal. He affirms the planned expansion and projects that the additional volume will cover the beneficiary's salary. He also asserts that having to show a net profit sufficient to cover alien workers it wishes to hire does not reflect the state of current tax laws and places an undue hardship on the petitioner. He also states that net profit is not an indicator of the company's ability to pay the proffered wage.

These contentions are not persuasive. At the outset, no specific detail or documentation has been provided to explain how the beneficiary's projected employment will significantly increase profits. The petitioner's ability to pay the proffered wage cannot be premised on future undeterminable profitability based on probability and projections. *Matter of Great Wall*, 16 I&N Dec. 142, 145. (Acting Reg. Comm. 1977). The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner show a *continuing* ability to pay the proffered wage. (Emphasis added.)

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether a petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record shows that the petitioner has not employed 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, 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 or compensation already paid to other employees or shareholders exceeded 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority

for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets. We reject, however, [REDACTED]'s assertion that the petitioner's 2001 total assets of \$178,891 should have been considered in the determination of the ability to pay the proffered wage. 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, as noted above CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

In this case, in 2001, neither the petitioner's ordinary income of \$4,108, nor its net current assets of \$874 was sufficient to pay the proffered wage of \$39,291.20.

Similarly, as shown on its 2002 return submitted on appeal, the petitioner's financial information fail to demonstrate that the certified wage could be paid by either its ordinary income of -\$41,341 or its net current assets of \$7,701. The petitioner has not demonstrated its continuing ability to pay the proffered wage during this period.

Based on the evidence contained in the record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.