

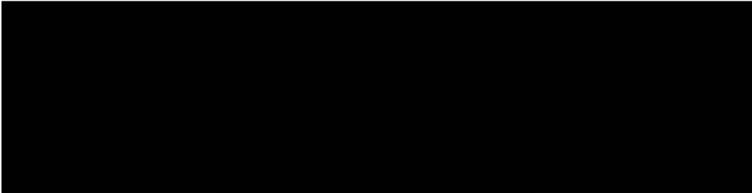
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Be

FILE:

Office: VERMONT SERVICE CENTER

Date:

SEP 22 2005

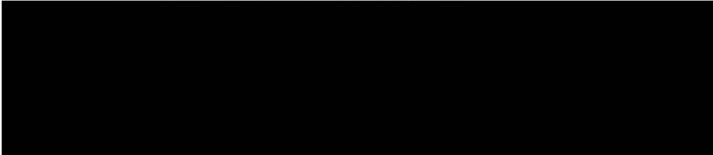
IN RE:

Petitioner:

Beneficiary:

PETITION: 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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 cook of Thai cuisine. 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.

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 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:

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 either 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 petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$12.57 per hour, which amounts to \$26,146 annually. On the Form ETA 750B, signed by the beneficiary on April 5, 2001, the beneficiary claimed to have worked for the petitioner beginning in May 6, 2000, and continuing through the date of the ETA 750B.

The I-140 petition was submitted on December 10, 2002. On the petition, the petitioner claimed to have been established in 1987, to currently have 12 employees, to have a gross annual income of \$639,393, and to have a net annual income of a negative \$14,179.

In support of the petition, the petitioner submitted, among other things:

- A certified Labor Department Form ETA 750;
- The petitioner's 2001 Form 1120S tax return; and,
- The beneficiary's 2001 Form W-2 Wage and Tax Statement for 2001 showing wages of \$8,989.62.

In a request for evidence (RFE) dated September 15, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted:

- A CPA's November 4, 2003 letter stating that a \$15,885 deduction for depreciation contributed to the petitioner's 2001 aggregate income tax loss of \$19,315; and,
- A 2001 Form W-2 Wage and Tax Statement the petitioner issued to the beneficiary in the amount of \$8,989.62;
- A 2001 Form W-2 for [REDACTED] for \$25,422.80; and,
- A "December 2003" letter from [REDACTED] owner of 15 percent of the petitioner's shares, stating that part of the reason for hiring the beneficiary was to allow [REDACTED], the 85-percent shareholder and "the original chef," "to reduce his hours upon his doctor's recommendation."

In a decision dated April 20, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the petitioner's "current net assets" are sufficient to show its ability to pay the proffered wage, based both on his own "current net assets" definition. He also maintains that CIS should not uniformly require petitioners to meet a net income or net asset standard because economic health and minimum profit margins vary from industry to industry. Further, counsel asserts the petitioner has a banking account cash balance of \$21,090.32, plus a \$3,000 line of credit, which he believes establishes the petitioner's ability to pay. Counsel asserts the petition meets the ability to pay standard set forth in the May 4, 2004 memo of William R. Yates, Associate Director of Operations for CIS, which counsel states the petitioner can establish ability to pay in any of three ways: net income, net assets or if the currently works for the petitioner at the proffered wage.

Counsel also cites the following as "precedent decisions":

1. EAC 01 018 50419 (AAO, May 13, 2002), reversing a director's denial of a petition where the petitioner's "depreciation and ordinary income showed a profit of \$50,965.00, even though it had registered liabilities in the amount of \$129,862.00;"
2. EAC 00 088 52775 (AAO, October 1, 2001), reversing a director's denial where the petitioner's combined net profit, depreciation and retained earnings "yielded a sum sufficient to pay the proffered wage;" and,
3. EAC 02 009 53358 (AAO), reversing a denial where the petitioner's profits, depreciation and retained earnings exceeded the proffered wage despite "the business' liabilities exceeded its assets."

Counsel wrongly cites EAC 02 009 53358 as having "reversed the denial" of a petition by the director. EAC 02 009 53358, decided on February 10, 2004, upheld a director's decision and dismissed the appeal. In that case, the AAO writes:

Contrary to counsel's assertion, depreciation will not be considered, and thus, the petitioner cannot establish its ability to pay the proffered wage this way.

The foregoing decisions are, rather, non-precedent decisions. While the facts of each case may bear a certain similarity to those of the instant case, they are not controlling for the AAO in reviewing the instant appeal.

Although 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of non-precedent decisions is of no effect.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 5, 2001, the beneficiary claimed to have worked for the petitioner beginning in June 2000 and continuing through the date of the ETA 750B.

The record contains copies of 2001 Form W-2 Wage and Tax statements of the beneficiary, showing compensation received from the petitioner only for that year, as shown in the table below.

| Year | Beneficiary's actual Compensation | Proffered Wage | Wage Increase Needed To Pay The Proffered Wage. |
|------|-----------------------------------|----------------|---|
| 2001 | \$8,989.62 | \$26,146 | \$17,156 |

The petitioner claims that it employed and established that it paid the beneficiary \$8,989.62 in 2001. Since the proffered wage is \$26,146, the petitioner must show that it can pay the remainder of the proffered wage for each year, which is \$17,156 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 the relevant period, it must establish its ability to pay that portion of the proffered salary, \$17,156, through from its net earnings or net current assets.

The petitioner's December 2003 letter, which asserts the principal shareholder and original chef for the restaurant intends to cut back his hours "upon his doctor's recommendation," most of which hours the beneficiary would presumably take over. However, the letter fails to specify how many of the chef's hours, workload or pay the petitioner intended the beneficiary to absorb. Granted, if the chef were to quit entirely, with the beneficiary taking his entire compensation, this would add \$25,422.80 to the earnings available to the petitioner to pay the beneficiary. Without evidence of a detailed plan for such a changeover, however, the beneficiary's replacing the chef amounts to speculation. Also, if the 85 percent shareholder were to otherwise remain active in the business and thus not free up his \$25,422.80 wage, it would not count toward establishing the petitioner's ability to pay the proffered wage. 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)).

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, contrary to counsel's assertion, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's 2001 Form 1120S tax return shows the petitioner reported a negative \$14,179 for ordinary income. Since that figure is negative, it fails to establish the ability of the petitioner to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Contrary to counsel's definition of "current net assets," the term "current assets" includes cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are those an employer expects to convert to cash as the proffered wage becomes due over time. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

| Tax Year | Net Current Assets | Wage increase needed To Pay The Proffered Wage |
|----------|--------------------|--|
| 2001 | -\$18,023 | \$35,179** |

** Crediting the petitioner with the \$8,989.62 actually paid to the beneficiary in 2001.

Since the negative amount of the petitioner's net current assets for 2001 increases the net income that the petitioner would need to earn, the petitioner's evidence of its 2001 net current assets also fails to establish the ability of the petitioner to pay the proffered wage.

The record also contains copies of bank statements for April 2001, the month surrounding the petition's April 24, 2001 priority date. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts that would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

In any event, in the instant petition, no bank statements for the rest of 2001 or for 2002 were submitted. The record contains no explanation for the absence of any bank statements for those years. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

Counsel's assertion, based upon the May 4, 2004 Yates Memo, that the petitioner has been employing the beneficiary "on a less than full-time basis, paying her the offered wage of \$12.57 per hours [sic]," is not supported by any evidence in the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, that the petitioner employed the beneficiary part-time at the proffered wage does not demonstrate that the petitioner had the ability to pay the beneficiary the proffered wage on the full-time basis contemplated for the proffered position.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.