



U.S. Citizenship
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Services

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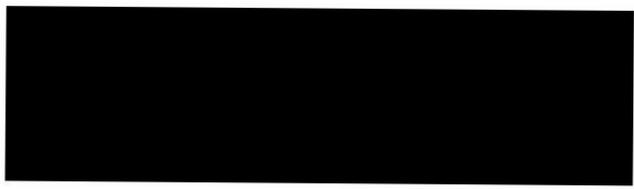


FILE: EAC 03 111 50001 Office: VERMONT SERVICE CENTER Date: APR 04 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker 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 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 a pizza maker. It seeks to employ the beneficiary permanently in the United States as a production supervisor. 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, through submits additional evidence and asserts that it has established its continuing financial ability to pay the proffered salary.

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 April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$11.79 per hour, which amounts to \$24,523.20 per year. On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary claims to have worked for the petitioner since August 1999.

On Part 5 of the petition, which was filed on February 26, 2003, the petitioner claims to have been established in 1998, has a gross annual income of \$720,000, a net annual income of \$680,000, and currently employs twenty workers.

In support of its ability to pay the proposed certified wage of \$24,523.20 per year, the petitioner initially submitted no evidence of its ability to pay the beneficiary's wage offer. Rather it provided copies of the newspaper recruitment advertisement for the certified position of production supervisor and a letter from its general manager acknowledging the beneficiary's employment with the petitioner since August 1999.

On January 13, 2004, the director requested additional evidence pertinent to the petitioner's financial ability to pay the proposed wage offer beginning on the priority date and continuing until the present. The director instructed the petitioner to provide a copy of its 2001 federal income tax return or a copy of its 2001 annual report accompanied by audited or reviewed financial statements. The petitioner was further instructed to submit a copy of the beneficiary's 2001 Wage and Tax Statement (W-2) if it employed the beneficiary during that year.

In response, the petitioner supplied a copy of the beneficiary's 2001 W-2 showing that it paid the beneficiary \$13,748.62. It also provided what appears to be an internally generated financial statement covering the first ten months of 2001, ending October 1, 2001. Counsel's transmittal letter, however, refers to it as an "annual report."

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage and denied the petition on June 21, 2004. The director found that the beneficiary's W-2 did not establish that the petitioner paid him the full proffered wage of \$24,523.20, and also referred to the ten-month financial statement as an "annual report." She noted that audited or reviewed financial statements had not accompanied it.

The appeal was filed on July 15, 2004 claiming that the petitioner will demonstrate its ability to pay the proffered salary. On Part 2 of the notice of appeal, counsel requested an additional 30 days to submit a brief and/or additional evidence. On August 12, 2004, counsel submitted a copy of a profit and loss statement covering the first ten months of 2001 and a balance sheet that is labeled "as of October 2004." An accompanying letter from the petitioner's accountant refers to these documents as reviewed financial statements pertaining to the year 2001. Counsel's transmittal letter, dated August 11, 2004, also states that the petitioner's total labor expense of \$166,661.85 proves the petitioner's ability to pay the proffered wage.

Subsequent correspondence and submissions from counsel in 2005 erroneously refer to a denial of this appeal as having occurred without consideration of the August 12, 2004, additional evidence previously received.¹ This correspondence will not be considered, as it is inaccurate and irrelevant.

Counsel's bare statement that the petitioner's total labor expense somehow automatically demonstrates its ability to pay the proffered wage is without support and not persuasive. Position, duties, and termination of other workers who performed the duties of the proffered position have not been documented. Wages paid to unidentified other workers for unspecified jobs does not establish a petitioner's ability to pay a proffered salary for the certified position.

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 may have 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. If either a petitioner's net income or net current assets² for a given

¹ Counsel also refers to other petitions filed. It is noted that a petitioner filing for multiple beneficiaries must show that its continuing financial ability to pay cumulative proffered wages for multiple beneficiaries beginning on each respective priority date.

² Besides net income, CIS will consider *net current assets* as an alternative method of examining a petitioner's continuing ability to pay the certified wage. Net current assets are the difference between the petitioner's current

period can cover the difference between actual wages paid and the proffered wage, then a petitioner's ability to pay may be established for that period of time. In the instant case, the record indicates that the petitioner has employed the beneficiary since 1999. Only the beneficiary's W-2 for 2001 has been provided. It shows that the petitioner paid him \$10,774.58 less than the certified wage of \$24,523.20.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will also 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). 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.

Regarding the financial documentation submitted to the underlying record and on appeal consisting of unaudited ten-month financial statements (not *annual* reports),³ it is noted that such financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. 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. By their own terms, the financial statements represent part of a review and are based on management's representation of its financial data. A limited review is primarily an inquiry and analytical review. "It is *not* an audit nor does it furnish a basis for an opinion since there is no appraisal of internal control nor gathering of audit evidence." *See Barron's Accounting Handbook*, 666-667 (3rd ed. 2000). As these documents are not audited as required by the 8 C.F.R. § 204.5(g)(2), they are not sufficiently probative of the petitioner's ability to pay the proffered wage during the period represented.

In this case, as noted above, the evidence provided to the record and on appeal is not probative of the petitioner's ability to pay the proffered wage of \$24,523.20 in 2001. Evidence in support of the ability to pay the certified wage in 2002 or 2003 was also not provided. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage beginning at the priority date. In this matter, the petitioner has failed to demonstrate that it has had the continuing financial ability to pay the certified wage beginning April 16, 2001.

assets and current liabilities. They represent a measure of a petitioner's liquidity during a given period and an alternate resource out of which to pay a proffered wage. If a petitioner's year-end 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.

³ That annual reports refer to those reports that certain corporations must make annually to their stockholders.

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.