



U.S. Citizenship
and Immigration
Services

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FILE:

SRC 04 043 51943

Office: TEXAS SERVICE CENTER

Date: APR 05 2006

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

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

The petitioner is a restaurant specializing in Chinese-style dishes. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director denied the petition accordingly.

On appeal, counsel submits:

- Counsel's statement;
- The petitioner's Form 1120S for its fiscal year commencing on October 1, 2003;
- A CPA's December 7, 2004 letter asserting that:
 - Savannah's continuing growth will spur increases in the petitioner's gross sales
 - When the beneficiary starts working, "a significant portion of the owners' salaries could be reallocated to pay for a new employee" for replacing one of the owners.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on December 4, 2002. The proffered wage as stated on the Form ETA 750 is \$9.64 per hour (\$20,051.20 per year).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in October 1991, to have a gross annual income of \$565,000, and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal years last from October 1 to September 30. On the Form ETA 750B, signed by the beneficiary on November 19, 2002, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- An original ETA 750;

- The petitioner's unaudited financial statements as of June 30, 2002, and November 30, 2002 with an attached CPA monthly revenue and expense bar-chart analysis that does not designate the year reviewed.

On October 1, 2004, the director sent the petitioner a Notice Of Intent To Deny (NOID) requesting further information as to the beneficiary's qualifications and establishes the petitioner's ability to pay the proffered wage for 2002 and 2003.

In response, the petitioner submitted:

- The petitioner's Form 1120S for its fiscal year commencing in 2002;
- The petitioner's unaudited monthly financial statement as of June 30, 2004, with attached bar chart that does not designate the year reviewed.

The director denied the petition on November 8, 2004, finding that the evidence submitted with the petition and in response to its NOID did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts the director made her decision without the "proper appreciation of the petitioner's tax returns and financial statements." He further asserts that for several years, the petitioner's gross sales figures "have consistently been greater than \$500,000 per year." Further, he states, "Even salaries of the two owners could be reallocated to pay the proffered wage as of one of the owners will not have to work after induction of the new employee."

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 has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through September 30, 2004.

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). Despite counsel's assertions, reliance on the petitioner's gross receipts and wage expense from its restaurant sales is misplaced. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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. (Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$20,051.20 per year from the priority date.

In the petitioner's fiscal year commencing in 2003, the Form 1120S stated net income¹ of -\$17,952. In the petitioner's fiscal year commencing in 2002, the Form 1120S stated net income of \$11,991.

Therefore, for the years October 1, 2002, through September 30, 2004, the petitioner did not have sufficient net income to pay the 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. We reject, however, the idea that the petitioner's total assets 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, 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.² 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets, during the petitioner's fiscal year commencing in 2002 were -\$10,458, and for during its fiscal year commencing in 2003, -\$25,137.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

²According 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.

of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. First, counsel states that, based upon the CPA's December 7, 2004 analysis, the area economy in Savannah will strengthen the petitioner's ability to pay the proffered wage. However, a petitioner must establish eligibility at the time of filing, not at some future time when the petitioner has improved its financial conditions. A petition cannot be approved at a later date after a petitioner becomes eligible under a new set of facts. See, *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

Counsel advised that the beneficiary would replace one of the owners, whose earnings will become available to pay the beneficiary's salary. The record does not, however, verify the owner's full-time employment, or provide evidence that the petitioner has replaced or will replace him with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the owner's work involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If the owner performed other kinds of work, then the beneficiary could not have replaced that owner.

Moreover, a December 7, 2004 letter from the petitioner's CPA points to a \$14,841 lease expense for a Mercedes car to explain the petitioner's \$17,952 loss on its Form 1120 for its fiscal year commencing October 1, 2003. If eliminated, the car expense would still not make up the entire deficit.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

In addition, CIS records show that the petitioner has filed I-140 petitions for three more workers, one of which CIS has approved, the other two on appeal to the AAO. Therefore, the petitioner must show that it had sufficient income to pay four times the proffered wage at the priority date. The evidence submitted does not establish that the petitioner 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.