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U.S. Citizenship
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Services

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FILE: EAC 03 111 50012 Office: VERMONT SERVICE CENTER

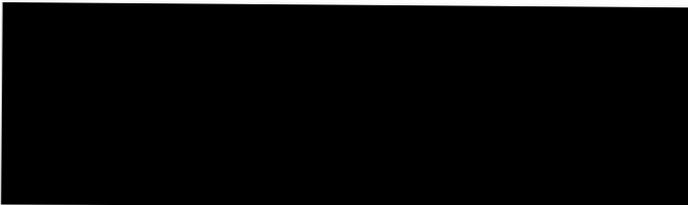
Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Other Worker Pursuant to § 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, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is a pizza maker. It seeks to employ the beneficiary permanently in the United States as a pizza baker. 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 AAO summarily dismissed the appeal on January 18, 2005.

On motion, the counsel submits a brief and additional evidence.

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 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 16, 2001. The proffered salary as stated on the labor certification is \$11.79 per hour or \$24,523.20 per year.

On motion, counsel alleges to have submitted a reviewed financial statement. However, the documentation provided states that the financial statement, the balance sheet, and the income statement for the period ended October 1, 2001 were compiled, not reviewed¹. The documentation was prepared by [REDACTED], Certified Public Accountant (CPA), and states that "All information in the financial

¹ It is noted that the financial statement, the balance sheet, and the income statement for the period ended October 1, 2001 are referred to as a compilation report in two places, albeit that the second paragraph indicates it is a review.

statements is the representation of management. . . Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the Financial Statements, they might influence the user's conclusions about the company's financial position."

Counsel states:

The financial statement states the Total Labor expense as \$166,661.85. This amount clearly proves the Petitioner's ability to pay the proffered salary of \$19,884.80 per year to the beneficiary.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (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 present matter, the petitioner did not establish that it employed the beneficiary at a salary equal to or greater than the proffered wage in 2001. In fact, the beneficiary's 2001 Form W-2, Wage and Tax Statement, indicates that the beneficiary earned only \$13,787.01 while working for the petitioner in 2001.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

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.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 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 petitioner did not provide a copy of its 2001 federal tax return for 2001. Therefore, it is impossible for the AAO to determine its net current assets in 2001. In addition, the petitioner's financial statements were for the period ended October 1, 2001, not a full year. Counsel has not suggested that the petitioner's 2001 tax return was unavailable, and since the petition was not filed with the director until February 22, 2003, there appears to be no reason that the tax return was not available.

Counsel contends that the compiled financial statements submitted show total labor expense of \$166,661.80; and, therefore, the petitioner has established its ability to pay the proffered wage of \$24,523.20. Counsel is mistaken. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to anything less than an audit are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage³. Furthermore, unless the beneficiary was actually paid the proffered wage, merely paying wages, no matter the total, does not assure that the petitioner can pay the difference between the wages paid to the beneficiary of \$13,787.01 and the proffered wage of \$24,523.20.

To prove its ability to pay the proffered wage of \$24,523.20 in 2001, the petitioner failed to submit the necessary evidence as required by the regulation at C.F.R. § 204.5(g)(2) which states that the evidence must be in the form of copies of annual reports, federal tax returns, or audited financial statements. The petitioner has not established its continuing ability to pay the proffered wage from the priority date of

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

³ It is noted that even though the director granted the petitioner the option of submitting reviewed financial statements, the regulations state that only audited statements are acceptable forms of evidence to establish the ability to pay the proffered wage. However, since the petitioner did not submit reviewed financial statements, in which case the petition may have been remanded, the appeal will be dismissed because the record of proceeding lacks any of the required documentation. *See* the regulation at 8 C.F.R. § 204.5(g)(2).

April 16, 2001.

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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The director's decision of June 24, 2004 is affirmed. The petition is denied.