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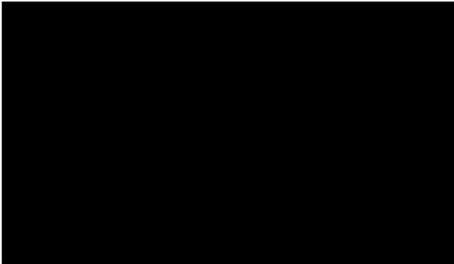
U.S. Department of Homeland Security
20 Mass, N.W. Rm. A3000
Washington, DC 20529



U.S. Citizenship
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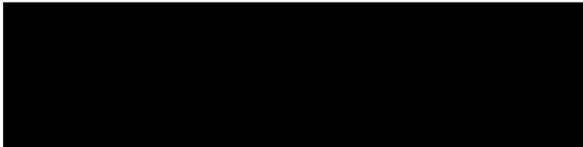
FILE: EAC 04 012 51439 Office: VERMONT SERVICE CENTER Date: AUG 14 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. Although required by statute, the petition was not accompanied¹ by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. There is a photocopied ETA 750 but in the name of a different alien/beneficiary. 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.

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) 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

¹ The regulation at 20 C.F.R. § 656.30 (e) Certifying Officers shall issue duplicate labor certifications only upon the written request of a Consular or Immigration Officer. Certifying Officers shall issue such duplicate certifications only to the Consular or Immigration Officer who submitted the written request. An alien, employer, or an employer or alien's agent, therefore, may petition an Immigration or Consular Officer to request a duplicate from a Certifying Officer. [45 FR 83933, Dec. 19, 1980, as amended at 56 FR 54930, Oct. 23, 1991]. There is no request found in the record of proceeding for a duplicate original labor certification.

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. 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 July 20, 1998.² The proffered wage as stated on the Form ETA 750 is \$12.50 per hour (\$26,000.00 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: a copy of Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a U.S. Internal Revenue Service Form tax return for 2001; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on October 18, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of a U.S. federal tax return for 1998 and bank account records for 1998.

In response to the request for evidence, counsel submitted a U.S. federal tax return for 1997 and bank account records.

The director denied the petition on December 28, 2004, finding that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage beginning on the priority date, and, that the petitioner failed to come forward with the requested evidence.

On appeal, counsel asserts the petitioner does have the ability to pay the proffered wage.

Counsel has submitted the following documents to accompany the appeal statement: a U.S. federal tax return for 1998; and, bank and savings statements.³

² It has been approximately eight years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

³ Counsel has chosen to respond to the director's request by, in part, photocopying and transmitting approximately 209 banking transaction documents without an exhibit table, reference sheet, or explanation for what purpose they had been submitted other than counsel introductory statement in her cover letter that the documentation was offered to prove the petitioner's ability to pay the proffered wage. . It would be aid if counsel would, if this matter is further pursued, explain the significance of the data in the documents, such as

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns⁴ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$26,000.00 per year from the priority date of July 20, 1998:

- In 1998, the Form 1120 stated taxable income of \$79,481.00 on gross receipts of \$6.068 million.
- In 2001, the Form 1120 stated taxable income of \$9,770.00 on gross receipts of approximately \$5.88 million.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage in year 2001 for which the petitioner's tax returns are offered for evidence.

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.⁵ A

the average monthly, or beginning or ending balances, the difference between checking and money market accounts, and the relationship of the data in the documents to the Schedule L statement found in the petitioner's tax returns submitted. Counsel's reasoning or specific contentions for the introduction of the material is not found in the record of proceeding.

⁴ The petitioner's tax year begins July 1st and end June 30 of the next year. Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. In 1997, the Form 1120 stated taxable income of \$90,109.00 on gross receipts of approximately \$5.86 million. In 1997, petitioner's Form 1120 return stated current assets of \$1,206,515.00 and \$1,284,077.00 in current liabilities. Therefore, the petitioner had <\$77,562.00> in net current assets.

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's 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.

Examining the Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 1998, petitioner's Form 1120 return stated current assets of \$1,650,560.00 and \$1,623,485.00 in current liabilities. Therefore, the petitioner had \$27,075.00 in net current assets. Since the proffered wage is \$26,000.00 per year, this sum is more than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of \$1,020,213.00 and \$2,070,874.00 in current liabilities. Therefore, the petitioner had <\$1,050,661.00> in net current assets. Since the proffered wage is \$26,000.00 per year, this sum is less than the proffered wage.

Therefore, in year 2001, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel advocates the use of the cash balance of the business accounts to show the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

However, counsel has also submitted money market accounts and savings accounts that state significant balances some over \$100,000.00 that are funds immediately available to pay the proffered wage. Counsel's argument concerning the petitioner's size, longevity, and number of employees is also relevant under the facts of this case. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1983 and employs approximately 100 employees. Their gross income has always been above \$5 million and they pay salaries and wages each year of approximately \$1.4 million. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

The petitioner has demonstrated its ability to 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.

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 met that burden.⁶

ORDER: The appeal is sustained.

⁶ We suggest that counsel request a duplicate original labor certification as soon as possible.