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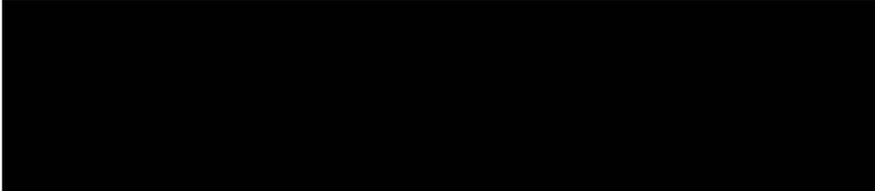
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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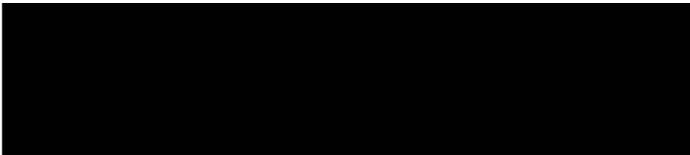
Date: **DEC 29 2006**

IN RE: Petitioner:
Beneficiary:



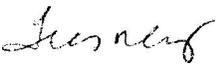
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the preference visa petition. The Director, Vermont Service Center reopened the matter pursuant to a motion and denied the petition again.¹ The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a cook. The acting director determined that the petitioner had not established that it has had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition accordingly. On a motion the director reopened the matter and dismissed the petition again on the same basis.

In support of the appeal counsel submitted a brief and additional evidence. Counsel also requested oral argument in this matter.

The regulations provide that the requesting party must explain in writing why oral argument is necessary. CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unusual factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unusual factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held.² Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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 unavailable 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.

¹ During the interim between issuance of the first decision of denial and issuance of the second the Vermont Service Center replaced its acting director with a director.

² Counsel stated that she was requesting oral argument “in order to ensure that technical areas discussed herein are properly understood.” This office observes that neither the brief nor the balance of the record contain any unusually difficult technical issues.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 4, 2001. The proffered wage as stated on the Form ETA 750 is \$13 per hour for a 40.5 hour week,³ which equals \$27,378 per year.

On the petition, the petitioner stated that it was established during September 1994 and that it employs 38 workers. The petition states that the petitioner's gross annual income is \$1.2million and that its net annual income is \$30,000. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since approximately 1997. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Wellesley, Massachusetts.

In support of the petition, counsel submitted first and second pages of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner is a corporation, that it incorporated on October 4, 1995, and that it reports taxes pursuant to accrual convention accounting and the calendar year. During 2001 the petitioner declared a loss of \$25,829 as its ordinary income. Because the corresponding Schedule L was not submitted the petitioner's net current assets could not then be calculated.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on February 28, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The service center also specifically requested the petitioner's complete 2001 tax return and, if it employed the beneficiary during 2000, 2001, or 2002, Form W-2 Wage and Tax Statements showing the wages it paid to him during those years.

In response, counsel submitted a complete copy of the petitioner's 2001 tax return, 2000, 2001, and 2002 W-2 forms, unaudited financial statements pertinent to various portions of 2002, and a May 22, 2003 letter from the petitioner's general manager.

The 2001 Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The W-2 forms provided show that the petitioner paid the beneficiary \$14,075, \$14,400, and \$14,500 during 2000, 2001, and 2002, respectively.

The petitioner's general manager's May 22, 2003 letter states that the petitioner had received an extension of time during which to file its 2002 tax return and that the return was not yet complete. The general manager further stated that in place of the 2002 tax return he was providing a copy of the petitioner's prospective 2002 profit and loss statement. The general manager stated yet further that the petitioner was currently paying the beneficiary \$13 per hour and that the beneficiary previously worked only part-time for the petitioner.

³ The Form ETA 750 states that the beneficiary would work a 40.5 hour week and that he would work from 2:45 to 9:30 pm. This office gathers from those two statements that the beneficiary would work six 6 ¾ hour days per week.

The acting director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on October 21, 2004, denied the petition. In that decision the acting director noted that the petitioner's 2001 Schedule L shows that its current liabilities exceeded its current assets.

In a response which the director accepted as a motion to reopen, counsel submitted (1) the petitioner's 2000 and 2002 tax returns, (2) copies of four pay stubs, (3) monthly statements and other documents pertinent to the petitioner's bank accounts, and (4) a brief.

The petitioner's 2000 tax return shows that it declared ordinary income of \$39,810 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 tax return shows that it declared a loss of \$31,295 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The four pay stubs submitted show that the petitioner paid the beneficiary \$13.50 per hour for 40 hours during each of four weekly pay periods represented by those stubs. The most recent of those pay stubs, for the week of October 17, 2004 to October 23, 2004, shows that the petitioner had paid the beneficiary a year-to-date total of \$23,760 during 2004.

In the brief, counsel argued that the petitioner's 2000 tax return demonstrates its ability to pay the proffered wage during subsequent years, that the petitioner's bank balances should be considered in determining its ability to pay the proffered wage, and that the pay stubs provided show that the petitioner is now paying the beneficiary in excess of the proffered wage.

Counsel further asserted that the petitioner's ordinary income is a poor index of its ability to pay the proffered wage because it does not accurately reflect the petitioner's cash position and that the petitioner's depreciation and amortization deductions should be added to its ordinary income in the determination of its ability to pay the proffered wage. Counsel asserted that the difference between the petitioner's total assets and its total liabilities represents additional funds available to the petitioner to pay wages.

Finally, counsel asserted that the acting director "inaccurately characterized the company's balance sheet for 2002 as showing current liabilities that were greater than current assets."

Because the initial appeal was not timely submitted the Director, Vermont Service Center, treated it as a motion. The director found that the petitioner had still not demonstrated its continuing ability to pay the proffered wage beginning on the priority date and denied the petition again on April 11, 2005.

Counsel submitted an appeal in this matter on April 29, 2005. Subsequently counsel submitted (1) the petitioner's 2003 and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) an affidavit dated May 12, 2005 from the petitioner's general manager, (3) statements of a brokerage account of the petitioner's general manager, (4) 2003 and 2004 W-2 forms, (5) additional pay stubs, and (6) a brief to supplement the appeal.

The petitioner's 2003 tax return shows that the petitioner declared a loss of \$50,092 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2004 tax return shows that the petitioner declared ordinary income of \$12,250 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The general manager's May 5, 2005 affidavit stated he is an investor in the petitioner and that the decision of denial erred when it stated that the petitioner's liabilities exceeded its assets. The general manager also noted the petitioner's location and its expectancy of renewing its lease as other positive influences on its value and restated counsel's position that the petitioner's depreciation deduction should be added back into its income to determine the funds available to the petitioner during a given year with which it could have paid the proffered wage. The general manager also stated that the corporation had received an offer of \$600,000 for the restaurant but refused it, and that if it had employed the beneficiary full-time it would have paid him the total annual amount of the proffered wage. The general manager stated that he would invest his own funds in the petitioner as necessary to pay the wage proffered in this case.

The 2003 and 2004 W-2 forms submitted show that the petitioner paid the beneficiary \$17,537.50 and \$28,720 during those years, respectively.

The pay stubs submitted pertain to two consecutive weekly pay periods during 2005. Those stubs show that the petitioner continued to pay the beneficiary \$13.50 per hour for a 40-hour workweek. The more recent of those stubs, which covers the workweek from April 3, 2005 to April 9, 2005, indicates that the petitioner had paid year-to-date gross wages of \$8,100 to the beneficiary by April 9, 2005.

In the brief counsel reiterated the arguments previously made on the motion.

The initial decision of denial did not, as counsel asserted, state that the financial statements submitted show that the petitioner's 2002 end-of-year current liabilities exceeded its current assets.⁴ Nor did it state, as the general manager asserted, that the petitioner's total liabilities exceed its total assets. The decision made no representation at all pertinent to the petitioner's unaudited financial statements, and no representation pertinent to the petitioner's total assets and total liabilities. It stated that the petitioner's "2001 Schedule L balance sheet . . . shows that [the petitioner's 2001 end-of-year] current liabilities [exceeded its] current assets." Counsel appears, in various arguments, to misinterpret the meaning of the term "net current assets." The meaning and the calculation of net current assets are explained below.

⁴ This office notes, however, that the only balance sheet submitted, shows the petitioner's June 30, 2001 current assets were \$13,837.90 and its current liabilities on that same date were \$357,266.32. Similarly, that balance sheet shows that on June 30, 2002 the petitioner's current assets were \$18,175.09 and its current liabilities \$104,159.15. On both of those dates, therefore, the only dates on which the current assets and current liabilities are shown on the financial statements submitted, the petitioner's current liabilities did, according to those balance sheets, exceed its current assets. Even if the decision of denial had so stated that would not be a mischaracterization, as counsel asserted.

Counsel's assertion that the petitioner's ordinary income is a poor index of its cash position, absent adjustment for depreciation and amortization, is unconvincing. This office is aware that depreciation and amortization deductions do not require or represent a specific cash expenditure during the year claimed. They are the systematic allocation of the cost or other basis of long-term assets, tangible and intangible, respectively. A depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost or other basis of assets and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While that expense does not require or represent the current use of cash, neither is it available to pay wages. The deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its reallocation to other years as convenient.

Further, amounts spent on long-term tangible and intangible assets are real expenses, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation and amortization schedules, she does not offer any alternative allocation of those costs.⁵ Counsel appears to be asserting that the real cost of long-term assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

Counsel's reliance on unaudited financial records is misplaced. 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

Counsel's reliance on the bank statements in this case is similarly misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of

⁵ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.⁶ 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 reported on its tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it employed the beneficiary and paid him \$14,400, \$14,500, \$17,537.50 and \$28,720 during 2001, 2002, 2003 and 2004, respectively.⁷ The petitioner is obliged to show the ability to pay the balance of the proffered wage during those years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

⁶ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁷ Because the priority date of the instant petition is April 4, 2001 the amount the petitioner paid to the beneficiary during 2000 is not relevant to its continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁸ shown on lines 16(d) through 18(d). 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 expected to be converted to cash as the proffered wage becomes due.

Counsel's assertion that the petitioner's 2000 net income should be considered in determining its ability to pay the proffered wage during subsequent years is unconvincing. To the extent that the petitioner retained those profits in a form readily available to pay additional wages those previous year's profits should be shown on the petitioner's Schedule L for the following years as net current assets. Net current assets are taken into account. No additional calculation is necessary pertinent to previous years' net profits.

The proffered wage is \$27,378 per year. The priority date is April 4, 2001.

Having demonstrated that it paid the beneficiary \$14,400 during 2001 the petitioner is obliged to show the ability to pay the \$12,978 balance of the proffered wage during that year. During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were at its disposal during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

Having demonstrated that it paid the beneficiary \$14,500 during 2002 the petitioner is obliged to show the ability to pay the \$12,878 balance of the proffered wage during that year. During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were at its disposal during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

⁸ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

Having demonstrated that it paid the beneficiary \$17,537.50 during 2003 the petitioner is obliged to show the ability to pay the \$9,840.50 balance of the proffered wage during that year. During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were at its disposal during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner demonstrated that it paid the beneficiary \$28,720 during 2004. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.