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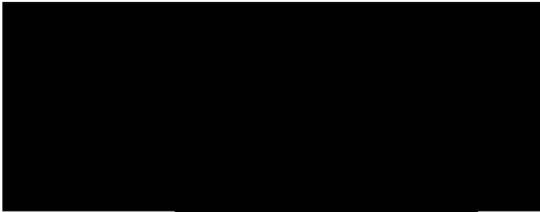
U.S. Department of Homeland Security
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Washington, DC 20529



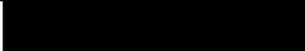
U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: DEC 29 2006

EAC 04 214 50894

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 Acting Center Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant kitchen manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

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 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 DOL's employment system. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 20, 2001. The proffered wage as stated on the Form ETA 750 is \$33,717 per annum. The ETA 750B, signed by the substituted beneficiary on May 10, 2004, does not indicate that the beneficiary has worked for the petitioner.¹

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on July 2, 2004, it is claimed that the petitioner was established in 1992. The 2001 corporate tax return states that it was incorporated on November 10, 1993. It is also claimed that the petitioner currently employs four workers, has gross annual income of \$125,241, and a net annual income of \$21,702.

¹ The current beneficiary, a substitution for the original beneficiary named in the labor certification, states on the biographic questionnaire (G-325A), submitted with his application for permanent residence, that he worked for the petitioner from August 1993 to September 1994. The record does not include any evidence or any assertion that the original beneficiary worked for the petitioner or that the petitioner ever paid wages to the original beneficiary.

As evidence of its continuing financial ability to pay the certified wage of \$33,717 per year, the petitioner provided a copy of its 2001 Form 1120, U.S. Corporation Income Tax Return. It reflects that the petitioner files its tax returns using a standard calendar year. The 2001 return contains the following information:

	2001
Gross Receipts or Sales	\$143,220
Total Income	\$119,791
Salaries and Wages	\$ 17,450
Taxable income before net operating loss (NOL)	
Deduction ²	\$ 33,717
Current Assets (Schedule L)	\$ 5,025
Current Liabilities (Schedule L)	\$ 1,368
Net Current Assets	\$ 3,657

As noted above, besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s)16 through 18 of Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The director denied the petition on November 17, 2004, determining that the petitioner had failed to establish its ability to pay the proffered wage. She noted that although the petitioner's net income as shown on its 2001 corporate return was sufficient to pay the proffered wage, CIS records revealed that the petitioner had filed 27 I-140s since June 1998. The director listed five cases in which the petitions had been approved but had not yet adjusted status or obtained an immigrant visa abroad. She concluded that the petitioner had failed to demonstrate that it could compensate any more than three of the beneficiaries for whom it had filed.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage because several of the other sponsored beneficiaries did not continue working for the petitioner after adjusting their status and that the petitioner currently employees three workers, including the beneficiary. **Counsel provides a letter, dated December 10, 2004, from the petitioner's corporate owner, [REDACTED].** He describes the collective status of the five cases discussed by the director in her denial. He mentions two current employees who are currently employed by the petitioner and three other workers who have either left his employment or are not currently working for him.

Besides net income or net current assets, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during a given period. If the petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the

² For the purpose of this review, taxable income before the NOL deduction will be treated as net income.

³ 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.

petitioner's ability to pay the proffered wage. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If, during a given period, any shortfall between the actual wages paid and the proffered wage can be covered by either a petitioner's net taxable income or net current assets, then the petitioner is deemed to have demonstrated its ability to pay the certified wage for the designated period of time. In this matter, the record shows that the beneficiary was employed by the petitioner in 1993, 1994, and may be currently employed by the petitioner, as suggested by counsel, but not confirmed by [REDACTED] petitioner's owner, on appeal.

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 next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expense deductions. 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). 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.

In this case, it is noted that although the petition was filed in 2004 and the priority date is in 2001, only one document, a 2001 tax return, was submitted in support of the petitioner's ability to pay the proffered wage. The petitioner's 2001 corporate tax return suggests sufficient net income to cover this beneficiary's wages in that year. The AAO finds that where the prescribed financial documentation under 8 C.F.R. § 204.5(g) (2), such as federal tax returns, audited financial statements, or annual reports, suggests sufficient net income or net current assets to cover the proffered wage, then the director should request additional evidence from the petitioner if other issues affect the director's review of the petition, relating to the petitioner's ability to pay the other beneficiaries and financial documentation in the years subsequent to 2001. See 8 C.F.R. § 103.2(b) (8). In this matter, the question of whether the petitioner had the ability to pay multiple beneficiaries was raised for the first time in the director's denial. Additional information about five of the beneficiaries was provided on appeal but did not sufficiently explain when and how the petitioner may have had the ability to pay the other beneficiaries, as well as the specifics of the employment and payment of wages to the sponsored beneficiaries, including the current alien. The AAO believes that additional information should be considered, relevant to the positions that the other beneficiaries were to fill, specifically whether the beneficiary, as an assistant kitchen manager would be eligible to have been considered as a replacement. The materials provided on appeal also raise a question as to whether some of these I-140s no longer represent a valid job offer. On remand this, as well as other financial documentation representing the ensuing years since 2001 should be provided.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

