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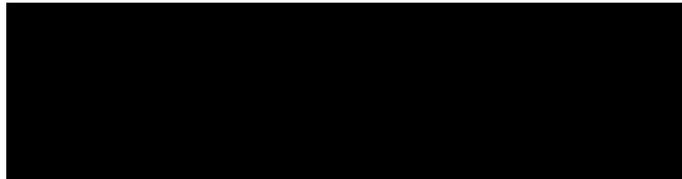
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

EAC 03 156 50112

Office: VERMONT SERVICE CENTER

Date:

FEB 03 2008

IN RE:

Petitioner:

Beneficiary:



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

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

FEB 03 06 - 4686203

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

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a hostess. 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.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 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 24, 2001. The proffered salary as stated on the labor certification is \$28,000 per year.

With the petition, the petitioner, through counsel, submitted a copy of the beneficiary's 2002 Form W-2, Wage and Tax Statement, showing the beneficiary earned \$18,413.12 in 2002 or \$9,586.88 less than the proffered wage. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on November 14, 2003, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. The director specifically requested copies of the petitioner's 2001 and 2002 federal income tax return, or in the alternative, copies of the petitioner's 2001 and 2002 annual reports accompanied by audited or reviewed financial statements. The director also requested a copy of the beneficiary's 2001 Form W-2, Wage and Tax Statement.

In response, counsel provided a copy of the petitioner's 2002 Form W-3, Transmittal of Wage and Tax Statements, and a copy of the beneficiary's 2001 Form W-2 showing the beneficiary earned \$3,925.32 in 2001 or \$24,074.68 less than the proffered wage. Counsel explained that the petitioner had not yet filed its 2001 and 2002 tax returns and had requested extensions to file those returns.

The 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. On June 29, 2004 the director denied the petition.

On appeal, counsel submits a letter from the petitioner's certified public accountant, [REDACTED] stating that, in his opinion, the petitioner is able to "support and pay a weekly salary or wage significantly in excess of \$530.00" as shown by the annual wages paid on the Form W-3. Counsel also submits copies of the petitioner's 2000 through 2003 Forms W-3, Transmittal of Wage and Tax Statements and copies of bank letters from [REDACTED]. [REDACTED] letter states that the petitioner's bank account, opened in 1977, has been in good standing and that the account is currently maintaining an average daily balance of \$95,000. [REDACTED] letter states that the petitioner's bank account, opened in 1966, had an average balance over the past year of approximately \$126,000. The [REDACTED] letter states that the petitioner's account, opened in 2003, has had an average balance of \$165,841.00 for the past twelve months. [REDACTED] letter was dated August 9, 2004.

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 had employed the beneficiary at a salary equal to or greater than the proffered wage in 2001 through 2003. The 2001 and 2002 Forms W-2 reflect wages earned of \$3,925.32 and \$18,413.12, respectively. The petitioner must demonstrate that it can pay the difference between the wages paid and the proffered wage in each year, which is \$24,074.68 and \$9,586.88, respectively.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. 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." See also *Elatos Restaurant Corp.*, 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.¹ 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. Neither Schedule L from the petitioner's tax returns, annual reports, nor audited financial statements were provided; therefore, it is impossible for CIS to determine the petitioner's net income or net current assets for the years 2001 through 2003.

The petitioner's accountant explains that the petitioner has filed extensions for their corporate tax returns due to changes to corporate structure. The petitioner's accountant further contends that the 2000 through 2003 Forms W-3 and the bank letters establish the petitioner's ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank accounts 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that would have been considered in determining the petitioner's net current assets.² In addition, while the petitioner has shown that it paid salaries and wages of close to \$2,000,000.00 each year, there is no evidence of the petitioner's gross receipts, net income, taxable income, or net current assets. The language of the regulation at 8 C.F.R. § 204.5(g)(2) clearly indicates what the basic evidentiary standard is to determine the ability to pay. There is nothing to indicate that the three basic evidentiary forms outlined in the regulation, e.g.,

¹ 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.

² It is noted that, in this case, neither Schedule L nor the tax returns were submitted.

federal tax forms, annual reports, and audited financial statements, are to become secondary or tangential evidence. Rather, the regulations clearly state that in "appropriate cases" CIS might request or a petitioner might submit additional evidence such as bank accounts, profit/loss statements, or personnel records. What is required is verifiable evidence that supports the entire record. The petitioner has not shown that it had sufficient income to pay an additional salary of \$28,000 per year.

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.