

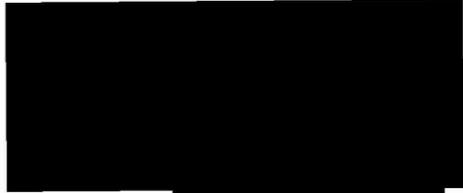
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 0419252760

OFFICE: TEXAS SERVICE CENTER Date: JUL 26 2006

IN RE: Petitioner: [REDACTED]
Beneficiary [REDACTED]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates restaurants. It seeks to employ the beneficiary permanently in the United States as a manager/bookkeeper. 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 asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$3,400 per month, which amounts to \$40,800 per annum.

On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary does not name the petitioner (SKV, Inc.) specifically as his employer but his listed experience consists of working at two Subway restaurants in Lawrenceville and Suwanee, Georgia. SKV, Inc. describes itself in a letter, dated June 7, 2004, which was submitted with the petition, as a business that is "engaged in the investment and management of fast food restaurants, namely Subway restaurants, in Georgia." The letter also states that the petitioner has two locations. These locations are not disclosed. However, because the addresses of the Subway restaurants shown on ETA

750B are not the same as the ones identified on the ETA 750A as the addresses where the alien will work, we cannot conclude from the record that the petitioner has employed the beneficiary. The letter does little to clarify this issue, but merely suggests that it will benefit by the beneficiary's continued employment in the U.S.

Part 5 of the visa petition, filed on July 1, 2004, indicates that the petitioner was established in 1987, claims a gross annual income of \$750,000, a net annual income of \$42,000, and currently employs six workers.

In support of its ability to pay the beneficiary's proposed wage offer of \$40,800 per year, besides a letter from the petitioner, it also provided incomplete copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, and 2003, each consisting of page one and an attached "statement 1" referring to other income and other deductions. The returns reflect that the petitioner files its federal income tax returns using a standard calendar year. They reveal that in 2001, the petitioner reported \$48,352 in ordinary income. In 2002, it declared \$29,216 in ordinary income and in 2003; it had ordinary income of \$27,003.

No other financial documentation was provided. The only reference to the petitioner's ability to pay the proffered wage is contained in the letter from Raman Bhima, the petitioner's president, which was submitted with the petition. He summarizes the petitioner's operations in stating that:

...Our operations have been very successful as we continue to grow. Our latest tax returns for 2003, 2002 and 2001 show a gross annual income of \$747,000, \$750,000 and \$656,000, respectively. Our net annual income for these years before depreciation was \$36,000, \$41,000, and \$56,000, respectively. In addition, SKV, Inc. pays a management fee for the managers and other employees for labor costs a total of \$231,000, \$235,000, and \$193,000.

Noting that the petitioner had failed to provide complete income tax returns including its Schedule L balance sheet from which net current assets can be calculated,¹ the director determined that the petitioner's net income figures for 2002 and 2003 were insufficient to pay the proffered wage of \$40,800. The director denied the petition on January 24, 2005.

On appeal, counsel submits a copy of Schedule L of the petitioner's 2002 and 2003 tax returns. Counsel states that these documents were not provided with the petition because the petitioner believed that the director would

¹Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.¹ Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are shown on Schedule L of the corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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.

see from its letter accompanying the petition that it since it showed it paid more than \$230,000 in management fees, it could use \$40,800 of these fees and pay the alien for this petition and still post a profit. The copy of the petitioner's Schedule L for 2002 shows that it had \$22,286 in current assets and \$3,614 in current liabilities, resulting in \$18,672 in net current assets. The 2003 Schedule L reflects that the petitioner had \$17,480 in current assets and current liabilities of \$2,774, yielding \$14,706 in net current assets. Counsel asserts that if these figures were combined with the posted net income for those years then the resulting figure of \$47,888 for 2002 and \$41,709 for 2003 would be sufficient to pay the proffered salary.

Counsel's assertions are not persuasive. It is noted that net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. Net current assets at the end of a given year which are greater than the proffered **wage** indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage.

It is further noted that [REDACTED] letter does not clearly state that the beneficiary's salary will be paid out of management fees already incurred. There is no reason for the director to have considered this issue. Moreover, counsel's description of the employer's belief on this issue does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is also noted that such an argument must be accompanied by specific supporting evidence identifying the individuals performing these functions with dates, locations, and the amounts paid.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by credible documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, as noted above, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages or compensation less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages or compensation paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. Here, the petitioner has not provided any specific evidence that it has employed or compensated the beneficiary.

If the petitioner does not establish that it 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 expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and

Ubeda v. Palmer, supra; see also Chi-Feng Chang v. Thornburgh, 719 F. Supp. 532, 536 (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.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, as noted above, CIS will review a petitioner's net current assets.

As mentioned above, although the petitioner's ordinary income of \$48,352 was sufficient to cover the proposed wage offer of \$40,800 per year in 2001, the evidence did not demonstrate a *continuing* ability to pay the certified salary as required by the regulation at 8 C.F.R. § 204.5(g)(2). Neither petitioner's net income of \$29,216, nor its net current assets of \$18,672 was sufficient to pay the proffered salary of \$40,800 in 2002. Similarly, in 2003, neither the net income of \$27,003, nor the petitioner's net current assets of \$14,706 were enough to pay the certified wage. Based on the evidence contained in the record and after consideration of the arguments presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered wage. It should be noted here that any future proceedings should include complete copies of all financial information or the petition should not be approved.

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