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**U.S. Citizenship
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FILE:



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Office: TEXAS SERVICE CENTER

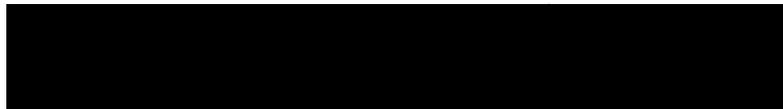
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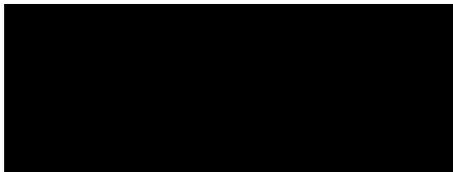
Petitioner:

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor 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 a brief and additional evidence.

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 granting 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 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 March 29, 2001. The proffered wage as stated on the Form ETA 750 is \$2,300 per month, which equals \$27,600 per year.

On the petition, the petitioner stated that it was established on May 17, 1977 and that it employs "4-5" workers. The petition states that the petitioner's gross annual income is \$650,000. In the space reserved for the petitioner to report its net annual income the petitioner entered "See attached tax returns." On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Dallas, Texas.

In support of the petition, the petitioner submitted its 2000 and 2001 Form 1120, U.S. Corporation Income Tax Returns. Those returns show that the petitioner is a corporation, that it incorporated on May 17, 1977, and that it reports taxes pursuant to accrual convention and a fiscal year running from June 1 of the nominal year to May 31 of the following year.

During the 2000 fiscal year, which ran from June 1, 2000 to May 31, 2001, the petitioner declared taxable income before net operating loss deductions and special deductions of \$239,413. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$84,104 and current liabilities of \$59,377, which yields net current assets of \$24,727.

During the 2001 fiscal year, which ran from June 1, 2001 to May 31, 2002, the petitioner declared taxable income before net operating loss deductions and special deductions of \$172,620. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$257,271 and current liabilities of \$54,437, which yields net current assets of \$202,834.

Because the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage, the Texas Service Center, on June 29, 2004, requested, *inter alia*, additional evidence pertinent to that ability. The service center cited 8 C.F.R. §204.5(g)(2) for the proposition that the petitioner must submit copies of annual reports, federal tax returns, or audited financial statements to show its continuing ability to pay the proffered wage beginning on the priority date.

The service center also specifically requested evidence pertinent to 2002 and 2003 and, if the petitioner had employed the beneficiary, evidence of the wage it paid him. The request also noted that, if the petitioner were a corporation, only the petitioner's own resources are pertinent to its ability to pay the proffered wage.

In response, counsel submitted (1) the petitioner's compiled June 30, 2002 balance sheet, (2) a letter dated August 23, 2004 from the petitioner's accountant, (3) copies of the petitioner's 2002 and 2003 tax returns, and (4) a brief. Counsel submitted no W-2 forms or other evidence of wages paid to the beneficiary.

In his August 23, 2004 letter the petitioner's accountant notes that the petitioner has been in business since 1977. The accountant states, citing the unaudited financial statements provided, that the petitioner's working capital, or net current assets, exceeded \$164,000 and its net worth, or stockholder's equity, was greater than \$355,000. The petitioner's net current assets and its stockholder's equity are addressed further below.

The petitioner's 2002 tax return shows that it declared taxable income before net operating loss deductions and special deductions of \$15,127 during that fiscal year, which ran from June 1, 2002 to May 31, 2003. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$307,456 and current liabilities of \$86,087, which yields net current assets of \$221,369.

The petitioner's 2003 tax return shows that the petitioner declared a loss of \$40,419 as its taxable income before net operating loss deductions and special deductions during that fiscal year, which ran from June 1, 2003 to May 31, 2004. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$195,161 and current liabilities of \$39,575, which yields net current assets of \$155,186.

In his brief counsel cites a May 4, 2004 memorandum from the Associate Director of Operations of Citizenship and Immigration Service for the proposition that the petitioner's net current assets must be considered in the determination of the petitioner's ability to pay the proffered wage. Counsel also urges that the petitioner's overall financial health should be considered. Finally, counsel states that an officer of the company is currently acquitting the duties of the proffered position, but would prefer to be replaced by a

competent employee. Counsel asserts that the officer's salary would then be available to pay the proffered wage to the beneficiary. Counsel refers to the petitioner's tax returns as support for the proposition that an officer of the company is performing the duties of the proffered position and of what the officer has been paid.

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 and, on September 21, 2004, denied the petition. In that decision the director did not discuss the petitioner's net current assets.

On appeal, counsel submits a letter dated November 9, 2004 from the petitioner's accountant, and another brief.

The accountant's November 9, 2004 letter states the alleged value of the petitioner's stockholders' equity at the end of its 2000, 2001, 2002, and 2003 fiscal years, and the amount of its stockholder's equity on September 30, 2004.

In his brief counsel urges that the expert opinion of the accountant should be accorded more consideration. Counsel further argues that the petitioner's financial statements, its stockholder's equity, and its net current assets should be considered.

Counsel's reliance on the balance sheets submitted in this matter 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. The accountant's report that accompanied the petitioner's balance sheets makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The assertion of the accountant and counsel that the petitioner's stockholder's equity is available to pay wages is unconvincing. Stockholder's equity represents the total value of the petitioner's assets, cash or non-cash, current or non-current, minus the total amount of the petitioner's liabilities. As such, the assets represented may not be in the form of funds available to pay the proffered wage, and the petitioner's stockholder's equity is not, therefore, a valid index of ability to pay additional wages. The value of the petitioner's assets will be considered only in the calculations pertinent to net current assets for reasons detailed below.

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 did not establish that it employed and paid 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 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).

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. 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

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 the 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.

Contrary to counsel's assertion, however, the petitioner's total assets 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. As counsel urges, CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.¹

The proffered wage is \$27,600 per year. The priority date is March 29, 2001.

The priority date fell within the petitioner's 2000 fiscal year, which ran from June 1, 2000 to May 31, 2001. During that fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$239,413. That amount is sufficient to pay the proffered wage. The petitioner has shown the ability to pay the proffered wage during its 2000 fiscal year.

During its 2001 fiscal year, which ran from June 1, 2001 to May 31, 2002, the petitioner declared taxable income before net operating loss deductions and special deductions of \$172,620. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

During its 2002 fiscal year, which ran from June 1, 2002 to May 31, 2003, the petitioner declared taxable income before net operating loss deductions and special deductions of \$15,127. That amount is insufficient to pay the proffered wage. The petitioner is unable to demonstrate the ability to pay the proffered wage with its

¹ In its discussion of net current assets, the service center appears to have confused current assets with total assets. The discussion, above, of current assets, current liabilities, and net current assets should clarify the distinction.

net profit during that year. At the end of that year, however, the petitioner had net current assets of \$221,369. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2002 fiscal year.

During 2003 the petitioner declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net income during that year. At the end of that year, however, the petitioner had net current assets of \$155,186. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The request for evidence in this matter was issued on June 29, 2004. Counsel's reply is dated September 13, 2004. The petitioner's 2003 fiscal year ended on May 31, 2005. When the request for evidence was issued the petitioner's 2004 tax return was unavailable. The appeal in this matter was received on October 21, 2004. On that date the petitioner's 2004 tax return was still unavailable. The petitioner is excused from providing evidence pertinent to 2004 and subsequent years.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during each of the salient years. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date. Under these circumstances this office need not address counsel's arguments pertinent to the petitioner's overall financial health and whether the petitioner has sufficiently demonstrated that wages paid to its officer for performing the duties of the proffered position were available during the salient years to pay the proffered wage.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.