



U.S. Citizenship
and Immigration
Services

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FILE:

EAC 04 035 50579

Office: VERMONT SERVICE CENTER

Date: MAR 20 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Japanese food cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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, the director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly, and upon review of the petitioner's motion to reopen, granted the petitioner's motion, and, then affirmed its prior decision concerning the continuing ability to pay that denied the petition.

The restaurant was established in 1999.

On appeal, counsel submits a brief and additional evidence. The director reviewed additional evidence submitted by counsel on appeal to prove the beneficiary's qualifications as a Japanese food cook.

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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 2, 2001. The proffered wage as stated on the Form ETA 750 is \$18.23 per hour (\$37,918.40 per year). The Form ETA 750 states that the position requires two years experience.

With the petition,¹ counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 1999, 2000, 2001, and 2002; and, a restaurant menu as well as other documentation.

The director denied the petition on October 12, 2004, finding 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, the evidence that was submitted failed to establish that the beneficiary had the required two years experience in the job offered as a Japanese food cook.

On appeal, counsel asserts “The Service erroneously disapproved this case...” and, submitted additional evidence including a letter from an employer [REDACTED] that stated that the beneficiary was employed there from July 1993 through August 1995 as a master sushi chef. The director reviewed and acknowledged the evidence but found that “After a complete review of the record of proceeding, including your motion, the grounds of denial have not been overcome.”

In a legal brief submitted by counsel, he states that because of the petitioner’s gross income figure, that this is evidence of the ability to pay. Counsel states that the beneficiary has been working for the petitioner and being paid wages by the petitioner since 2001. Counsel also states that petitioner’s net income stated on its tax returns is a “tax strategy” to reduce its income tax liability and that the employees “...can be paid higher wages and more personal income taxes ...”

Counsel also states in his brief that “USCIS ... [found] that the petitioner failed to establish the beneficiary had the required two years experience in the job offered. After Petitioner submitted new evidence along with the motion to reopen, USCIS indicated that Petitioner has established qualifying experience.” This is a correct statement. In the present case the director received and reviewed a letter received from an employer Yoshida Inc. that stated that the beneficiary was employed from July 1993 through August 1995 as a master sushi chef.

However, as the director found in the decision dated October 12, 2004, there is conflicting evidence presented in the record of proceeding concerning the beneficiary’s employment with the petitioner. The certified Alien Employment Application employment history does not support either counsel’s or the petitioner’s statements in the record of proceedings that the beneficiary has been employed by the petitioner since 2000/2001. The only probative evidence of employment is wage information submitted for the first half of 2004.

On another subject, in an explanatory letter dated August 5, 2004, submitted, the petitioner contends that “... net profits in the restaurant business do not mean much because most capital was paid for salary and buying supplies.” The petitioner goes on to state that “The liabilities have nothing to do with profits either, which do not in any way indicate that our restaurant is unable to pay the offered wages.”

Counsel has submitted the following documents to accompany the appeal: the above explanatory letter; a Form 941 for the quarter ended June 30, 2004; a U.S. federal tax return; and, a statement entitled “Employee Detail for [REDACTED]” a menu; and, a letter from petitioner’s accountant.

¹ No documentation was submitted, concerning the beneficiary’s qualifications, with the petition as the documentation according to the petitioner had already been requested by and submitted to the U.S. Department of Labor.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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.

Statements were submitted in the record of proceeding to show that the petitioner employed the beneficiary since 2000, or, as stated in counsel's brief, since 2001. Petitioner submitted a Form 941 "Employer's Quarterly Federal Tax Return" for the quarter ending June 30, 2004. The beneficiary is noted as receiving \$10,685.00 in wages for that calendar quarter.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure 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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. 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 v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns² demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$37,918.40 per year from the priority date of March 2, 2001:

- In 2000, the Form 1120-A³ stated taxable income of \$1,238.00.
- In 2002, the Form 1120 stated taxable income of \$9,990.00
- In 2003, the Form 1120 stated taxable income of \$3,227.00.

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. There was insufficient information (i. e. W-2, Misc-1099 form statements, pay stubs, cancelled pay checks, or yearly wage statements) to make this determination.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years from March 2, 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

² Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. The tax return for April 5, 1999 to March 31, 2000 stated a tax loss of \$12,662.00.

³ The tax year stated on the return is April 1, 2000 to March 31, 2001 so the return is probative since the priority date is March 2, 2001.

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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's 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. The petitioner's year-end current liabilities are shown on Part III of the Form 1120-A return.

Examining the Form 1120-A and 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L and Part III found in each of those returns indicates the following:

- In 2000, petitioner's Form 1120-A return stated current assets of \$21,579.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$21,579.00 in net current assets. Since the proffered wage is \$37,918.40 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of \$20,273.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$20,273.00 in net current assets. Since the proffered wage is \$37,918.40 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120 return stated current assets of \$35,138.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$35,138.00 in net current assets. Since the proffered wage is \$37,918.40 per year, this sum is less than the proffered wage by \$2,780.00.

Therefore, for the period March 2, 2001 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel has made an affirmation of fact in his brief dated December 8, 2004, that that the beneficiary has been working for the petitioner and paid wages by the petitioner since 2001. The above statement is not supported by evidence submitted and found in the record of proceeding. The only evidence submitted in the record of proceedings concerning wages paid to the beneficiary is a Form 941 statement for the quarter ended June 30, 2004, and, "Employee Detail for Sumou Japanese Restaurant, Inc. for the period January 1, 2004 to June 30, 2004.

Petitioner explains in its letter submitted on appeal and counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁵ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel contends that the petitioner's gross business income figure is evidence of the ability to pay. This statement is not supported by case precedent. As mentioned above. In *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

⁴ 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.

⁵ 8 C.F.R. § 204.5(g)(2).

Cir. 1983) the court held that the Service 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. *Supra* at 1084.

The petitioner contends that "... net profits in the restaurant business do not mean much because most capital was paid for salary and buying supplies." The petitioner goes on to state "The liabilities have nothing to do with profits either, which do not in any way indicate that our restaurant is unable to pay the offered wages." Counsel also states that petitioner's net income stated on its tax returns is a "tax strategy" to reduce its income tax liability and that the employees "...can be paid higher wages and more personal income taxes" As already stated, 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);

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has not established that the beneficiary is eligible for the proffered position.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.