



U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **MAR 24 2006**

WAC 03 163 53498

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery and restaurant. It seeks to employ the beneficiary permanently in the United States as a baker. 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, the petitioner submits a brief.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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 July 14, 2000. The proffered salary as stated on the labor certification is \$11.55 per hour or \$24,024 per year.

With the petition, the petitioner submitted copies of its 1999 through 2001 Forms 1120S, U.S. Income Tax Returns for an S Corporation. The petitioner's 1999¹ tax return reflected an ordinary income or net income of -\$4,522 and net current assets of -\$1,059. The petitioner's 2000 tax return reflected an ordinary income or net income of -\$42,530 and net current assets of -\$25,846. The petitioner's 2001 tax return reflected an ordinary income or net income of -\$15,453 and net current assets of -\$10,993. The director considered this documentation insufficient and on April 14, 2004, he requested additional evidence pertinent to the petitioner's ability to pay the proffered wage from the priority date of July 14, 2000 and continuing to the present. The

¹ Since 1999 is before the priority date of the petition (July 14, 2000), it has limited value in determining the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. Therefore, the petitioner's 1999 tax return will not be considered as evidence of the petitioner's ability to pay the proffered wage in this proceeding.

petitioner was informed that the evidence must be either in the form of copies of annual reports, federal tax returns with appropriate signatures, or audited financial statements. The director specifically requested complete copies of the petitioner's 2000 through 2003 federal tax returns and copies of the petitioner's California Employment Development Department (EDD) Forms DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the State of California. In addition, the director notified the petitioner that the 1999 through 2001 tax returns previously submitted did not have the appropriate signatures.

In response, the petitioner requested an extension of time to obtain an additional experience letter for the beneficiary and to comply with the required tax information.

The director denied the request for an extension of time and adjudicated the petition based on the record of proceeding.² 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 July 21, 2004, denied the petition.

On appeal, the petitioner contends that the denial should be reconsidered because it has been in business since June 1965 and because after September 11, 2001, small businesses across the nation suffered tremendously. The petitioner provides copies of its owner's 1998, 1999, 2000, and 2002 Forms 1040, U.S. Individual Income Tax Returns and a copy of its 2003 Form 1120S, U.S. Income Tax Return for an S Corporation. The 1998, 1999, 2000, and 2002 Forms 1040 reflect adjusted gross incomes of -\$396,252, -\$388,108, -\$415,244, and -\$374,166, respectively. The petitioner's 2003 Form 1120S reflects an ordinary income or net income of -\$41,414 and net current assets of -\$6,141. The petitioner states, "The economy has gone down specially in Los Angeles where we are facing strikes among the markets, bus lines, and fires." The petitioner continues by describing the benefits of hiring [REDACTED] (not the beneficiary) and the length of time [REDACTED] has been employed by the petitioner. The petitioner states that he would like to retire, but continue the operation of the bakery and restaurant. He does not, however, state that he would replace himself with the beneficiary.

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 in 2000, 2001, or 2003 at a salary equal to or greater than the proffered wage. It is noted that even though Form ETA 750B and Form G-325, Biographic Information, states that the petitioner employed the beneficiary from November 1993 to the present, the petitioner has not provided any evidence of this employment such as, but not limited to, pay stubs, cancelled pay checks, Forms W-2, Wage and Tax Statements, Forms 1099-MISC, Miscellaneous Income, or the beneficiary's individual income tax return.

² The regulations at 8 C.F.R. § 103.2(b)(8) allow the petitioner twelve weeks to respond to a request for evidence. Additional time may not be granted.

³ It is noted that the brief submitted by the petitioner was written in connection with a different case and a different receipt number.

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.⁴ 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. The petitioner's net current assets during 2000, 2001, and 2003 were -\$25,846, -\$10,993, and -\$6,141, respectively. The petitioner could not have paid the proffered wage in 2000, 2001, and 2003 from its net current assets.⁵

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter*

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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ Even though the petitioner claims that it had submitted its 2002 tax return for the business, the record of proceeding does not contain such tax return.

of *Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small “custom dress and boutique shop” on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary’s annual wage of \$6,240 was considerably in excess of the employer’s net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner’s simple net profit, including news articles, financial data, the petitioner’s reputation and clientele, the number of employees, future business plans, and explanations of the petitioner’s temporary financial difficulties. Despite the petitioner’s obviously inadequate net income, the Regional Commissioner looked beyond the petitioner’s uncharacteristic business loss and found that the petitioner’s expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner’s circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner’s reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner’s ability to pay the proffered wage. In this case, however, the petitioner has provided pertinent tax returns for four years, 1999, 2000, 2001, and 2003, with each tax return showing a loss in net income and net current assets. These losses are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In fact, the petitioner shows a reduction in gross receipts each year from 1999 through 2003. There is also no evidence of the petitioner’s reputation throughout the industry. The petitioner has provided no verifiable evidence of its loss (amount of loss in figures compared to previous years or subsequent years) or nexus to the events of September 11, 2001.

The petitioner asserts that the denial should be reconsidered due to the length of time it has been in business and because of the length of time it has employed the beneficiary. While CIS will consider the length of time a business has existed and the length of time a business has employed a beneficiary, in this case, the petitioner has shown only losses during the three pertinent years, and it has not provided any evidence that it actually employed the beneficiary (Forms W-2, Forms 1099, payroll records, etc.).

The 2000 tax return reflects an ordinary income or net income of -\$42,530 and net current assets of -\$25,846. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2000. Thus, it has not demonstrated its ability to pay the proffered wage in that year.

The 2001 tax return reflects an ordinary income or net income of -\$15,453 and net current assets of -\$10,993. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2001. Thus, it has not demonstrated its ability to pay the proffered wage in that year.

The 2002 tax return was not provided. No other regulatory-prescribed evidence for that year was submitted and thus, the ability to pay the proffered wage has not been established.

The 2003 tax return reflects an ordinary income or net income of -\$41,414 and net current assets of -\$6,141. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2003. Thus, it has not demonstrated its ability to pay the proffered wage in that year.

The petitioner did not submit sufficient evidence to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

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.