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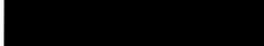
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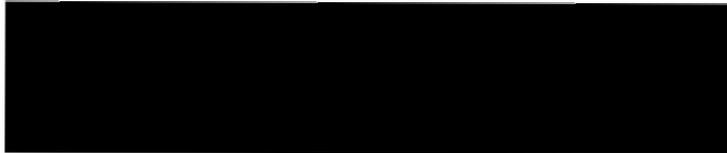
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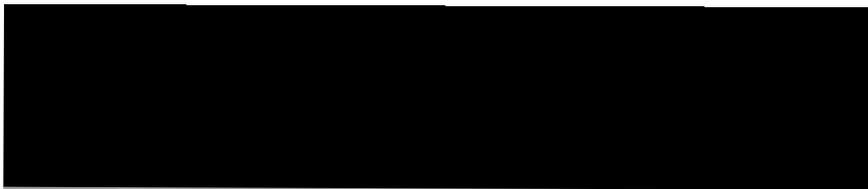
Petitioner:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the preference visa petition that 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 cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting 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.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$20 per hour, which equals \$41,600 per year.

On the petition, the petitioner stated that it was established on December 24, 1996 and that it employs 20 workers. The petition states that the petitioner's gross annual income is \$1 million. The space reserved on the Form I-140 for the petitioner to report its net annual income was left blank. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since February of 2001. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in New York, New York.

In support of the petition, counsel submitted (1) the petitioner's 2001 and 2002 Form 1065 U.S. Returns of Partnership Income, (2) a quarterly wage printout for the fourth quarter of 2001, (3) a NYS 45 ATT New York Quarterly Combined Withholding Return for the third quarter of 2002, (4) copies of 2001, 2002, and 2003 Form W-2 Wage and Tax Statements, (5) copies of monthly statements pertinent to the petitioner's bank account, (6) and a letter dated February 3, 2004 from an accountant.

The partnership returns submitted show that the petitioner is a limited liability company, that it was established on December 24, 1996, and that it reports taxes pursuant to the calendar year and accrual convention.

The 2001 partnership return shows that the petitioner reported a loss of \$135,787 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2002 partnership return shows that the petitioner reported a loss of \$98,082 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The quarterly wage printout shows that during the fourth quarter of 2001 the petitioner employed 47 workers and paid the beneficiary wages and tips of \$5,457.75. A year-to-date total shows that during all of 2001 the petitioner paid the beneficiary \$12,253.19.

The withholding form for the third quarter of 2002 shows that the petitioner paid the beneficiary gross wages subject to withholding of \$4,836.29 during that quarter.

The 2001, 2002, and 2003 W-2 forms show that the petitioner paid the beneficiary \$12,079.94, \$17,269.97, and \$15,375.58 during those years, respectively.

The accountant's February 3, 2004 letter urges that the average the petitioner paid the beneficiary over 2001, 2002, and 2003 added to the amount of the petitioner's monthly bank balances shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The acting 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 22, 2004, denied the petition.

On appeal, counsel submits copies of documentation previously submitted and a brief.

In the brief counsel argues that the evidence submitted and the accountant's analysis show the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel notes that the petitioner's bank balances at the end of most months was greater than the monthly amount of the proffered wage. Counsel further states that "a line-of-credit or checking account overdraft privileges would have been used" to cover the proffered wage during those months when the ending checking account balance was less than the monthly amount of the proffered wage. Counsel offers no evidence pertinent to the credit line.

Even if the existence of a credit line was established that would be insufficient to show the ability to pay the proffered wage. A line of credit, or any other indication of available credit, including an overdraft privilege, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds,

rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

The petitioner's bank balances are also an unconvincing index of the petitioner's ability to pay additional wages. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.¹ 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 reported on its tax returns.²

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 established that it employed the beneficiary and paid him \$12,079.94, \$17,269.97, and \$15,375.58 during 2001, 2002, and 2003, respectively.

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 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

¹ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

² The analysis of counsel and the accountant also implies that the petitioner could have used funds out of its bank account during a given month without reducing the balance in that account the following month. The petitioner is obliged to show the source of funds that would have replenished that account if some portion of it had been used to pay the proffered wage.

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.

The petitioner's total assets, however, 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. 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.

The proffered wage is \$41,600 per year. The priority date is April 27, 2001.

The petitioner has demonstrated that it paid the beneficiary wages of \$12,079.94 during 2001 and must show the ability to pay the \$29,520.06 balance of the proffered wage during that year. During 2001 the petitioner declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner has demonstrated that it paid the beneficiary wages of \$17,269.97, during 2002 and must show the ability to pay the \$24,330.03 balance of the proffered wage during that year. During 2002 the petitioner declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner has demonstrated that it paid the beneficiary wages of \$15,375.58 during 2003 and would ordinarily be obliged to show the ability to pay the \$26,244.42 balance of the proffered wage during that year. The petition in this matter was submitted on November 16, 2003. On that date the petitioner's 2003 tax return was unavailable. The petitioner is excused from demonstrating its ability to pay the proffered wage during 2003.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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 not met that burden.

ORDER: The appeal is dismissed.