



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
EAC 04 137 53485

Office: VERMONT SERVICE CENTER

Date: MAY 16 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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, Vermont Service Center. The petitioner filed a motion to reopen the denial. The director granted the motion.¹ The previous decision was affirmed by the director, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and, the petition will remain denied.

The petitioner is a restaurant/catering services corporation. It seeks to employ the beneficiary permanently in the United States as a manager, food service (catering). 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. The director denied the petition accordingly.

According to the petitioner, it employs seven individuals, and, it was established in 1999.

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 unavailable in the United States.

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 unavailable.

On the I-140 petition, the petitioner selected check box “g.” that states “Any other worker (requiring less than two years of training or experience).

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

¹ The issue on the motion was reconsideration of the Application to Adjust Status. The matter at issue before the AAO is set forth above.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$28.00 per hour (\$58,240.00 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits additional evidence.

With the petition, 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; a partial copy of the 2000 and a full copy of the 2001 (dated July 22, 2003) U.S. Internal Revenue Service Form tax returns; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The director denied the petition on December 9, 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.

On appeal, counsel asserts that evidence will be submitted to demonstrate the ability to pay the proffered wage.

Counsel has submitted the following documents to accompany the appeal statement: the petitioner's U.S. federal tax returns for years 2001 (dated January 14, 2002), 2002 and 2003.

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. No evidence was submitted to show that the petitioner employed the beneficiary. According to the undated Form G-235A submitted, the beneficiary was unemployed for the five years. According to the certified Form 750 Part B, Section 15 (a), the last employment position held by the beneficiary was in the position of assistant banquet and conference manager at the Bays Water Inn, London, United Kingdom from March 1990 to January 1993.

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 \$58,240.00 per year from the priority date of April 30, 2001:

- In 2001, the Form 1120S dated January 14, 2002, stated taxable income of \$51,248.00.
- In 2001, the Form 1120S dated July 22, 2003 stated a taxable income loss³ of <\$135,747.00>.⁴
- In 2002, the Form 1120S dated January 25, 2003 stated taxable income of \$53,933.00.
- In 2003, the Form 1120S dated February 27, 2004 stated taxable income of \$56,989.00.

There is no explanation for the differences between the two tax returns for 2001. If the later return dated July 22, 2003, was submitted after the unsigned, by the petitioner, return dated January 14, 2002, then it would amend that earlier dated return.

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 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

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.⁵ 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 1120S 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.

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

- In 2001, petitioner's Form 1120S return dated January 14, 2002 stated current assets of \$211,995.00 and \$137,916.00 in current liabilities. Therefore, the petitioner had

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 first three pages of the petitioner's 2000 tax return were submitted in blank.

³ IRS Form 1120SS, Line 21.

⁴ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁵ 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.

- \$74,079.00 in net current assets. Since the proffered wage is \$58,240.00 per year, this sum is more than the proffered wage.
- In 2001, petitioner's Form 1120S return dated July 22, 2003 stated current assets of \$25,700.00 and \$137,916.00 in current liabilities. Therefore, the petitioner had <\$112,216.00> in net current assets. Since the proffered wage is \$58,240.00 per year, this sum is less than the proffered wage.
 - In 2002, petitioner's Form 1120S return dated January 25, 2003 stated current assets of \$362,830.00 and \$83,234.00 in current liabilities. Therefore, the petitioner had \$279,596.00 in net current assets. Since the proffered wage is \$58,240.00 per year, this sum is more than the proffered wage.
 - In 2003, petitioner's Form 1120S return dated February 27, 2004 stated current assets of \$479,424.00 and \$97,725.00 in current liabilities. Therefore, the petitioner had \$381,699.00 in net current assets. Since the proffered wage is \$58,240.00 per year, this sum is more than the proffered wage.

Beyond the decision of the director, as already stated, there is no explanation accompanying the submission of two differing tax returns for the tax year 2001. Assuming that the tax return dated July 22, 2003 for tax year 2001 is the amended tax return submitted to the U.S. Internal Revenue Service for that year, the ending cash balance stated on that return for 2001 is \$25,700.00. Therefore, this amount, \$25,700.00 should be the beginning cash balance on the 2002 tax return. However, the beginning cash balance for tax year 2002 on Schedule L is \$186,296.00. There is no note on either return or found in the record of proceeding to explain this discrepancy in reporting cash assets for 2001 and 2002. The other tax return for 2001 dated January 14, 2002, is also inconsistent since it stated an ending cash balance of \$13,178.00. Based upon these inconsistencies, we reject the tax return for 2002 as not probative of the petitioner's financial status for the 2002 tax year. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Therefore, for the period 2001 and 2002 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

