

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE: EAC-03-238-54558 Office: VERMONT SERVICE CENTER Date: **MAY 19 2006**

IN RE: Petitioner: 
Beneficiary: 

PETITION: 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, Chief
Administrative Appeals Office

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

The petitioner is restaurant. It seeks to employ the beneficiary permanently in the United States as a Cook, Foreign Specialty. 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.

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 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:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$13.17 per hour, which amounts to \$27,939.60 annually. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1999 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on April 23, 2002

The I-140 petition was submitted on August 16, 2003. On the petition, the petitioner claimed to have been established in 1981 and to have a gross annual income of \$214,556.00. The items on the petition for the petitioner's current number of employees and for its net annual income were left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated May 13, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on August 20, 2004.

In a decision dated October 1, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and no additional evidence. Counsel states on appeal that copies of the petitioner's bank statements in the record show that the petitioner consistently had monthly ending balances which were greater than the monthly proffered wage. Counsel states that the petitioner's bank statements therefore establish the petitioner's ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, 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 instant case, on the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1999 and continuing through the date of the ETA 750B. However, the record contains no other evidence indicating that the beneficiary has worked for the petitioner and no evidence indicating the amount of any compensation paid by the petitioner to the beneficiary.

As another 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 for a given year, 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 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001, 2002 and 2003. The record before the director closed on August 20, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was the most recent return available.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return.

The petitioner's tax returns show amounts for taxable income on line 28 as shown in the table below.

| Tax year | Net income | Wage increase needed to pay the proffered wage | Surplus or deficit |
|----------|---------------|--|--------------------|
| 2001 | \$(29,782.00) | \$27,393.60* | \$(57,175.60) |
| 2002 | \$(22,525.00) | \$27,393.60* | \$(49,918.60) |
| 2003 | \$(17,999.00) | \$27,393.60* | \$(45,392.60) |

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

| Tax year | Net current assets | Wage increase needed to pay the proffered wage | Surplus or deficit |
|----------|--------------------|--|--------------------|
| 2001 | \$(883.00) | \$27,393.60* | \$(28,276.60) |
| 2002 | \$12,619.00 | \$27,393.60* | \$(14,774.60) |
| 2003 | \$(26,549.00) | \$27,393.60* | \$(53,942.60) |

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner's bank statements the ending balances are as follows

| 2001: | Ending balances | 2003 | Ending balances |
|-----------|-----------------|-----------|-----------------|
| January | \$6,212.51 | January | \$11,263.34 |
| February | \$6,061.19 | February | \$3,768.36 |
| March | \$4,724.98 | March | \$4,467.53 |
| April | \$7,193.40 | April | \$5,267.00 |
| May | \$31,725.87 | May | \$7,657.98 |
| June | \$2,301.88 | June | \$10,091.83 |
| July | \$5,222.20 | July | \$6,940.41 |
| August | \$3,039.61 | August | \$6,831.83 |
| September | \$4,234.32 | September | \$7,981.42 |
| October | \$5,383.65 | October | \$3,795.74 |
| November | \$8,499.84 | November | \$1,475.56 |
| December | \$3,829.95 | December | \$3,656.02 |
| 2002 | | 2004 | |
| January | \$3,706.06 | January | \$3,619.04 |
| February | \$6,003.15 | February | -\$1,582.67 |
| March | \$2,201.95 | March | \$5,386.72 |
| April | \$10,223.68 | April | \$3,528.60 |
| May | \$9,179.37 | May | \$3,187.85 |
| June | \$7,069.20 | June | \$5,985.34 |
| July | \$7,051.86 | July | - |
| August | \$5,260.29 | August | |
| September | \$6,477.60 | September | |
| October | \$3,780.63 | October | |
| November | \$2,518.82 | November | |
| December | \$43,044.74 | December | |

The above ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director correctly stated the petitioner's net income in 2001, 2002 and 2003. The director used the figures on line 30, for taxable income, rather than the figures on line 28, for taxable income before net operating loss deduction and special deductions. But in the instant case, the figures on line 28 and on line 30 were the same on each of the Form 1120 tax returns in the record. The director also correctly calculated the petitioner's year-end net current assets for each of those years. However, the director incorrectly labeled the results of those calculations as "Net Income (loss)," rather than as net current assets. The director found that the information in the petitioner's tax returns failed to establish the petitioner's ability to pay the proffered wage in those years. The director also found that the bank statements submitted in evidence failed to establish

the petitioner's ability to pay the proffered wage during the years at issue. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.