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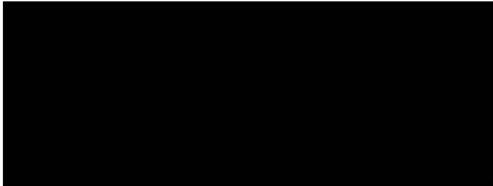
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
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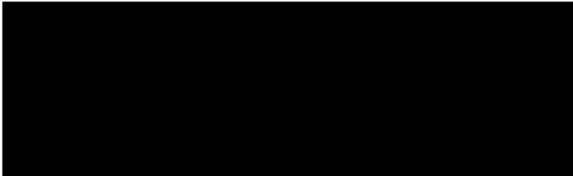
FILE: EAC 04 102 50025 Office: VERMONT SERVICE CENTER Date: **SEP 06 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

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 (DOL), 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, counsel asserts that the petitioner has employed the beneficiary and has had the continuing financial ability to pay the proffered salary.

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) provides:

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. 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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 3, 2001. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour, which amounts to \$29,120 per annum. On the Form ETA 750B, signed by the beneficiary on , the beneficiary claims to have worked for the petitioner since May 2000.

On Part 5 of the visa petition, filed on February 17, 2004, the petitioner claims to have been established in 1994, to have a gross annual income of \$200,00, a net annual income of \$12,000, and to currently employ six workers. In support of the ability to pay the proposed wage offer of \$29,120, the record contains a copy of the petitioner's

corporate tax return for 2001. It reflects that the petitioner files its federal tax returns using a standard calendar year. In 2002, it reported taxable income of \$7,057 before the net operating loss (NOL) deduction. Schedule L shows that the petitioner had \$22,050 in current assets and no current liabilities, yielding \$22,050 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.¹ Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a readily available resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of a corporate tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If a corporation's year-end 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 record also contains copies of the petitioner's bank statements for 2001.

The director denied the petition on January 21, 2005, finding that the petitioner had failed to demonstrate its ability to pay the proffered wage. He noted that the petitioner's bank statements did not show a sustained period of balances sufficient to cover the proffered wage. He also found that the petitioner's net income of \$7,057 was insufficient to pay the proffered wage. He further stated that Schedule L of the petitioner's 2001 tax return showed that its current assets did not exceed current liabilities by an amount sufficient to pay the certified wage.

On appeal, counsel asserts that the petitioner should have been apprised of the deficiencies of the petitioner's evidence and allowed an opportunity to provide additional documentation since CIS took the time to send the petitioner a notice. On appeal, counsel provides a copy of the petitioner's 2004 corporate tax return, which demonstrates the petitioner's ability to pay the proffered wage during that year, through either its \$29,233 in taxable income before the NOL deduction or net current assets of \$34,004. He further provides copies of the petitioner's payroll records for January and February 2005, showing the beneficiary's compensation to be at the weekly rate of the proffered wage.

Counsel further supplies a letter from the petitioner's accountant, [REDACTED] who emphasizes that as a non-cash expenditure, the petitioner's depreciation expense taken in 2001 should be applied toward the payment of the proffered salary. He further notes that \$50,000 taken as "other assets" represents a liquor license that could easily be converted to cash. Finally, he notes that there was an extra \$7,000 available as cash on hand in cash registers and safes, etc. that were not part of the bank statements.

Current CIS policy is to review credible evidence of a petitioner's payment of wages to a designated beneficiary where provided. Because the record suggested that the petitioner has employed the beneficiary since May 2000, it was appropriate for the director to request additional evidence from the petitioner to allow it the opportunity to

¹ 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.

document the level of compensation that has been paid to the beneficiary. The case is now being remanded for that purpose. *See* 8 C.F.R. § 103.2(b)(8).

Consistent with current CIS policy, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by reliable documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will also be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. As the record currently stands, except for payroll records provided on appeal relevant to 2004, evidence of wages paid to the beneficiary is not contained in the record, although the beneficiary claims employment with the petitioner since May 2000.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). 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 corporate income tax returns, rather than the petitioner's gross income as counsel advocates here on appeal. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay.

Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 536.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage. As set forth above, they are the difference between *current* assets and liabilities. (Emphasis added.) We do not accept the suggestion on appeal that the petitioner's liquor license, designated as a longer-term asset on the Schedule L balance sheet of the 2001 corporate return, should be included in this calculation, as it presumably has a business use and would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

As suggested by the director, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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), consisting of federal tax returns, annual reports, or audited financial statements are not applicable or otherwise provide an inaccurate financial portrait of the petitioner. As indicated by Mr. [REDACTED], bank statements generally show only a portion of a petitioner's financial status. In this respect, the 2001 bank statements will not be considered as a substitution for the evidence prescribed by the regulation. Cash assets, including cash in registers or safes, should also be shown on the corresponding federal tax return as part of the listing of cash on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. In this instance, there is no evidence that the funds represented the 2001 bank statements offered on appeal somehow represent additional available funds.

As the record currently indicates, the petitioner's 2001 federal tax return shows that neither its net income of \$7,057, nor its net current assets of \$22,050 was sufficient to cover the certified wage during that year. Finally, it is noted that no financial documentation covering 2002 or 2003 is contained in the record although the petition was filed in February 2004. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning at the priority date. Such evidence must include federal tax returns, audited financial statements, or annual reports. In this matter, evidence pertinent to any subsequent period after the year of the priority date may also be provided on remand. The case will be remanded to the director for further investigation of any wages paid to the beneficiary during any of the relevant years and the petitioner's continuing ability to pay the certified wage consistent with the regulatory requirements.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.