PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 27 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

[redacted]

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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a market. It seeks to employ the beneficiary as a butcher. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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, 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 November 19, 1997. The proffered salary as stated on the labor certification is $13.88 per hour, which equals $28,870.40 per year.

With the petition, counsel submitted a copy of the front page of the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation, showing ordinary income of $4,389, and a letter that states:

> In general, salaries paid in any organization have three fundamental purposes: (a) to produce sales, (b) to manage the company, and (c) to produce goods and/or services that the company commercializes.
>
> According to the Accepted Accounting Principles, when a company provides services, the salaries paid to the personnel, whom are responsible for the services provided are [p]art of the Cost of Goods Sold of the company.
>
> The Accepted Accounting Principles states that the Cost of Goods Sold, are as well, part of the Cost of Merchandise, that is available for sale; to determine the quantity, it must be combined with the initial inventories and the available merchandise for sale. Consequently,

> we affirm that El Mercado La Rancherita, petitioning employer, has in fact employees to whom salary has been paid.
>
> * * *
>
> The employer has documented the burden of proof in accordance with Section 291 of the Act, 8 U.S.C. 1361. Consequently, it has been clearly demonstrated that the employer has the economic solvency and capacity to pay wages.

The director considered this documentation insufficient, and, on January 14, 2003, the Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage.

In response, counsel submitted a copy of computer printouts for the petitioner for the years 1999 through 2001, a copy of the petitioner's 1998, 1999, and 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, a copy of the articles of incorporation of the business, and a request for additional time to provide the 1997 income tax returns from the prior owner. The 1998 tax return reflected ordinary income of $6,028 and net current assets of -$7,744. The 1999 tax return reflected ordinary income of $23,174 and net current assets of $8,036. The computer printout for 2000 reflected ordinary income of $4,389. The computer printout for 2001 reflected ordinary income of $5,131. The 2002 tax return reflected ordinary income of $39,966 and net current assets of $42,251.

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 April 22, 2003, denied the petition.

On appeal, counsel provided an additional copy of the evidence previously submitted, a copy of the prior 1997 Form 1120S, U.S. Income Tax Return for an S Corporation, for M&MP, the entity that filed the ETA-750, and copies of the beneficiary's Forms W-2, Wage and Tax Statements, for the years 1997 through 2002. The tax return for 1997 reflects an ordinary income of -$4,362 and net current assets of -$6,750. The forms W-2 reflected salaries earned of $10,749, $11,872.25, $12,190, $13,090, $13,000, and $4,860, respectively.

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 present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage.

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.

A further means of determining the petitioner's ability to pay the proffered wage includes reviewing the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

The 1997 tax return reflects an ordinary income of -$4,361 and net current assets of -$6,750. The petitioner could not pay the proffered wage in 1997 from either its ordinary income or its net current assets. Even when considering the amount paid to the beneficiary in 1997, there is still not enough money to make up the difference needed to pay the wage.

The 1998 tax return reflects an ordinary income of $6,028 and net current assets of -$7,744. The petitioner could not pay the proffered wage of $28,870.40 out of either its ordinary income or its net current assets. Again, even when considering the amount paid to the beneficiary in 1998, there is still not enough money to make up the difference needed to pay the wage.

The 1999 tax return reflects an ordinary income of $23,174 and net current assets of $8,036. The petitioner could not pay the proffered wage of $28,870.40 out of either its ordinary income or its net current assets. However, the ordinary income and the amount paid to the beneficiary in 1999 is more than the proffered wage. Therefore, the petitioner has established its ability to pay the proffered wage in 1999.

The 2000 computer printout reflects an ordinary income of $4,389. The petitioner could not pay the proffered wage out of this income. In addition, the amount paid to the beneficiary in 2000 and the ordinary income, when added together, are still less than the proffered wage.

The 2001 computer printout reflects an ordinary income of $5,131. The petitioner could not pay the proffered wage out of this income. In addition, the amount paid to the beneficiary in 2001 and the ordinary income, when added together, are still less than the proffered wage.

The 2002 tax return reflects an ordinary income of $39,966 and net current assets of $42,251. The petitioner could pay the proffered wage from either the ordinary income or the net current assets.

---

[1] A petitioner's "current assets" consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner's balance sheets, current assets include, but are not limited to the following: cash, accounts receivable, inventories, pre-paid expenses, certain marketable securities, loans and promissory notes, and other identified current assets. A petitioner's "current liabilities" are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner's accounts payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year, and any other identified current liabilities.

In summary, the petitioner has not established that it had the ability to pay the proffered wage in 1997, 1998, 2000, and 2001. Thus, we need not address whether the petitioner has established that it the successor in interest to the entity that filed the ETA-750. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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.