identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: WAC 03 068 50230 Office: CALIFORNIA SERVICE CENTER Date: NOV 18 2004

IN RE: Petitioner: [redacted]
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:

[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 Director, California 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 bakery and café. It seeks to employ the beneficiary permanently in the United States as a pastry baker. 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.

On appeal, counsel submits a statement and additional evidence.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 21, 1995. The proffered wage as stated on the Form ETA 750 is $9.84 per hour, which equals $20,467.20 per year.

On the petition, the petitioner stated that it was established on October 1, 1982 and that it employs five workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner at its present location since December 1994. Previously, from November 1989 to November 1994, the beneficiary claimed to have worked for the petitioner at a different location, also in Monterey Park, California. The beneficiary claimed no other employment.

In support of the petition, counsel submitted the petitioner's 1995, 1999, and 2000 Form 1065, U.S. Returns of Partnership Income. The 1995 return shows that the petitioner declared a loss of $11,830 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 1999 return indicates that the petitioner declared a loss of $17,235 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $13233 and current liabilities of $3,335, which yields net current assets of $9,898.

The 2000 return indicates that the petitioner declared a loss of $8,454 during that year. The corresponding Schedule L shows that the petitioner ended the year with current assets of $4,061 and current liabilities of $2,734, which yields net current assets of $1,327.

Counsel also provided the petitioner's 1996, 1997, 1998, and 2001 Form 565 California Partnership Return of Income.

The 1996 return shows that the petitioner declared ordinary income of $16,426 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $10,937 and current liabilities of $4,458, which yields net current assets of $6,479.

The 1997 return shows that the petitioner declared a loss of $40,886. Because the corresponding Schedule L is not in the file, this office is unable to calculate the petitioner's net current assets for that year.

The 1998 return shows that the petitioner declared a loss of $30,502. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $5,056 and current liabilities of $3,400, which yields net current assets of $1,656.

The 2001 return shows that the petitioner declared a loss of $13,405 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $15,516 and current liabilities of $4,706, which yields net current assets of $10,810.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on May 15, 2003, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also noted that the evidence previously provided did not show income or net current assets sufficient to pay the proffered wage. The Service Center also specifically requested that the petitioner provide Form W-2 Wage and Tax Statements showing the wages paid to the beneficiary.

In response, counsel submitted the first pages of the petitioner's 1995, 1997, 1998, 1999, and 2000 Form 1065 U.S. Partnership Returns of Income and the first pages of the petitioner's 1996 and 2001 Form 565 California Partnership Returns of Income. On those pages, the end-of-year total assets are highlighted. Counsel also provided copies of W-2 forms showing wages paid to the beneficiary during 1992 and 1993.

In a response typed on the returned copy of the request for evidence, counsel stated that the petitioner ceased issuing W-2 forms to the beneficiary during 1994, and that no W-2 forms for 1994 and ensuing years showing wages paid to the beneficiary were available. Counsel also noted that the total assets shown on the first pages

of the tax returns exceed the proffered wage. Counsel incorrectly stated, however, that those total assets shown on page one are the petitioner's net current assets.

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 August 28, 2003, denied the petition.

On appeal, counsel submits a statement. Counsel again asserts that the petitioner's total assets are its net current assets. The calculation of net current assets is discussed below. Counsel also submits copies of the first pages and Schedules L of returns previously provided. Counsel still did not provide a copy of the petitioner's 1997 Schedule L.

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, 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 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 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, however, 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, those expected to be 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 $20,467.20 per year. The priority date is November 21, 1995.

During 1995 the petitioner declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with 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 not shown that any other funds were available during that year with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 1995.

During 1996 the petitioner declared ordinary income of $16,426. That amount is insufficient to pay the proffered wage. The petitioner ended the year with net current assets of $6,479. That amount is also insufficient to pay the proffered wage. The petitioner has not shown that any other funds were available during that year with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 1996.

During 1997 the petitioner declared a loss of $40,886. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its income. Because the petitioner's 1997 Schedule L is not in the file, this office is unable to calculate its 1997 end-of-year net current assets. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its net current assets during that year. The petitioner has not shown that any other funds were available during that year with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 1997.

During 1998 the petitioner declared a loss. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with net current assets of $1,656. That amount is insufficient to pay the proffered wage. The petitioner has not shown that any other funds were available during that year with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner declared a loss. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with net current assets of $9,898. That amount is insufficient to pay the proffered wage. The petitioner has not shown that any other funds were available during that year with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner declared a loss. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with net current assets of $1,327. That amount is insufficient to pay the proffered wage. The petitioner has not shown that any other funds were available during that year with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a loss. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with net current assets of $10,810. That amount is insufficient to pay the proffered wage. The petitioner has not shown that any other funds were available during that year with which to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1995, 1996, 1997, 1998, 1999, 2000, and 2001. 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.