

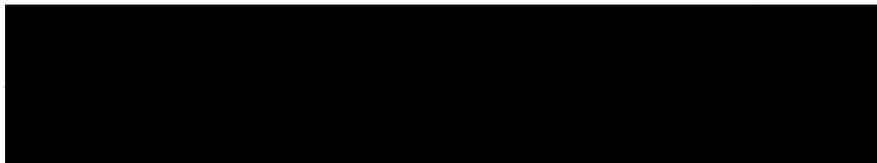
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



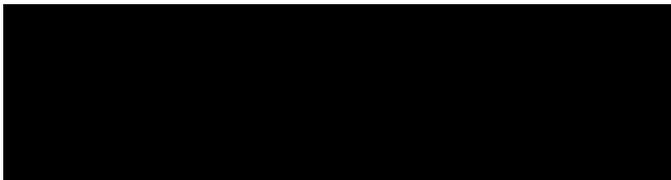
B6

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 18 2005
WAC 02 199 53644

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care home. 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, 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, the petitioner submits additional documentation on the petitioner's financial resources for 2001 and 2002.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 December 28, 1999. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$11.55, or an annual wage of annual salary of \$24,024. On the Form ETA 750B, signed by the beneficiary, and amended on April 22, 2002, the beneficiary claimed to have worked for the petitioner from January 1999 to January 2000.

On the petition, the petitioner claimed to have been established in 1991, to have 14 employees and to have a net annual income of \$75,000. In support of the petition, the petitioner submitted no further documentation. Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 17, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director

specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage from 1999 to the present. The director also requested evidence that the beneficiary possessed the experience listed on the ETA-750. The director specifically stated that the evidence needed to be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying the information, and the verification should state the beneficiary's title, duties, and dates of employment with number of hours worked per week identified.

In response, the petitioner submitted a letter from [REDACTED] Administrator, on a blank sheet of paper. This letter stated that the beneficiary was a former employee at Oravilla Guest Home, Orange, California, and worked as a cook. This letter further stated that the duration of employment was from December 1996 to July 1999. The petitioner also submitted IRS Form 1120S federal corporate income tax returns for 1999, 2000, and 2001. The petitioner submitted no further explanation of the submitted documents.

In his denial of the petition, the director stated that the petitioner's federal income tax forms established that, based on the petitioner's negative ordinary income in 1999 and 2000, the petitioner had not established that it continuously had the ability to pay the beneficiary's wage from the priority to the present. On February 24, 2003, the director denied the petition.

On appeal, the petitioner states that a letter from its accountant explains the financial capability of the petitioner for the year 2001, and a copy of the petitioner's income and expense statement for the year 2002 reflects amounts in excess of \$50,000 which is more than sufficient to pay the proffered wage. The petitioner submits a letter from [REDACTED] C.P.A., Orange, California.

This letter states that the income for [REDACTED] for the year 2001 was \$47,669, and that if the depreciation deduction was added back, the cash flow would have been \$62,669. A handwritten note on this letter states that [REDACTED], is doing business as [REDACTED] and is signed by [REDACTED] Administrator, [REDACTED]. The petitioner also submits a statement of the petitioner's income and expenses for the period ending on December 31, 2002. A letter from [REDACTED] accompanies the letter and states that [REDACTED] has not "audited or reviewed the company income statement and accordingly, [he does] not express an opinion or any other form of assurance on it." The cover letter also stated that the petitioner has elected to omit substantially all of the disclosures ordinarily included in financial statements prepared on the cash basis of accounting, and accordingly, the financial statement is not designed for those who are not informed about such matters." The accompanying statement of income and expenses for the year 2002 indicates that the petitioner had \$743,136 in sales, with total expenses of \$676,718.

Although Form I-290B indicates that the petitioner was sending a brief or evidence to the AAO within thirty days, no such brief or additional information is found in the record. Thus, the AAO will examine the petition based on the record as it is presently constituted.

In determining the petitioner's ability to pay the proffered wage during a given period, 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.

In the instant case, the petitioner did not claim that it employed and paid the beneficiary the full proffered wage for the last week in 1999 and onward; however the ETA750B was amended by the Department of Labor in April 2002 to show that the beneficiary worked for the petitioner fulltime from January 1999 to January 2000. However, this documentation conflicts with the documentation from Mr. [REDACTED] who stated that the beneficiary worked for him as a cook at [REDACTED] Orange, California, from December 1996 to July 1999. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." In addition, the record contains no evidentiary documentation, such as W-2 forms, pay slips, or wage statements, to support the beneficiary's employment by the petitioner. Without more persuasive evidence, the petitioner has not established that it employed the beneficiary or that it paid the beneficiary the proffered wage.

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 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). 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 corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The petitioner submitted federal income tax returns for three years: 1999, 2000, and 2001.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 1999 shows the following amount of ordinary income: -\$9,385. In 2000, the petitioner's ordinary income was -\$3,743, and in 2001, the petitioner's net income was \$47,669. Thus, based on net income figures, the petitioner was able to pay the proffered wage in 2001; however, the petitioner has not established that it had the ability to pay the beneficiary's wage as of December 28, 1999 and through 2000.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the

proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 out of those net current assets. The petitioner's net current assets during the year 1999, however, were -\$82,799. In 2000, the petitioner's net current assets were -\$88,283. Thus, an examination of the petitioner's net current assets for either 1999 or 2000 does not establish that the petitioner had the ability to pay the beneficiary's wage as of the priority date and during the year 1999 or 2000. Therefore, the petitioner has not established that it has the ability to pay the proffered wage from the priority date to the present time.

On appeal, the petitioner submits a letter from its accountant with regard to the petitioner's assets and the use of a depreciation deduction in the petitioner's 2001 federal income tax returns. As previously stated, CIS does not consider depreciation deductions in its examination of the petitioner's net current assets. The petitioner also submits in its appeal received by the service center on March 26, 2003, an unaudited statement of income and expenses for the year 2002. This documentation is problematic for two reasons. First, the documentation addresses the petitioner's assets and liabilities as of December 31, 2002, and is not persuasive as to the petitioner's ability to pay the proffered wage as of the priority date, namely, December 28, 1999. Second, according to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary at any time. In 1999 and 2000, the petitioner's federal income tax returns document negative ordinary income, and negative net current assets. The petitioner also has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, established that it has the continuing ability to pay the proffered wage as of the priority date to the present time.

Beyond the director's decision, with regard to the beneficiary's prior experience as a cook, the record lacks sufficient relevant documentation to establish that the beneficiary has two years of experience as a cook. Although the discrepancies between the two employers' records have been discussed previously, it is also noted that the beneficiary's claimed first employer, [REDACTED] provided no information as to the hours worked by the beneficiary, the letter submitted was not on letterhead, and the employer provided no

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.

evidentiary documentation, such as pay slips or W-2 forms, to establish the beneficiary's employment. For this additional reason, the petition may not be approved.

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.