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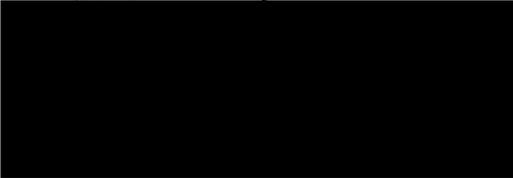
U.S. Department of Homeland Security
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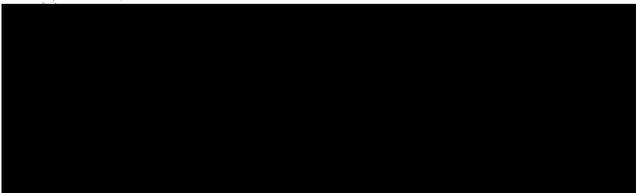


FILE: EAC 02 195 52235 Office: VERMONT SERVICE CENTER Date: JAN 13 2005

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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a 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, submits a brief.

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 March 14, 2001. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour, which equals \$26,000 per year.

On the petition, the petitioner stated that it was established during 2001 and that it employs 10 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since May 2000. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Worcester, Massachusetts.

In support of the petition, counsel submitted two 2001 Form W-2 Wage and Tax Statements and a 2001 Form 1099 Miscellaneous Income statement. The W-2 forms show that the petitioner paid the beneficiary \$1,414.80 and \$5,603 and the Form 1099 shows that the petitioner paid the beneficiary an additional \$15,254.65 during that year. Those three amounts total \$22,272.45. Counsel also submitted monthly statements pertinent to the petitioner's monthly checking account balance.

On November 1, 2002 the Vermont Service Center requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested the petitioner's 2001 Federal tax returns with all schedules and attachments and copies of the beneficiary's 2002 W-2 forms. The petitioner was accorded until January 27, 2003 to respond.¹

In response, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that it covers the period from October 1, 2001 through the end of the calendar year. During that period the petitioner declared ordinary income of \$5,817. The corresponding Schedule L shows that at the end of 2001 the petitioner had \$23,189 in current assets and \$21,440 in current liabilities, which yields \$1,749 in net current assets.

Counsel also submitted more bank statements and a 2002 W-2 form showing that the petitioner paid the beneficiary \$3,666 during that year.

The director found 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 7, 2003, denied the petition.

On appeal, counsel notes that the decision of denial did not address the amounts that the Forms W-2 and 1099 showed the petitioner had paid to the beneficiary.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it employed and paid the beneficiary \$22,272.45 during 2001 and \$3,666 during 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given year, 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

¹ This office notes that, although the request was made on November 1, 2002, when the beneficiary's 2002 W-2 form was clearly unavailable, the petitioner had until January 27, 2003 to respond. One would expect the beneficiary's W-2 form to be available, to the petitioner, at least, prior to that date. Further, counsel's submission of that form indicates that it was, in fact, available.

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 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 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 \$26,000 per year. The priority date is March 14, 2001.

During 2001 the petitioner paid the beneficiary \$22,272.45. That amount is less than the amount of the proffered wage. The petitioner must show the ability to pay the \$3,727.55 balance of the proffered wage. The petitioner declared ordinary income of \$5,817. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner paid the beneficiary only \$3,666 during 2002. The petitioner did not submit its 2002 tax returns. However, the Request for Evidence in this matter was issued on November 1, 2002, when the petitioner's 2002 tax return was certainly unavailable. The petitioner was not requested, nor otherwise required, to submit its 2002 tax return.

The petitioner demonstrated its ability to pay the proffered wage during 2001, the only salient year. The petitioner has 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.