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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUL 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:

[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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

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 restaurant. It seeks to employ the beneficiary permanently in the United States as head waiter. 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 documentation.

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) 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 April 24, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$14.96, or an annual salary of \$31,116. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have had no steady employment for the past three years.

On the petition, the petitioner did not indicate when it was established, the number of employees, or its gross or net annual income. In support of the petition, the petitioner submitted a letter of employment verifying the beneficiary's employment at the restaurant La Mer in Casablanca, and the petitioner's IRS Form 1120S for the year 2000.

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 October 15, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 2001 federal tax returns, with all schedules and attachments. In addition, the director requested that the petitioner submit W-2 forms for the beneficiary if the petitioner had employed the beneficiary in 2001.

In response, counsel submitted IRS Form 1120S, the petitioner's corporate tax returns for the year 2001. In addition, counsel submitted copies of the beneficiary's W-2 form for 2001. This document indicated the petitioner paid the beneficiary \$19,783.80 in 2001.

On July 9, 2003, the director denied the petition. In his denial of the petition, the director examined both the petitioner's 2000 and 2001 income tax return, and stated that the petitioner's financial liabilities exceeded its financial assets in both years. In addition, the director stated that the W-2 Form submitted by the petitioner showed that the beneficiary was paid \$11,333 less than the proffered wage in 2001. The director determined that the petitioner had not established that it had the ability to pay the proffered wage as of the priority date and onward.

On appeal, counsel submits a Form W-2 for 2002 that shows that the petitioner paid the beneficiary \$31,094 in 2002, which counsel describes as more than the proffered wage. In addition, counsel states that the director must take into account all relevant facts including, but not limited, to W-2 forms, tax returns, financial statements, overall longevity of employer, and whether the petitioner pays its expenses and meets its liabilities. Counsel also notes that the petitioner had gross sales for the year of almost \$1,000,000 and depreciation of over \$50,000, an item that is only used for tax purposes. Counsel states that Citizenship and Immigration Services (CIS) recognizes this, especially in cases in which the petitioner's cash flow is positive, and in which W-2 Forms clearly show that the beneficiary is being compensated in excess of the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. Although the petitioner submitted W-2 salary statements for the beneficiary for the years 2000 and 2001, since the priority date for the petition is April 24, 2001, the beneficiary's salary and the petitioner's financial resources in the year 2000 are not dispositive in the present proceedings. Therefore, only the IRS W-2 form from 2001 is considered in this proceeding. Based on this document, the petitioner paid the beneficiary an annual salary of \$19,783 which is \$11,333 less than the proffered annual wage. On appeal, the petitioner submits the beneficiary's W-2 Form for 2002, which indicates the petitioner paid the beneficiary \$31,094.79 in 2002. Contrary to counsel's assertion, this wage is not more than the proffered wage of \$31,116. The fact that the petitioner paid the beneficiary very close to the proffered wage in 2002, does not establish that the petitioner paid the beneficiary the proffered wage as of the priority date and to the present. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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. As noted previously, the wage and tax documentation submitted by the petitioner for the year 2000 is not relevant to these proceedings. Therefore, only the petitioner's 2001 federal income tax returns are considered with regard to its net income.

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 2001 shows the following amount of ordinary income: -\$179,601. This figure fails to establish the ability of the petitioner to pay the proffered wage, based on its net income.

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 submitted the following information for tax year 2001:

	2001
Ordinary Income	\$ -179,601
Current Assets	\$ 12,858
Current Liabilities	\$ -293,218
Net current assets	\$ -280,360

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net income of -\$179,601, and net current assets of -\$280,360, and has not, therefore, demonstrated the ability to pay the difference between the actual wages paid and the proffered wage, namely, \$11,333, out of its net income or net current assets. Although the petitioner paid the beneficiary close to the proffered wage in 2002, the record does not contain the petitioner's Form 1120S for the tax year 2002, with which to gauge whether the

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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner's net income or net current assets are sufficient to pay the difference between the beneficiary's actual wage and the proffered wage. Even if the beneficiary's tax return for 2002 were to establish the petitioner's ability to pay the proffered wage in 2002, a petitioner must establish the elements for the approval of the petition at the time of filing. Thus, the petitioner has to establish that it has the capability to pay the proffered wage as of the 2001 priority date as well as during 2002. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel states that the director must take into account all relevant facts and states that the petitioner had gross sales for the year of almost \$1,000,000 and depreciation of over \$50,000. However, 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 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 537.

Therefore neither the petitioner's gross sales or depreciation will be considered in these proceedings. Without more persuasive evidence, the petitioner has not established that it has additional financial resources with which to pay the difference between the beneficiary's actual wages and the proffered wage. Therefore the petitioner has not established that it has the ability to pay the proffered wage as of the priority date and onward.

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.