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U.S. Citizenship
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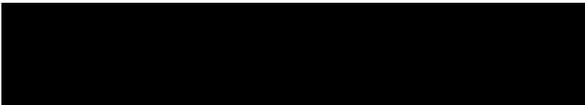
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FILE: WAC 01 244 50401 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



MAY 18 2005

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 preference 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 is a Chinese food-catering firm. It seeks to employ the beneficiary permanently in the United States as a Chinese style chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered wage.

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 DOL's employment system. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was originally accepted for processing on October 25, 1993. The proffered wage as stated on the Form ETA 750 is \$1,733 per month, which amounts to \$20,796 annually. The documents submitted with the petition indicate that the alien beneficiary is a substitution for the original alien named in the ETA 750A. The ETA 750B, signed by the alien on May 3, 2001, does not indicate that the petitioner has employed him.

On Part 5 of the visa petition, it is claimed that the petitioner was established in 1992, has a gross annual income of \$172,818 and currently employs four workers. As evidence of its continuing financial ability to pay the certified wage of \$20,796 per year, the petitioner initially submitted copies of its U.S. Partnership Return of Income for 1998, 1999, and 2000. These tax returns contain the following information:

	1998	1999	2000
Net income	\$ 370	-\$11,694	-\$ 4,252
Current Assets	\$6,756	\$ 8,738	\$15,603
Current Liabilities	\$3,614	\$ 3,702	\$ 3,455
Net Current Assets	\$3,142	\$ 5,036	\$12,148

Besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will also examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are generally shown on Schedule L of its federal tax return. If a petitioner's year-end 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.

With its petition, the petitioner additionally provided copies of its checking account statements from the [REDACTED] covering a period between January 1998 and February 2001. It further supplied copies of internally generated unaudited financial statements presented as statements of cash flows and disbursements for 1998, 1999, and 2000.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence on November 8, 2002. The director requested that the petitioner supply evidence of its ability to pay the proffered salary as of the priority date in the form of annual reports, audited financial statements, or federal tax returns. The director instructed the petitioner to provide this evidence for 1993, 1994, 1995, 1996, 1997, and 2001.

In response, the petitioner, through counsel, submitted the petitioner's federal tax returns for 1993-1997 and for 2001. They reflect the following information:

	1993	1994	1995	1996	1997	2001
Net Income	-\$22,460	-\$16,345	-\$13,194	-\$12,018	-\$12,423	\$ 1,496
Current Assets	\$10,509	\$11,885	\$10,343	\$10,982	\$ 6,781	\$18,023
Current Liabilities	\$ 1,158	\$ 1,067	\$ 1,645	\$ 1,415	\$ 1,825	\$ 3,474
Net Current Assets	\$ 9,351	\$10,818	\$ 8,698	\$ 9,567	\$ 4,956	\$14,549

Counsel also submitted copies of the corresponding internal statements of cash flows and disbursements for 1993-1997 and for 2001.

Upon reviewing the petitioner's net income and net current assets as reflected on its federal tax returns submitted to the record, the director concluded that the evidence did not support petitioner's continuing ability to pay the proffered wage beginning on the priority date of October 25, 1993. The director denied the petition on February 26, 2004.

On appeal, counsel resubmits copies of various documents previously supplied to the record, along with a copy of the petitioner's 2002 federal tax return. It indicates that the petitioner reported net income of -\$1,760. Schedule L shows that the petitioner had \$12,908 in current assets and \$3,585 in current liabilities, yielding \$9,323 in net current assets. Counsel also provides a copy of the petitioner's internal statement of cash flows and

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.

disbursements for 2002. Counsel asserts that the withdrawn funds reflected on line 10 as “guaranteed payments to partners” should be added back to the petitioner’s net income. Counsel also asserts that non-cash deductions of amortization and/or depreciation should also be added back to the petitioner’s net income in 1993, 1994, 1995, and 2002.

Counsel’s assertions are not persuasive. 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 may have 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 this case, the evidence does not suggest that the petitioner has employed the beneficiary.

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 also examine the net income figure reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses such as monies already expended as payments to partners. 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). 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 deducted rather than net income.

Counsel’s reliance on the petitioner’s bank statements and unaudited internally generated cash flow statements is misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner’s ability to pay a proffered wage. While this regulation allows additional material “in appropriate cases,” there is no convincing demonstration in this case why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. A petitioner’s bank statements may constitute additional evidence to be submitted in appropriate cases, but bank statements generally show only a portion of a petitioner’s financial status and do not reflect other liabilities and encumbrances that may affect a petitioner’s ability to pay the proffered wage. Here, it is also noted that no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return.

Similarly, the unaudited financial statements submitted in the form of cash flow statements are not persuasive evidence of the petitioner’s ability to pay the proffered salary. 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 have limited probative value of a petitioner’s ability to pay the proffered wage.

In this case, as set forth above, all of the relevant years represented by the petitioner’s federal tax returns show that, except for 2001, the petitioner has reported its net income as a loss in each year. Similarly, its highest level of net current assets occurred in 2001 when it had \$14,549. This sum, however, as well as the other levels of net current assets in each of the relevant years, falls well short of the funds needed to pay the proffered wage of \$20,796. The

regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the evidence and argument presented on appeal, the AAO concurs with the director's determination that the petitioner had not sufficiently demonstrated its continuing ability to pay the proffered wage beginning at the visa priority date. Neither the petitioner's net income, nor its net current assets was sufficient to pay the proffered wage in any of the relevant years.

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.