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U.S. Citizenship
and Immigration
Services

BLE



FILE: EAC 02 296 52228 Office: VERMONT SERVICE CENTER Date: SEP 30 2010

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director denied the employment-based preference 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 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, counsel states that the beneficiary planned to return to the petitioner once he obtained work permission and would have replaced any one of the cooks who leave the petitioner's employ after short periods of time. Counsel states that the petitioner clearly established its 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 the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 5, 1998. The proffered wage as stated on the Form ETA 750 is \$13.71 per hour, which amounts to \$28,516.80 annually.

With the petition, the petitioner submitted a letter of work verification from Hotel National Inn, Poco de Callas. This letter stated that the beneficiary worked in the kitchen from 1975 to 1980.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 23, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal tax returns from 1997 to 2002, with all schedules and attachments. The director stated that as an alternative the petitioner could submit annual reports 1997, 2001, and 2002 accompanied by audited or reviewed financial statements. If the petitioner ever employed the beneficiary from 1997 to 2002, the director requested copies of the beneficiary's Form W-2 Wage and Tax Statements to show how much the beneficiary was paid.

In response, the petitioner submitted Form 1120 corporate tax returns for the years 1997 to 2002. The petitioner also submitted Forms W-2 for the beneficiary for the years 1998, 1999, and 2000. Counsel noted that the petitioner for the last several years showed a payroll of over \$100,000 and that other cooks who stay for short periods of time had replaced the beneficiary. Counsel stated that once the beneficiary was legally able to work, his position would be available and he would replace one of the existing cooks. Counsel also stated that with regard to the issue of ability to pay as of the date of filing, in 1998, the beneficiary was paid \$15,800. Counsel further noted that the petitioner's tax return in 1998 indicated income of \$2,642, cash on hand of \$8,541 and depreciation of \$20,732. The documents submitted by counsel indicate that the beneficiary also earned \$23,400 in 1999 and \$23,901 in 2000.

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 May 5, 2004, denied the petition. The director stated that the petitioner's federal tax returns from 1998 to 2002 did not establish that the petitioner had the ability to pay the proffered wage based on its net income or net current assets. The director states that in each year from 1998 to 2002, the petitioner's current liabilities were greater than its current assets. With regard to the federal income tax return the petitioner submitted for 1997, the director determined that this tax return was not dispositive based on the 1998 priority date.

On appeal, counsel states that the petitioner clearly established the ability to pay the proffered wage as of the date the petitioner was filed. Counsel asserts that the beneficiary planned to return to the petitioner once he obtained work permission and would have replaced any one of the cooks who leave the petitioner's employ after short periods of time. Although counsel states that she is sending a brief and/or evidence to the AAO within 30 days, no further documentation is found in the record. Therefore the AAO will review the petition based on the record as 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. The petitioner in response to the director's request for further evidence submitted the beneficiary's W-2 Forms for 1998 to 2000. While these documents establish that the petitioner employed the beneficiary during these three years, they do not establish that the petitioner paid a salary equal to or greater than the proffered wage. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1998 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 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, now CIS, should have considered income before expenses were paid rather than net income.

In examining the petitioner's net income as a corporation for the period of time in question, the AAO uses the taxable income identified in the petitioner's federal income tax forms.¹ With regard to the instant petition, the petitioner's net income for 1998 to 2000 would have to be sufficient to pay the difference between the actual wages paid to the beneficiary and the proffered wage. In 1998, this difference is \$12,716.80.² In 1999, the difference between actual wages and proffered wage is \$5,116.80, and in 2000, this sum is \$4,615.80. For the remaining years of 2001 and 2002, the petitioner would have to establish it had the ability to pay the entire proffered wage, as the petitioner provided no evidence that it employed the beneficiary during these two years. As documented by the petitioner's federal income tax returns, the petitioner's net income for the years 1998 to 2002 is as follows: \$2,642, \$3,114, \$3,044, -\$13,784, and \$611. These figures are not sufficient to establish that in 1998 to 2000 the petitioner has sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage, or to pay the entire wage in 2001 and 2002.³

Nevertheless, counsel is correct that 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. In addition, 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 tax returns reflect the following information for the following years:

¹ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

² The difference between the actual wages paid and proffered wage for 1998 is the proffered wage of \$28,516 minus the actual wages of \$15,800. The relevant figures for 1999 and 2000 are also calculated by subtracting the actual wages paid from the proffered wage.

³ In 2000, the petitioner's taxable income is closest to making up the difference between the actual wages and the proffered wage. In this year, the beneficiary's actual wages of \$23,901, combined with the petitioner's taxable income of \$3,044, would result in \$26,945, or \$1,571.80 less than the proffered wage of \$28,516.80.

⁴ 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.

	1998	1999	2000
Taxable income	\$ 2,642	\$ 3,114	\$ 3,044
Current Assets	\$ 20,646	\$ 35,124	\$ 4,675 ⁵
Current Liabilities	\$ 60,858	\$ 96,916	\$ 63,416
Net current assets	\$ -40,212	\$ -61,792	\$ -58,741

	2001	2002
Taxable income	\$ -13,784	\$ 611
Current Assets	\$ 14,548	\$ 20,895
Current Liabilities	\$ 104,412	\$ 118,127
Net current assets	\$ -89,864	\$ -97,232

The petitioner demonstrated that it paid wages to the beneficiary during 1998, 1999, and 2000. In these three years, as previously illustrated, the petitioner had taxable income of \$2,642, \$3,114, and \$3,044. As stated previously, the difference between the actual wages paid and the proffered wage for 1998, 1999, and 2000 is \$12,716.80, \$5,116.80, and \$4,615.80. The petitioner did not show sufficient taxable income in these years to pay the difference between the beneficiary's actual wages paid and the proffered wage. Furthermore, the petitioner has substantial negative net current assets for these three years, namely, -\$40,212, -\$61,792, and -\$58,741, and therefore, cannot pay the difference between the actual wages paid and the proffered wage based out of its net current assets. The petitioner did not establish that it had either sufficient taxable income or net current assets in 1998 to 2000 to pay the difference between the actual wages paid and the proffered wages. Therefore the petitioner did not establish that it had the ability to pay the proffered wage as of the 1998 priority and through the next two years.

With regard to the years 2001 and 2002, the petitioner, as previously stated, had to have sufficient taxable income or net current assets to pay the entire proffered wage of \$28,516.80. However, as illustrated above, the petitioner had negative taxable income of \$13,784 in 2001 and a taxable income of \$611 in 2002. Neither sum is sufficient to pay the proffered wage. In addition, the petitioner had substantial negative net current assets in 2001 and 2002. The petitioner could not pay the proffered wage based on either its 2001 and 2002 taxable income or net current assets. Thus, the petitioner did not establish that it has the ability to pay the proffered wage as of the priority date and through 2002.

In the response to the director's request for further evidence, and on appeal, counsel states that the beneficiary will be replacing another cook after the beneficiary is able to work legally. Counsel does not provide any evidentiary documentation to further substantiate her assertion. The assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). The record does not name any specific cook(s), state their wages, verify their full-time employment, or provide evidence that the petitioner will replace them with the beneficiary. Wages already paid to

⁵ Petitioner's current assets for 2000 include -\$9,961 in cash, \$5,216 less allowance for bad debts, \$7,420 in inventory, and \$2,000 in other current assets.

others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Without more persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 1998 and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.