

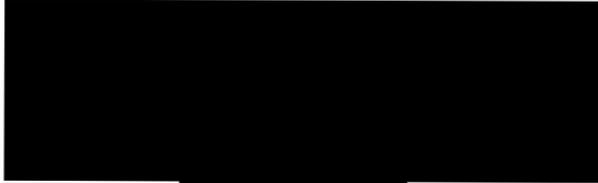
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U.S. Citizenship
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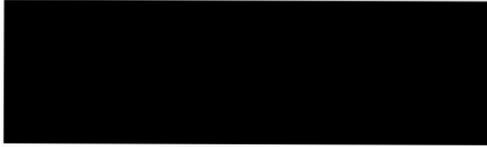
Date: APR 04 2006

EAC 03 111 50026

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 preference visa petition was denied by the Acting Center Director (director), Vermont Service Center, and 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 (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 contends that the petitioner's evidence established its continuing financial ability to pay the proffered salary.

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) provides:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour, which amounts to \$27,040 per annum. On the Form ETA 750B, signed by the beneficiary on March 2, 2001, the beneficiary claims to have worked for the petitioning employer since July 1995.

Part 5 of the visa petition, February 22, 2003, indicates that the petitioner was established in 1991 and employs two workers. In support of its ability to pay the beneficiary's proposed wage offer of \$27,040 per year, the

petitioner initially submitted an incomplete copy of its Form 1120S, U.S. Income Tax Return for an S Corporation.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, on December 19, 2003, the director instructed the petitioner to provide additional documentation to establishing that it has had the continuing financial ability to pay the proffered wage as of the priority date of April 30, 2001. The director requested that the petitioner provide a complete copy of its 2001 federal income tax return or a 2001 annual report accompanied by audited or reviewed financial statements, as well as a copy of the beneficiary's Wage and Tax Statement (W-2) for 2001 if the petitioner employed him during this period.

In response, the petitioner, through counsel, supplied copies of the petitioner's corporate tax returns for 2001 and 2002. They reflect that the petitioner files its taxes using a standard calendar year. The data from these tax returns is shown as follows

| | 2001 | 2002 |
|-------------------------------------|-----------|----------|
| Ordinary income (loss) ¹ | \$ 11,703 | \$5,496 |
| Current Assets (Sched. L) | \$ 2,278 | \$ 710 |
| Current Liabilities (Sched. L) | \$ 2,006 | \$2,250 |
| Net current assets | \$ 272 | -\$1,540 |

It is noted that net current assets, as shown above, is the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible cash or cash equivalent resource out of which a proffered wage may be paid. A corporation's year-end current assets and current liabilities are generally shown on Schedule L of the corporate tax return. Current assets are found on line(s) 1 through 6 and current liabilities are specified on line(s) 16 through 18. If a corporation'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 response to the director's request for additional evidence, the petitioner also included a copy of the beneficiary's individual income tax return for 2001 and a copy of a 2003 W-2 showing that the petitioner paid him \$21,350 during that year.

The director denied the petition on July 14, 2004. She concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage³ as of the priority date of April 30, 2001. The

¹ Ordinary income will be treated as net taxable income for the purpose of this review.

² 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.

³ The director misstated the certified wage as \$23,400.

director found that the petitioner's 2001 tax return reflected insufficient net taxable income or net current assets that could cover the proposed wage offer.

On appeal, counsel resubmits copies of the petitioner's 2001 and 2002 corporate tax returns. She also provides a copy of the petitioner's 2003 corporate tax return. It shows that the petitioner reported \$8,528 in ordinary income. Schedule L of the tax return reflects that the petitioner had \$4,595 in current assets and \$2,116 in current liabilities, resulting in \$2,479 in net current assets.

A copy of the beneficiary's W-2 for 2003 is resubmitted. A copy of the beneficiary's W-2 for 2002 is also provided. It shows that the petitioner paid him \$6,300 in 2002. Counsel further resubmits a copy of the beneficiary's individual tax return for 2001 and also provides a copy of his 2002 individual tax return, along with copies of the petitioner's bank statements for April 30, 2001, December 31, 2001, December 31, 2002, and December 31, 2003.

Counsel asserts that the proffered wage must be prorated for 2001, beginning on the priority date of April 30, 2001. She contends that credit must be given to the information contained within Schedule C-EZ, Net Profit from Business included with the copy of the beneficiary's 2001 individual tax return, indicating that the beneficiary claimed net profit of \$25,000 derived from operating a sole proprietorship as a cook at the same name and address of the petitioner. Together with the amount of \$42,827 as total wages paid as shown on the petitioner's tax return for 2001 shows that the petitioner had the ability to pay and did pay the beneficiary at or above the proffered wage. She asserts that a similar formula should be used for 2002, which includes the beneficiary's claim of \$25,000 received as earnings from his employment at the petitioner's as shown on his income tax return for 2002, along with the petitioner's claim of total wages of \$60,589 paid on its 2002 income tax return. Regarding 2003, counsel asserts that the petitioner's increased net income and wages paid to the beneficiary demonstrates its ability to pay the proffered wage.

In this case, the AAO cannot conclude that the evidence provided demonstrates the petitioner's continuing ability to pay the proffered wage of \$27,040 per year. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

In this case, it is noted that other than the beneficiary's statement of gross income on his individual tax return, no corroboration of the amount of wages paid to the beneficiary in 2001, such as copies of W-2s, Form 1099s, state quarterly wage reports, cancelled checks, or other payroll information has been provided by the petitioner's own records. The petitioner's 2001 tax return merely provides a statement of total wages paid, it does not identify who the recipients were. Standing alone, this does not provide sufficient evidentiary weight for the director to conclude that the petitioner established its financial ability to pay the proffered wage. Even if, as counsel states, the petitioner believed that it was unable to issue a W-2 or Form 1099, other forms of payment, such as cancelled checks, could show a petitioner's payment of wages to a beneficiary. Going on record without supporting

documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) ((citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Similarly, in 2002, the petitioner's W-2 documents wages paid to the beneficiary in the amount of \$6,300. No other evidence provided, other than the beneficiary's individual tax return claiming an additional \$18,500 gross receipts received (business net income of \$13,006) from the petitioner, provides sufficient corroboration from the petitioner of any other wages paid to the beneficiary. The petitioner's total amount of wages paid as shown on its 2002 tax turn does not provide such corroboration. Given the documents received, it is not unreasonable to credit only the \$6,300 wages paid to the beneficiary as shown on the W-2 issued by the petitioner. For 2003, the amount of \$21,350 in wages paid to the beneficiary as shown by the 2003 W-2 may be included in the calculation of the petitioner's ability to pay the proffered wage.

If a petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (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 paid rather than net income.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, as noted above, CIS will review a petitioner's net current assets. In this respect, the reliance on the petitioner's bank statements as provided on appeal 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," in this case it has not been established 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. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. Here, it is 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 Schedule L of the submitted tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return.

The petitioner's ability to pay the proffered salary of \$27,040 in 2003 has been established because its net taxable income of \$8,528 was sufficient to pay the \$5,690 difference between the proffered wage of \$27,040 and the actual wages of \$21,350 paid to the beneficiary as shown by the 2003 W-2.

As indicated in the director's decision, however, and as noted above, neither the petitioner's 2001 net taxable income of \$11,703, nor its net current assets of \$272 was sufficient to pay the proffered wage of \$27,040. The petitioner's ability to pay the proposed wage offer, as stipulated on the approved labor certification, has not been shown for 2001. Regarding proration of the certified wage for 2001, we reject a process whereby CIS prorates the proffered wage for the portion of the year that occurred after the priority date. We will not consider 12 months of income as shown on the corporate income tax return towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), that is not at issue here.

Similarly, in 2002, neither the petitioner's net taxable income of \$5,496, nor its -\$1,540 in net current assets could cover the \$20,740 shortfall resulting from the comparison of \$6,300 in actual wages paid, as shown by the 2002 W-2, and the proffered wage of \$27,040. The petitioner's financial ability to pay the proffered wage during 2002 has not been demonstrated.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage as of the visa priority date. Based on the evidence contained in the record of proceedings and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered salary as of the April 30, 2001, priority date of the petition.

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.