



U.S. Citizenship
and Immigration
Services

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[REDACTED]

jb

FILE: [REDACTED]
EAC-03-165-51759

Office: VERMONT SERVICE CENTER

Date: **JUL 25 2006**

IN RE: Petitioner:
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 "Robert P. Wiemann".

Robert P. Wiemann, Chief
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 manufacturing and retail bake shop. It seeks to employ the beneficiary permanently in the United States as a bakery supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, counsel submits a brief statement and additional evidence.¹

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on January 15, 1998. The proffered wage as stated on the Form ETA 750 is \$30.01 per hour (\$62,420.80 per year). The position of bakery supervisor requires two (2) years experience in the job offered and will supervise 2 employees. On the petition, the petitioner claimed to have been established on November 16, 1964, to have a gross annual income of \$802,177.03, and to have a net income of \$10,371.22. The petitioner did not claim any number of employees. According to the tax returns

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

in the record, the petitioner was elected as an S corporation on November 22, 1991 and the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 12, 1998, the beneficiary did not claim to have worked for the petitioner.

The petitioner submitted the petition with the following items pertinent to its ability to pay the proffered wage: the beneficiary's W-2 forms for 1998 and 1999 through 2002, and the petitioner's Form 1120S tax returns for 1999 through 2001. On May 13, 2004, the director issued a request for evidence (RFE), requesting additional evidence for the petitioner's ability to pay the proffered wage of \$62,420.80 as of January 15, 1998 and continuing to the present. In response the petitioner submitted its tax returns for the years 1996 and 1997, and the beneficiary's W-2 forms for 1996 through 2002. On November 2, 2004 the director denied the petition, finding that the petitioner did not establish that it had the ability to pay the proffered wage beginning on the priority date and continued to the present.

On appeal, counsel advises that the beneficiary will replace workers that are no longer employed with the petitioner, and submits a letter from the petitioner and W-2 forms for those replaced employees.

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. In the instant case, the petitioner submitted the beneficiary's W-2 forms for 1996 through 2002. However, the AAO will review and consider the ones for 1998 and subsequent years since the priority date in the instant case is January 15, 1998.

The beneficiary's Form W-2 Wage and Tax Statements, show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage
1998	\$28,366.40	\$62,420.80	\$34,054.40
1999	\$30,547.80	\$62,420.80	\$31,873.00
2000	\$29,986.40	\$62,420.80	\$32,434.40
2001	\$30,777.10	\$62,420.80	\$31,642.90
2002	\$30,196.40	\$62,420.80	\$32,224.40

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

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).

Reliance on the petitioner's gross receipts and wage expense is misplaced. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 1996, 1997 and 1999 through 2001. Since the priority date in this case is January 15, 1998, the tax returns for 1996 and 1997 are not necessarily dispositive. The petitioner's tax returns for 1999 through 2001 demonstrate the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered wage for these years:

Tax Year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1999	\$10,371.22 ²	\$31,873.00	\$(21,501.78)
2000	\$4,733.00	\$32,434.40	\$(27,701.40)
2001	\$19,183.00	\$31,642.90	\$(12,459.90)

Therefore, the petitioner did not have sufficient net income to pay the difference between the wage already paid to the beneficiary and the proffered wage for the years 1999 through 2001.

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.

² Ordinary income (loss) from trade or business activities as reported on Line 21.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets	Wage increase needed to pay the proffered wage	Surplus or deficit
1999	\$(22,617.36)	\$31,873.00	\$(54,490.36)
2000	\$(20,821.00)	\$32,434.40	\$(53,255.40)
2001	\$1,735.00	\$31,642.90	\$(29,907.90)

Therefore, the petitioner did not have sufficient net current assets to pay the difference between the wage already paid and the proffered wage for the years 1999 through 2001.

The record before the director closed on August 9, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 should be available. However, the petitioner did not submit its tax returns for 1998, 2002 and 2003, nor did the petitioner explain why the tax returns were not submitted. Therefore, the petitioner also failed to demonstrate its ability to pay the proffered wage or the difference between wages paid and the proffered wage for 1998, 2002 and 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal counsel advised that the beneficiary will replace workers that are no longer employed in the company and attached W-2 forms for these employees for 1998 through 2001. The record does not, however, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to 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. Counsel does not explain how the beneficiary replaces two or three other workers while he is currently working for the petitioner. Moreover, there is no evidence that the positions of the workers who are no longer employed by the petitioner involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. The AAO notes that one of workers counsel claims who are no longer employed by the petitioner is the owner and president of the petitioner. However, counsel does not explain and document how the beneficiary

³According 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.

replaces the owner and president of the petitioner. The petitioner's letter says that he will stop baking duties and focus on management only; however, the record is unclear regarding how much of the owner's time went towards baking and how much the owner earned for those duties that could be allocated towards the proffered position.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.