

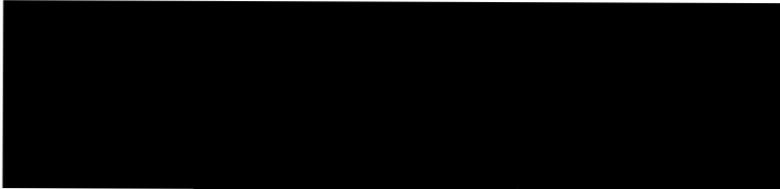


U.S. Citizenship
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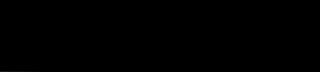
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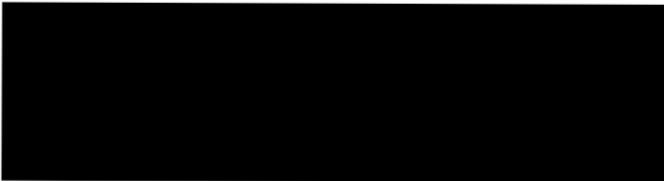
Petitioner:

Beneficiary:



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 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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 a brief and additional evidence.

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 November 26, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour, which amounts to \$24,689.60 annually. On the Form ETA 750, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner indicated it was established on April 20, 2004. It did not indicate the number of employees, its gross annual income or net annual income. With the petition, the petitioner submitted IRS Forms 1120, federal corporate income tax return, for the years 2001 and 2002. These documents indicated that the petitioner had taxable income before NOL deduction and special deductions of \$18,562 in 2001, and taxable income before NOL deduction and special deductions of \$2,060 in 2002. In a cover letter, counsel also indicated that the beneficiary was being substituted for the original beneficiary on the Form ETA 750. The petitioner also submitted a notarized certificate for a document that appears to be the beneficiary's Family Census Register from Korea.¹

On August 24, 2004, the director denied the petition. The director determined that the petitioner's 2001 federal corporate tax return indicated taxable income of \$18,562 which was not sufficient to pay the proffered wage. The director further noted that Schedule L of the same tax return showed net current assets of \$14,652, which was also

¹ The translation of this document is contained in the beneficiary's I-485 application, also found in the record.

insufficient to pay the proffered wage. The director stated that since the petitioner's tax returns were submitted with the initial petition, the director had not issued a request for further evidence.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage since the 2001 priority date to the present. Counsel states that the beneficiary will be assuming the position held by [REDACTED] (Mr. [REDACTED]). Counsel then states that the petitioner employed Mr. [REDACTED] from October 2000 to April 2004, and that in 2001 Mr. [REDACTED] earned \$18,750, \$37,235 in 2002, and \$34,398 in 2003. Counsel states that the petitioner's taxable income of \$18,562 plus the other employee's salary of \$18,750 is more than the proffered wage. Counsel also notes that in 2002 and 2003, the replaced employee earned more than the proffered wage, and thus the petitioner established that it has the ability to pay the proffered wage. Counsel submits W-2 Forms for Mr. [REDACTED] that indicated he earned \$18,750 in 2001, \$37,235 in 2002, and \$34,398 in 2003. Counsel also submits a letter from [REDACTED] (Mr. [REDACTED]), the petitioner's vice president. Mr. [REDACTED] states that the petitioner employed Mr. [REDACTED] from October 2000 to April 2004 as a full-time baker, and that he earned \$18.00 an hour.

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 did not claim to have employed the beneficiary as of the priority date. 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 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.

Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, Form 1120, U.S. Corporation Income Tax Return. The petitioner's taxable income for 2001 is \$18,561 and in 2002 is \$2,060. These figures fail to establish the ability of the petitioner to pay the proffered wage in either 2001 or 2002.

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. 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.² 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:

	2001	2002
Taxable income ³	\$ 18,562	\$ 2,080
Current Assets	\$ 18,595	\$ 17,811
Current Liabilities	\$ 3,943	\$ 3,886
Net current assets	\$ 14,652	\$ 14,425

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, as previously illustrated, the petitioner shows a taxable income of \$18,562, and net current assets of \$14,652, and has not, therefore, demonstrated the ability to pay the proffered wage either from taxable income or net current assets. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a taxable income of \$2,080 and net current assets of \$14,425. Thus, in 2002, the petitioner has not demonstrated the ability to pay the proffered wage of \$24,689.60 based on either its taxable income or net current assets. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the 2001 priority date to the present.

On appeal, counsel advises that the beneficiary will replace one worker. 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. The petitioner names the worker to be replaced, and the date of his termination, as well as evidence as to his wages from 2001 to 2003. However, the record remains incomplete. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Other than the assertions of counsel, there is no evidence that Mr. [REDACTED] position involves the same duties as those set forth in the Form ETA 750. If Mr. [REDACTED] performed other kinds of work, then the beneficiary could not have replaced him or her. Therefore, the provision of Mr. [REDACTED] W-2 forms is not sufficient to establish the petitioner's ability to pay the proffered wage based on the beneficiary's replacement of another employee.

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

³ 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.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date 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.