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**U.S. Citizenship
and Immigration
Services**

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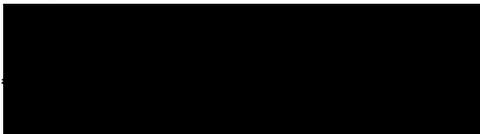
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Date: APR 05 2005

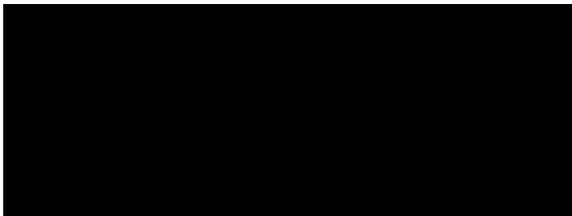
IN RE:

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 Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty 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 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$14.77 per hour, which amounts to \$30,721 annually.

With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 2001, as well as the beneficiary's W-2 form for 1999, 2000, and 2001.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 13, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its corporate income tax returns for 2000 and 2002, along with the beneficiary's W-2 form for 2002. The director stated that the petitioner could also submit an annual report for 2001 accompanied by audited or reviewed financial statements,

and that additional evidence such as accredited profit/loss statements, bank account records, or personnel record could be considered but only as supplementary evidence to the documentation previously requested.

In response, the petitioner submitted the petitioner's income tax returns for 2000 and 2002, as well as a copy of the beneficiary's W-2 form for 2002.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage as of the April 29, 2001 priority date to the present, and, on September 4, 2003, denied the petition. The director stated that none of the federal tax returns submitted were sufficient to establish that the petitioner had the ability to pay the proffered wage as of the priority date and onward.

On appeal, counsel states that the petitioner has a very successful business and that its growth has been continuous since its establishment. Counsel states that the petitioner's owner purchased, and remodeled the property in which the petitioner is located. Counsel submits a letter dated November 5, 2003 from ██████████ Falls Church, Virginia. ██████████ submits two financial statements for the petitioner: a balance sheet and a statement of income. ██████████ states the petitioner had a net income of \$9,704 and a positive cash flow (income plus depreciation) of \$45,056 for the year 2001. Mr. ██████████ then states: "[a]n approximate additional \$8,000 salary, which would have been paid in 2001, is not a burden and is perfectly feasible from the economic and financial point of view."

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. Based on the beneficiary's W-2 forms from 2001 and 2002, the petitioner has employed the beneficiary since the priority date in April 2001. The salary earned by the beneficiary during these two years was the same \$10,712 in 2002. Although the petitioner established that it had employed the beneficiary it did not establish that it paid the proffered wage of \$30,721 as of the priority date. Therefore, the petitioner cannot 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. Finally, with regard to the petitioner's accountant's comments on the petitioner's cash flow which is partially based on depreciation figures, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

Although the director requested the petitioner's federal income tax return for 2000, since the priority date is in 2001, the petitioner's 2000 tax returns are not dispositive in these proceedings. With regard to the years 2001 and 2002, the petitioner's net income was \$9,074 in 2001 and \$3,150 in 2002. These net income sums, when combined with the beneficiary's actual wages for these years, adds up to \$19,786 in 2001 and \$13,862 in 2002. Both figures are considerably less than the proffered wage of \$30,721. Thus, the petitioner cannot establish that it can pay the proffered wage based on its net income.

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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 petitioner's tax returns reflect the following information for the year 2001 and 2002:

	2001	2002
Taxable income ²	\$ 9,074	\$ 3,051
Current Assets	\$ 6,410	\$ 13,551
Current Liabilities	\$ 0	\$ 0
Net current assets	\$ 6,410	\$ 13,551

The petitioner has demonstrated that it paid wages of \$10,712 to the beneficiary during 2001 and 2002. In 2001, as previously illustrated, the petitioner shows net current assets of \$6,410. The petitioner's current net assets for 2001 and the beneficiary's actual salary combined are only \$17,122, which is \$13,599 less than the proffered wage. In 2002, the petitioner shows net current assets of \$13,551. This net current assets figure combined with the beneficiary's actual salary of \$10,712, would produce a salary of \$24,263, a sum less than the proffered wage of \$30,721. The petitioner therefore, has not demonstrated the ability to pay the proffered wage as of the 2001

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.

² 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.

priority date and onward based on its net current assets. Although on appeal, counsel notes the purchase of two properties by the petitioner as affecting the petitioner's operations in both positive and negative ways, the two properties are not current liquid assets that the petitioner could use to pay the proffered wage. Without more persuasive evidence, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. Therefore, the director's decision shall stand, and the petition shall be denied.

In addition, it is noted that the petitioner's owner and the beneficiary share the same last name. Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

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.