



U.S. Citizenship
and Immigration
Services

INVASION OF PERSONAL PRIVACY

PUBLIC COPY

B6

FEB 18 2005



FILE: [REDACTED]
LIN 03 080 51534

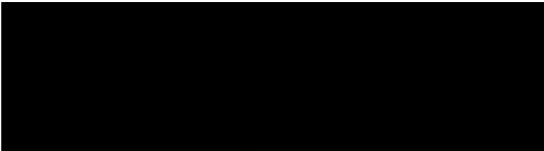
Office: NEBRASKA SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

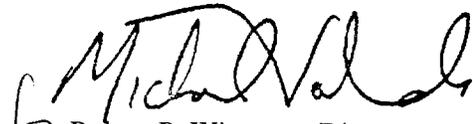
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a closely-held corporation that operates a Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a cook specializing in Thai cuisine. 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, new counsel contends that the director erred in finding that the petitioner had not 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 23, 2001. The proffered wage as stated on the Form ETA 750 is \$24,700 annually.

The petitioner is structured as an S-corporation. With the petition, the petitioner submitted the original labor certification; the petitioner's offer of employment; a letter from the beneficiary's former employer confirming her prior work history; the petitioner's 2001 federal Sub-S income tax return; and a Form G-28. On the petition, the petitioner asserted it was established in 1995, had a gross annual income of \$252,955, and currently employed nine workers.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director on May 17, 2003, requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's 2002 federal income tax return; and a list of monthly household expenses and of checking and savings account balances¹.

¹From his statements in the RFE, the director apparently assumed that the petitioner was structured as a sole proprietor.

In response, the petitioner submitted its Form 1120 Corporate tax returns for the petitioner for the year 2002. The petitioner also submitted bank statements for both the petitioner's and its majority shareholder.

The tax returns reflect the following information for the following years:

	2001	2002
Net income	\$21,637	\$44,419
Current Assets	\$11,656	\$16,999
Current Liabilities	\$17,333	\$17,811
Net current assets	-\$5,677	-\$812

In addition, counsel submitted copies of the petitioner's checking account statements for the first quarter of 2003; a copy of the petitioner's site lease payment schedule; and copies of the majority owner's banking statements, bonds and individual tax returns.

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, based upon the petitioner's federal income tax return for 2001 showing a net income of \$21,637 in 2001, while the proffered wage was \$24,700. On September 5, 2003, the director denied the petition.

On appeal, counsel asserts that the petitioner's net income for 2001 was only slightly less than the proffered annual wage, as stated, which he contends the petitioner could have accommodated by making preventive adjustments in the restaurant's expenses and charitable giving. Counsel also submitted the petitioner's non-audited profit-and-loss statement for the first three quarters of 2003 showing a net income of \$33,547.20, and the petitioner's bank statements covering the entire three years from priority date to August 2003.

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 did not establish that it employed and paid the beneficiary the full proffered wage in 2003.

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 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.

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. We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.

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(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 net current assets during the year in question, 2001, however, were negative. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

In the present case, the petitioner is a firm that had been in business since 1995. In 2001, when it filed the Form ETA 750, the petitioner had \$252,955 in gross receipts and paid out \$36,074 in wages and salaries during the year in which the priority date was established. From its 2002 federal income tax return, the petitioner's net income rose to \$44,419, well above the proffered wage, and its gross receipts rose to \$304,432 for the same year. However, for 2001 the petitioner reported its net income as \$21,673 and its net current assets as -\$5,677, which fails to establish the petitioner's ability to pay the proffered wage for that year. Likewise, the petitioner reported its net income for 2002 as \$44,419, which by contrast is enough to cover the proffered wage. The AAO does not determine a petitioner's ability to pay from a single year's financial records. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. *See* 8 C.F.R. §§ 204.5(g)(2) and 103.2(b)(1) and (12).

The unaudited financial statements that counsel submitted on appeal, showing \$33,547.20 for the first three quarters of 2003, are not persuasive evidence by themselves. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. However, in the overall context of the petitioner's business, the statements tend to show the petitioner remains a vital, going concern.

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.

However, because the petitioner's net current assets for both 2001 and 2002 are negative, providing no offset for the \$3,063 by which the petitioner's net income for 2001 falls below the proffered wage, counsel fails to persuasively contend that with very little adjustment to expenses, the restaurant could have made up the balance in the proffered wage. Moreover, wages already paid or funds already used are not available to pay the wage at the priority date of the petitioner.

The petition indicates that the beneficiary will replace one of the petitioner's existing workers. The record does not, however, name the worker, state his or her wages, verify whether full-time or not or provide evidence that the petitioner replaced that worker with the beneficiary. 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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is dismissed. The petition is denied.