



U.S. Citizenship  
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Services

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FILE: WAC-02-219-53748 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2005

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

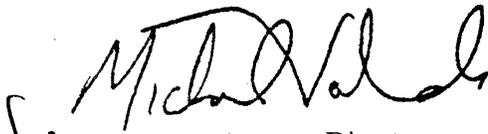
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a wholesale bakery and pasta producer. It seeks to employ the beneficiary permanently in the United States as a baker and pasta preparer. 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, the petitioner submits additional evidence. An entity called Legal Solution Group, Inc. and a specific individual, [REDACTED] claim to be "immigration consultants" and representatives of the petitioner. However, a review of recognized organizations and accredited representatives reported in July 2004 by the Executive Office for Immigration Review, does not mention Legal Solution Group, Inc. or [REDACTED]. Under 8 C.F.R. § 292.1, persons entitled to represent individuals in matters before the Department of Homeland Security ("DHS"), and the Immigration Courts and Board of Immigration Appeals ("Board"), or the DHS alone, include, among others, accredited representatives. Any such representatives must be designated by a qualified organization, as recognized by the Board. A recognized organization must apply to the Board for accreditation of such a representative or representatives. Since neither Legal Solution Group, Inc. nor [REDACTED] are accredited representatives qualified to enter an appearance on behalf of the petitioner under 8 C.F.R. § 292.1, neither will receive notice of this decision, which will only be sent to the petitioner directly.

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 October 27, 1998. The proffered wage as stated on the Form ETA 750 is \$7.00 per hour, which amounts to \$14,560 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since April 1995.

On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of \$1,300,000, and to currently employ 37 workers. In support of the petition, the petitioner submitted excerpts from its Forms 1065, U.S. Return of Partnership Income for 1998, 1999, 2000, and 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 21, 2002, the director 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 complete tax returns for 1998 to the present.

In response, the petitioner submitted partially complete Form 1065 partnership tax returns for the years 1998, 1999, 2000, and 2001. The tax returns reflect the following information for the following years:

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income <sup>1</sup>	\$35,008	\$41,023	-\$41,947	\$7,174
Current Assets	\$196,954	\$131,390	\$108,576	\$96,634
Current Liabilities	\$127,238	\$31,603	\$54,515	\$36,106
Net current assets	\$69,716	\$99,787	\$54,061	\$60,528

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, and, on May 28, 2003, denied the petition, citing the petitioner's low net incomes and "negative" net cash assets for each year.

On appeal, the petitioner submits internally generated payroll records and quarterly tax reports, in combination representing all four quarters of 2002, the first quarter of 2003, and all four quarters of 2001. None of these documents reflect that the petitioner actually employed and paid the beneficiary any wages during that timeframe. The petitioner also submits its 2002, U.S. Corporation Income Tax Return for 2002, reflecting that the petitioner incorporated in 2001. The tax return shows that the petitioner's net income<sup>2</sup> was -\$5,490 and its net current assets were \$89,364. The petitioner also submits the beneficiary's individual income tax returns showing that the beneficiary paid taxes on wages earned as a "bakeryman," but otherwise does not indicate the source of his earnings. The petitioner's unaccredited representative stated on the appellate form accompanying the appeal that the petitioner can pay the proffered wage because it pays salaries to its 37 employees and that the beneficiary was actually paid wages in each relevant year as [REDACTED] on the petitioner's payroll records. Another document in the record of proceeding shows the beneficiary's name as [REDACTED].

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 1998, 1999, 2000, 2001, or 2002. The petitioner's unaccredited representative's unsupported assertion on appeal that "Guadencio Martinez's" name on the petitioner's payroll records is the same person as [REDACTED] the name of the beneficiary on all pertinent immigration forms as well as his individual income tax returns is without merit. There is insufficient evidence that "Guadencio Martinez" is the same person as "Guadencio Lopez" to resolve the inconsistency. Simply going on record without

<sup>1</sup> Ordinary income (loss) from trade or business activities as reported on Line 22.

<sup>2</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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.

The petitioner's net income of \$35,008 and \$41,023 is sufficient to cover the proffered wage of \$14,560 in 1998 and 1999, respectively. Thus the petitioner has demonstrated its ability to pay the proffered wage out of its net income in 1998 and 1999. The petitioner's net income of -\$41,947, \$7,174, and -\$5,490 in 2000, 2001, and 2002, respectively, however, is insufficient to cover the proffered wage of \$14,560. Thus the petitioner has not demonstrated its ability to pay the proffered wage out of its net income in 2000, 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. 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.<sup>3</sup> A partnership's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17 on its partnership returns for 1998 through 2001, but 16 through 18 on its corporate return in 2002<sup>4</sup>. If a petitioning entity'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

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<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>4</sup> The AAO notes that the director determined the petitioner to have negative net cash assets. The AAO cannot ascertain how the director ascertained his figures.

petitioner's net current assets in 2000, 2001, and 2002 were \$54,061, \$60,528, and \$89,364, respectively, all amounts that are greater than the proffered wage of \$14,560. Thus, the petitioner has demonstrated its ability to pay the proffered wage out of its net current assets in 2000, 2001, and 2002.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1998, 1999, 2000, 2001, or 2001. In 1998 and 1999, the petitioner's net income is sufficient to demonstrate the ability to pay the proffered wage. In 2000, 2001, and 2002, the petitioner shows net current assets sufficient to demonstrate the ability to pay the proffered wage.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, and 2002. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

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 sustained. The petition is approved.