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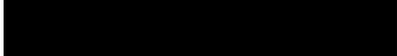
**U.S. Citizenship
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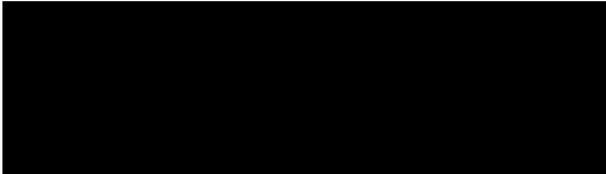


BC

FILE: EAC 02 274 53315 Office: VERMONT SERVICE CENTER Date: **JAN 27 2005**

IN RE: Petitioner: 
Beneficiary: 

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

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 employment based immigrant visa petition was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a restaurant. It seeks to employ the beneficiary as a kitchen supervisor. As required by statute, the petition was accompanied by certification from the Department of Labor. The acting director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a statement and indicates that a brief would be submitted within thirty days. To date, no additional documentation has been received; therefore, a decision will be determined based on the record, as it is currently constituted.

In pertinent part, Section 203(b)(3)(A)(i) of 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 or seasonal 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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification 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 request for labor certification was accepted on April 9, 2001. The proffered salary as stated on the labor certification is \$14.22 per hour or \$29,577.60 per year.

With the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, a copy of the beneficiary's 2001 Form W-2, Wage and Tax Statement, and copies of two payroll statements for the beneficiary in 2002. The petitioner's 2001 tax return reflected an ordinary income of \$3,981 and net current assets of \$6,682. The beneficiary's 2001 Form W-2 and tax return reflected wages earned of \$6,260. The payroll records indicated that the beneficiary was being paid at a rate of \$7.50 per hour, and, as of August 2, 2002, he had earned \$9,300. The acting director considered this documentation insufficient and on May 12, 2003, she requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of April 9, 2001 and continuing to the present. The acting director

specifically requested that the financial documentation be in the form of copies of annual reports, copies of federal tax returns including all schedules and tables (with appropriate signature(s)), or audited financial statements.

In response, counsel submitted copies of the petitioner's bank statements for the months April 2001 through June 2001 and August 2001 through October 2001. Counsel also submitted a copy of the beneficiary's 2002 Form W-2, Wage and Tax Statement. The beneficiary's 2002 Form W-2 reflected wages earned of \$13,200. The bank statements reflected balances from a low of \$1,988.53 to a high of \$4,740.45.

The acting 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 October 15, 2003, denied the petition.

On appeal, counsel, states:

The net taxable income of [\$]3,981, plus the cash on hand at the end of year [\$]2,423, the depreciation of [\$]5,511 and the actual amount paid to the beneficiary during 2001 which was [\$]6,260, total \$18,175. These funds in addition to the average monthly balance in its checking account supports a finding that the petitioner has the financial ability to pay the wage. In addition during 2002 the respondent's salary doubled and while it is not yet the prevailing wage, as there is no legal obligation to pay the prevailing wage until the time of adjustments, it demonstrates the companies [sic] ability to pay an additional [\$]6,000 in the beneficiary's salary.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 2001 and 2002 at a salary equal to or greater than the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.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 net current assets during 2001 were \$6,682. The petitioner could not have paid the proffered wage in 2001 from its net current assets. Counsel points out that the petitioner had \$2,423 in cash on hand at the end of the year. However, cash on hand at the end of the year is part of net current assets and as such, is accounted for as part of the above net current assets analysis.

Counsel also contends that the petitioner's bank balances establish the petitioner's ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that is considered when determining the petitioner's net current assets.

The 2001 tax return reflects an ordinary income of \$3,981 and net current assets of \$6,682. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2001. Even if the wages paid to the beneficiary in 2001 were added to the ordinary income or the net current assets, the petitioner would still be unable to pay the proffered wage. (\$3,981 ordinary income + \$6,260 wages paid = \$10,241, \$6,682 net current assets + \$6,260 wages paid = \$12,942)

Since this office has not received any additional evidence of the petitioner's ability to pay the proffered wage,

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.

the petitioner has not overcome the director's denial. As stated in 8 C.F.R. § 204.5(g)(2), the petitioner must establish its ability to pay the proffered wage from the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. In the instant case, the priority date is April 9, 2001, and the petitioner has not established its ability to pay the proffered wage in 2001 and continuing to 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 not met that burden.

ORDER: The appeal is dismissed.