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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

JUL 13 2005

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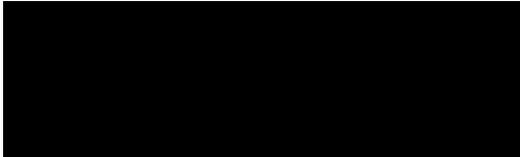
Petitioner:



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

CC:



DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook of Italian style foods. 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 states that the petitioner's ability to pay the proffered wage should not be based on the petitioner's 2001 federal income tax return that reflected the economic impact of the September 11, 2001 attacks. Counsel submits further documentation.

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 April 17, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$18.89, or an annual salary of \$39,291.20. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner at 145 W. 53rd Street from November 1996 to October 2000, and also for the petitioner at its present address from November 2000 to the present.

On the petition, the petitioner claimed to have been established in September 1986, to have 90 employees and a gross annual income of \$6,696,481, as well as a net annual income of \$4,690,126. The petitioner submitted a translated copy of the beneficiary's birth certificate, and IRS Form 1120S, the petitioner's corporate income tax return, for the years 1999 and 2000.

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 June 18, 2003, the director requested additional evidence pertinent to that ability. The director examined the petitioner's net income and current net assets for 1999 and 2000 and stated that these returns did not establish the petitioner's ability to pay the proffered wage. The

director then stated that the petitioner could submit any of four types of evidence to establish its ability to pay the proffered wage of \$755.60 a week as of the priority date. Included in the four types of evidence that could be submitted were the following: copies of its 2001 and 2002 federal income tax returns, with all schedules and attachments; copies of the beneficiary's 2001 and 2002 W-2 Wage and Tax Statements to establish that the petitioner had employed the beneficiary since November 2000; a statement from the financial officer of the petitioner, which established the petitioner's ability to pay the proffered wage; and annual reports for 2001 and 2002, accompanied by audited or reviewed financial statements. The director stated additional evidence such as profit/loss statements, bank account records, or personnel records may be submitted but only as supplementary evidence to establish the petitioner's ability to pay the proffered wage. Finally the director stated that the record did not contain evidence of the beneficiary's work experience, and he requested evidence to establish that the beneficiary possessed the required two years of job related work experience as of the April 2001 priority date.

In response, counsel submitted IRS Form 1120S, the petitioner's corporate tax returns for the year 2001, and Form 7004, Application for Automatic Extension of Time To File Corporation Income Tax Return, for the petitioner's 2002 income tax return. The petitioner also submitted a letter from [REDACTED] Manager, [REDACTED] New York. [REDACTED] stated in his letter, dated February 27, 2001, that the beneficiary had worked in the restaurant as a Italian cook for the last four years. In addition, counsel submitted a letter dated September 12, 2003 from Allen Gross, A. Gross, Certified Public Accountant, P.A., Emerson, New Jersey. In his letter, [REDACTED] stated that the petitioner had been in business since 1986, and that the petitioner currently employed 137 people and had gross sales in excess of \$7,500,000. [REDACTED] added that the petitioner's future outlook was extremely positive as the petitioner was in the midst of an additional expansion that would bring the employee head count to approximately 175 persons, and to gross sales of \$10,000,000. [REDACTED] then asserted that the petitioner had the resources to pay the beneficiary the proffered wage.

In his denial of the petition, dated November 18, 2003, the director examined the petitioner's negative net income of -\$154,049, and current liabilities of \$1,129,021, as established in the petitioner's 2001 federal income tax return, and stated that the petitioner's net income and net current assets did not establish its ability to pay the proffered wage in 2001.

On appeal, counsel states that Citizenship and Immigration Services (CIS) relied on the petitioner's reported negative income of \$154,049 in 2001 to deny the petition. Counsel asserts that the petitioner's 2001 federal income tax return reflects the economic impact of the September 11 2001 attacks but only for the year 2001. Based only on the tax return from 2001, the petitioner should not have been found unable to pay the proffered salary. Counsel submits the petitioner's IRS Form 1120S for 2002. Counsel submits an article from an Internet website identified as restaurant.org, that contains the Congressional testimony of an owner of an Italian restaurant in Washington, D.C. dated May 14, 2003. Counsel also submits a preliminary report prepared by the Fiscal Policy Institute, New York City, dated September 28, 2001, and entitled "Economic Impact of the September 11 World Trade Center Attack." The preliminary report estimated that the New York City economy was expected to lose an estimated 108,500 jobs within the first month after the September 11 attacks, and that the three industries with the greatest job impacts were securities, retail trade and restaurants, in that order. Counsel also resubmits the petitioner's 2001 federal income tax return as well as the September 2003 letter from the petitioner's accountant.

With regard to counsel's assertion that the petitioner's federal income tax return for 2001 was unduly affected by the September 11, 2001 attacks, and that the petitioner's ability to pay the proffered wage should not be based solely on the 2001 tax return document, 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).

In examining the petitioner's 2000 and 2001 income tax returns, both tax returns reflect negative ordinary income, with the 2000 federal income tax return indicating a greater loss in ordinary income than the 2001 federal income tax return. With regard to the petitioner's gross receipts, the petitioner's gross receipts were \$500,000 less in 2001 than in 2000. In addition, while the 2001 federal income tax return reflected that the petitioner's officers were not compensated that year, counsel makes no relevant comments with any relationship between the non-compensation of officers and the petitioner's economic downturn following the September 2001 attacks. In addition, the preliminary report written by the Fiscal Policy Institute appears to examine those restaurants, retail stores and securities firms located in the direct vicinity of the September 2001 attacks. Neither the report nor the accountant's letter suggested that the petitioner experienced the same economic impact as these businesses. Finally, the accountant's letter did not focus at all on any economic downturn issues in the petitioner's 2001 federal income tax return, but rather reinforced the idea that the petitioner continues to grow, and has significantly increased its employee base since the 2001 attacks.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. Although the petitioner submitted a statement from the manager of the Remi restaurant located on [REDACTED] that the beneficiary had worked there for four years, this documentation is not specific enough to establish the beneficiary's employment by the petitioner. First, there is no explanation provided as to whether the two restaurant addresses are for the same petitioner. But more importantly, the letter from [REDACTED] does not specify the periods of time that the beneficiary worked for the restaurant. If [REDACTED] statement that the beneficiary had worked at the Remi Restaurant on West [REDACTED] since February 27, 2001 is accurate, the beneficiary would have worked there from 1997 to 2001. However, the ETA 750 indicates that the beneficiary worked at the [REDACTED] restaurant from November 1996 to October 2000, at which time she then worked for the petitioner at the Avenue of the Americas restaurant. In addition, the letter provided no information as to whether the beneficiary worked full time or part time, and any salary paid to the beneficiary. Based on the lack of specificity and conflicts with dates, the letter from [REDACTED] is given no weight in these proceedings. Finally, the petitioner provided no W-2 wage statements or Form 1099-MISC documentation to establish any salary or non-employee compensation given to the beneficiary for any time period. Without more persuasive evidentiary documentation, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158,165(Comm. 1998), (citing *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. Since the priority date for the instant petition is April 2001, the tax documentation submitted by the petitioner for the years 1999 and 2000 is not dispositive to these proceedings. Therefore, only the petitioner's 2001 and 2002 federal income tax returns are considered with regard to its net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax returns for 2001 and 2002 shows the following amounts of ordinary income: -\$152,049 in 2001 and \$27,063 in 2002. These figures fail to establish the ability of the petitioner to pay the proffered wage of \$39,291.

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 On Form 1120S, the petitioner'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 submitted the following information for tax years 2001 and 2002:

| | 2001 | 2002 |
|---------------------|---------------|--------------|
| Ordinary Income | \$ -154,049 | \$ 27,063 |
| Current Assets | \$ 175,955 | \$ 246,567 |
| Current Liabilities | \$ 1,304,976 | \$ 1,201,282 |
| Net current assets | \$ -1,129,021 | \$ -954,715 |

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.

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in 2001. In 2001, the petitioner shows a net income of -\$154,049, and net current assets of -\$1,129,021, and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. In 2002, the petitioner shows a net income of \$27,063, and net current assets of -\$954,715, and has not, therefore, demonstrated the ability to pay the proffered wage in 2002 out of its net income or net current assets. Counsel asserts on appeal that the petitioner's tax return for the year 2001 is not indicative of the petitioner's ability to pay the proffered wage. However, in tax year 2000, the petitioner shows a net income of -\$198,223, net current assets of \$308,511, current liabilities of \$1,210,529, and net current assets of -\$902,018. Therefore the petitioner could not establish that it could pay the proffered wage based on its net income or net current assets in either the year before or following the events of September 11, 2001. Counsel's assertion that the petitioner's 2001 tax return is not indicative of whether it can pay the proffered wage remains unpersuasive. In addition the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Although the director did not address the issue of whether the beneficiary had the requisite two years of work experience in his denial of the petition, he did raise the issue in the request for further evidence sent to the petitioner. In response, the petitioner submitted the letter from [REDACTED] manager of the [REDACTED] on [REDACTED]. As stated previously, the letter is also given no weight in these proceedings, based on the lack of specificity. Even if this letter were given some weight in the proceedings, it would not necessarily establish that the beneficiary worked for the petitioner the requisite two years. The manager's letter did not specify the full-time or part-time nature of the beneficiary's work, and thus, the record is not clear that the beneficiary did work the equivalent of the requisite two years prior to the 2001 priority date. Since the appeal will be dismissed for other reasons, the AAO will not further examine this issue, but any additional proceedings in this matter should address it.

Beyond the decision of the director, it should be noted that, in his request for further evidence, the director stated that the petitioner could submit a statement from a financial officer to establish the petitioner's ability to pay the proffered wage.² The director provided no further clarification of his statement, and in response the petitioner appears to have submitted a letter from its accountant as to the petitioner's financial health and future plans. It appears that the director was referring to 8 C.F.R. § 204.5(g)(2) and the types of documentation that a petitioner may submit if it employs more than 100 employees. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. However, the regulation further states: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establish the

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

prospective employer's ability to pay the proffered wage." (Emphasis added.) The initial petition submitted by the petitioner in August 22, 2002 indicated that the petitioner had 90 employees, while the accountant's letter dated September 2003 stated that the petitioner had 137 employees, with a future expansion bringing the employee total to 175.

If the petitioner had 100 employees as of the priority date of April 2001, it could have submitted a letter from its chief financial officer as to the petitioner's ability to pay the proffered wage. However, since the petitioner did not indicate in the initial I-140 petition that it had 100 or more employees as of the priority date of April 2001, the petitioner would have had to have submitted more persuasive evidentiary documentation, such as payroll records, or Form DE-6 quarterly reports to establish that it had 100 employees as of the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Furthermore, the letter submitted to the record by the petitioner's accountant would not suffice as the letter from the petitioner's financial officer envisioned by the regulation. The petitioner's accountant has no corporate role or responsibility within the petitioner's business. Based on the number of employees indicated on the initial petition, and the lack of documentation, such as DE-6 Quarterly Wage reports, that would establish the actual number of employees, the petitioner did not fulfill the necessary criteria for the submission of a letter from its financial officer. If the petitioner now has 100 or more employees, it may consider pursuing such a course of action as outlined in 8 C.F.R. § 204.5(g)(2) with regard to future I-140 petitions, provided adequate documentation is submitted to establish the actual number of employees.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. With regard to whether the petitioner has the ability to pay the proffered wage, the petitioner has not met that burden. The director's decision shall stand. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed.