



U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 192 53369 Office: VERMONT SERVICE CENTER Date: JUL 21 20

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

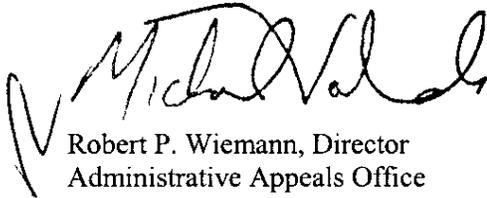
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a bread bakery. It seeks to employ the beneficiary permanently in the United States as a bread maker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the 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.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 12, 1998. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$39,291.20 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1120S U.S. Corporation Income Tax Return for 1997 through 2000, copies of the beneficiary's Wage and Tax Statements for 1998 through 2001, and, documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center on March 5, 2003, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$39,291.40 as of January 12, 1998, of filing and continuing to the present.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted or resubmitted the petitioner's Internal Revenue Service (IRS) Form 1120S tax returns for years 1998, 1999, 2000, and copies of the beneficiaries Wage and Tax Statement for 1998 through 2001.

The tax returns submitted or already submitted demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$39,291.20 per year from the priority date.

- In 2000, the Form 1120S stated taxable income¹ of \$20,982.00
- In 1999, the Form 1120S stated taxable income of \$20,211.00.
- In 1998, the Form 1120S stated taxable income of \$8,490.00.
- In 1997, the Form 1120S stated taxable income of <\$2,449.00>.²

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. From the copies of the beneficiary's Wage and Tax Statements for 1998 through 2001 submitted, the petitioner paid the beneficiary \$14,560.00 each of those years. Therefore the petitioner did not pay the beneficiary the proffered wage during those years.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

¹ Form 1120S, Line 21.

² The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage.³

- In 2000, the Form 1120S stated taxable income of \$20,982.00. In tax year 2000 the petitioner paid the beneficiary \$14,560.00. Adding the two figures together equals \$35,542.00. This sum is less than the proffered wage is \$39,291.20.
- In 1999, the Form 1120S stated taxable income of \$20,211.00. In tax year 1999 the petitioner paid the beneficiary \$14,560.00. Adding the two figures together equals \$34,771.00. This sum is less than the proffered wage is \$39,291.20.
- In 1998, the Form 1120S stated taxable income of \$8,490.00. In tax year 1998 the petitioner paid the beneficiary \$14,560.00. Adding the two figures together equals \$23,050. This sum is less than the proffered wage is \$39,291.20.

In the subject case, as set forth above, the net income the petitioner had available between the years 1998 through 2000 added to the wages paid to the beneficiary during the period, does not equal the amount of the proffered wage.

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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the three Form 1120S U.S. Income Tax Returns submitted by petitioner (from the priority date), Schedule L found in each of those returns indicates current assets never exceeded its current liabilities.

- In 2000, petitioner's Form 1120S return stated current assets of a \$32,200.00 and \$134,250.00 in current liabilities. Therefore, the petitioner had a <\$102,050.00> in current net assets for 2000. Since the proffered wage was \$39,291.20 per year, this sum is less than the proffered wage.
- In 1999, petitioner's Form 1120S return stated current assets of a \$12,354.00 and \$105,232.00 in current liabilities. Therefore, the petitioner had a <\$92,878.00> in current net assets for 1999. Since the proffered wage was \$39,291.20 per year, this sum is less than the proffered wage.
- In 1998, petitioner's Form 1120S return stated current assets of a \$37,909.00 and \$124,215.00 in current liabilities. Therefore, the petitioner had a <\$86,306.00> in current net assets for 1998. Since the proffered wage was \$39,291.20 per year, this sum is less than the proffered wage

³ There is no tax return submitted for 2001, or, W-2 Wage and Tax Statement submitted for 1997. The priority date began in 1998.

⁴ 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.

Therefore, for the period 1998 through 2000 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in his brief accompanying the appeal that there are another ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel believes that the calculation "gross annual sales minus deductions" is a better method to calculate the petitioner's ability to pay. For the year that counsel uses as an example, the petitioner's gross receipts or sales, (line one of the Form 1120S tax return for 2000) states gross sales of \$1,224,298.00 with total deductions including cost of goods sold of \$1,203,316.00 leaving taxable income of \$20,982 on line 21. Counsel declares erroneously that deductions are \$300,000 without specificity to line items within the tax return. By selectively choosing some but not all deductions to reach a result, counsel is distorting the facts presented by the tax returns in evidence.

CIS will not consider gross income without also considering the expenses that were incurred to generate that income. Also, the overall magnitude of the entity's business activities is considered by CIS when the entity's ability to pay is marginal or borderline as is the present case. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the period 1998 to 2000 was an uncharacteristically unprofitable year for the petitioner.

Counsel makes the assertion that the increasing cost of labor reported on the tax returns and the petitioner's ability to meet those yearly costs "...show[s] the petitioner's ample ability to pay the proffered wage of \$39,291" As an explanation for his premise counsel states:

Now, the BCIS is going to find an easy way out: how many employees are really getting wages paid under "Cost of Labor" as above? Well, the employer will leave \$24,731-annual aside for this beneficiary and divide the remaining approximately low end figure of labor payments of \$103,880- and high end figure of \$151,849-by maybe a hundred other part timers, itinerant workers (the actual amount of employees whether full or part time is irrelevant to this issue.

We believe that counsel is making the assertion that in the future the petitioner will either adjust its work force to accommodate the beneficiary in its employ, or adjust the work forces wages to meet the proffered wage. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner replaced them 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. Moreover, there is no evidence that the position of these workers involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Lastly counsel declares that "... pursuant to 20 C.F.R. § 626.209(c).(2) [sic 20 C.F.R. §656.209(c)(2)], the petitioner is not required to pay the offered wage until after permanent residence is granted. Counsel is in correct. However, the labor certification process requires the employer to have the *ability* to pay the proffered wage on the priority date. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part "... The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." The date of priority is determined when the Form ETA 750 Application

for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *Matter of Wing's Tea House. Supra.*

The evidence submitted does not establish that the petitioner had 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 not met that burden.

ORDER: The appeal is dismissed.