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U.S. Citizenship
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FILE: [REDACTED]
EAC 02 152 52383

Office: VERMONT SERVICE CENTER

Date: JUN 28 2005

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

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 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 bakery. It seeks to employ the beneficiary as a manager. As required by statute, the petition was accompanied by certification from the Department of Labor. The 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 brief and additional evidence.

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 January 14, 1998. The proffered salary as stated on the labor certification is \$86,200 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation, copies of the petitioner's bank statements for the periods December 1997, January 1998, February 1998, and October 2001 through December 2001, a copy of a 2001 financial statement, and copies of Form 941, Employer's Quarterly Federal Tax Return for 2001. The petitioner's 2000 tax return reflected an ordinary income of \$77,695 and net current assets of \$60,707. The director considered this documentation insufficient and on July 16, 2002, he requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of January 14, 1998 and continuing to the present. The director specifically requested the petitioner's 2001 federal income tax return with all schedules and attachments. The director also requested a copy of the beneficiary's 2001 Form W-2, Wage and Tax Statement, if the petitioner employed the beneficiary in 2001.

In response, counsel submitted copies of the petitioner's bank statements from December 2000 to December 2001, copies of the petitioner's 1998 through 2001 Forms 1120S, U.S. Income Tax Return for an S Corporation, a copy of a letter from the petitioner's Certified Public Accountant (CPA), and a statement that the beneficiary was not employed in 2001. The 1998 tax return reflected an ordinary income of -\$50,987 and net current assets of \$678. The 1999 tax return reflected an ordinary income of \$29,623 and net current assets of \$7,022. The 2001 income tax return reflected an ordinary income of \$95,526 and net current assets of \$65,915.

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 20, 2003, denied the petition.

On appeal, counsel submits additional bank statements and a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. The 2002 tax return reflects an ordinary income of \$71,411 and net current assets of \$107,719. Counsel states:

The service has erred in stating that the bank balances do not show incremental increases. Following are the bank balances of the company, which show there is steady increase in the cash balances. Statements were already provided to the Service.

<u>Month</u>	<u>Balance</u>
January 1998	\$10,560.24
February 1998	\$20,235.17
March 1998	\$14,298.01
December 2000	\$39,951.00
January 2001	\$11,487.38
April 2001	\$28,629.80
May 2001	\$31,145.05
June 2001	\$11,601.09
July 2001	\$20,989.44
August 2001	\$32,482.28
September 2001	\$ 6,591.55
October 2001	\$20,045.98
November 2001	\$26,713.45
December 2001	\$37,973.41

The main criteria is [sic] that the funds available should be enough to pay the proffered wages. In fact, it is. The amount showed on bank balance is not only after paying all other employees but also after paying all regular business expenses. This entire amount is free, unencumbered and available to pay proffered wages.

Tax Returns for the year 2000 with profit of \$77,695 plus bank balances \$66,412 plus cash flow after deduction depreciation and amortization of \$8,968 equaled to \$153,075 which are greater than proffered wages.

Tax Returns for the year 2001 shows net income of \$95,526.00 plus bank balances \$38,597.00 plus cash flow after deduction depreciation and amortization of \$7,473 equaled to \$141,596 which are greater than proffered wages.

* * *

Again the financial ability of the Petitioner's to pay the Prevailing Wage is applicable to pay the wages, which are **prevailing at that time**. Thus, the Petitioner's liability to pay the Prevailing Wage in 1998 should be considered for the OES Wages, which were determined for 1998. Obviously that wage amount was considerably less than the wages in 2002. Similarly the ability to pay the prevailing wages for 1999 should be considered for **OES WAGES PREVAILING FOR** 1999, and so on and so forth. . . . The decision to apply proffered wage for 1998 determined in 2001 is absurd, even if it is in accordance with the laid down policy. The policy needs to be revised with the processing time. . . .

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 1998 through 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 1998 through 2002 were \$678, \$7,022, \$60,707, \$65,915, and \$107,719, respectively. The petitioner could not have paid the proffered wage in 1998 through 2001 from its net current assets. The petitioner could have paid the proffered wage in 2002 from its net current assets. Counsel points out that the petitioner had cash on hand at the end of the pertinent years. 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.

Counsel contends that the petitioner should be "liable" only for paying the prevailing wage for each year in question, i.e., 1998 prevailing wage for 1998, 1999 prevailing wage for 1999, etc. However, the regulation at 8 C.F.R. § 204.5(g)(2) specifically states that the petitioner must establish its ability to pay the **proffered** wage and not the prevailing wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

The 1998 tax return reflects an ordinary income of -\$50,987 and net current assets of \$678. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 1998.

The 1999 tax return reflects an ordinary income of \$29,623 and net current assets of \$7,022. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 1999.

The 2000 tax return reflects an ordinary income of \$77,695 and net current assets of \$60,707. The petitioner could not have paid the proffered wage from either its ordinary income or its net current assets in 2000.

The 2001 tax return reflects an ordinary income of \$95,526 and net current assets of \$65,915. The petitioner could have paid the proffered wage from its ordinary income in 2001.

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 2002 tax return reflects an ordinary income of \$71,411 and net current assets of \$107,719. The petitioner could have paid the proffered wage from its net current assets in 2002.

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.