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MAR 03 2005

FILE: EAC 02 124 51153 Office: VERMONT SERVICE CENTER Date:

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:

[REDACTED]

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 Mexican restaurant. It seeks to employ the beneficiary as a foreign food specialty cook. 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 provides a brief.

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 11, 2001. The proffered salary as stated on the labor certification is \$18.89 per hour or \$39,291.20 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, and copies of compiled balance sheets for the period ended June 30, 2001. The petitioner's 2000 tax return reflected an ordinary income of \$8,005 and net current assets of -\$14,768. The 2001 compiled balance sheets for the period ended June 30, 2001 reflected a net income of -\$750 and net current assets of -\$15,668¹. The director considered this documentation insufficient and on July 30, 2002, he requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of April 18, 2001 and continuing to the present. The director specifically requested the petitioner's 2001

¹ It is noted that the 2001 compiled balance sheets are not one of the three preferred forms of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2), and, therefore, were not and will not be considered in determining the petitioner's ability to pay the proffered wage.

tax return will all schedules and attachments. The director also requested copies of Forms W-2, Forms 1099, Forms W-3, and Forms 1096 for all the petitioner's employees for the years 2000 and 2001.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, a copy of a certificate of deposit for the petitioner showing a balance of \$25,130.51 as of October 9, 2002, and copies of Forms W-2, Wage and Tax Statements, for 2000 and 2001 for [REDACTED]

[REDACTED] The 2001 tax return reflected an ordinary income of -\$2,716 and net current assets of -\$16,457. The 2000 and 2001 Forms W-2 reflected wages earned of \$9,796 and \$10,646, respectively for [REDACTED] \$15,050 and \$13,300, respectively for Angel Castaneda. Counsel states:

In reply to your inquiry of July 10, 2002 I am asked by the petitioner to point out the following:

First the employer maintains its business for over 11 years and always met its expenses and especially salaries. In this particular instance of concern to your office please note that the total wages as per line 8 of the corporate tax return show the sum of \$45,623. This sum includes the wages [REDACTED] in the sum of \$10,646 and Angel Castaneda in the sum of \$13,300 for a total of \$23,946, (who no longer remain employed) thus leaving a balance of \$21,677 (\$45,623 - \$23,946). Also see attached W-2s. Thus, the sum of \$21,677 as contained in the payroll paid, plus the petitioner's availability of funds by way of its having extra cash invested in a CD in the sum of \$25,131 (see copy enclosed) shows sufficient funds available to pay the prevailing wage of \$39,291 which can be paid to [REDACTED]

Also please note that the restaurant is in the immediate vicinity (within a few blocks) of the World Trade Center disaster and suffered a substantial loss of business immediately following the bombing, as a result, from the public's loss of access to the area. We trust that you will be able to give the beneficiary and the petitioner additional consideration as a result.

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 January 17, 2003, denied the petition.

On appeal, the petitioner, through counsel, submits copies of previously submitted evidence, evidence that the petitioner received a grant and a loan from SEEDCO, WTC Small Business Fund, for \$25,000 each³, and a copy of a business CD application from Chase Bank for the previously mentioned CD originally valued at \$25,000. The CD was opened on May 30, 2002. Counsel states:

² It is noted that although the Form ETA 750, Application for Alien Employment Certification, indicates that the beneficiary has been employed by the petitioner since August of 1998, the petitioner did not provide a copy of the beneficiary's Forms W-2, Wage and Tax Statements, which could aid in determining the petitioner's ability to pay the proffered wage.

³ It is noted that the evidence provided of the grant and loan is undated and does not contain any identifying information.

The BCIS overlooked that Petitioner had available cash funds with which to pay the prevailing wage to the Beneficiary. The Petitioner had available funds (1) as a result of the Beneficiary's substituting for two former payroll employees, a part-time salaried corporate officer, and (2) as a result of out-right cash and loan grants obtained from the World Trade Center Business Fund in 2001.

. . . As a result of Petitioner's proximity to the World Trade Center and the loss of business suffered, Petitioner received grants and a loan from the World Trade Center Business Fund totaling \$50,000, which could be used to pay ongoing business, including employees' salaries. See Exhibit A. Therefore, Petitioner, had additional cash funds of \$50,000 enabling Petitioner to pay the Beneficiary the prevailing wage of \$39,291 in 2001.

Second, Petitioner's 2001 payroll included two part-time employees and an officer who did part-time kitchen management, the duties of whom were to be taken over by Beneficiary, thus enabling Petitioner to pay their part-time salaries to Beneficiary instead. In other words, the Petitioner expected that the job assignment and duties of employees [REDACTED] who earned \$10,646 and Angel Castaneda who earned \$13,300, for a total of \$21,677 would be assumed by the Beneficiary. See Exhibit B. Likewise and in addition, the Petitioner assumed that the Beneficiary would also assume the officer's part-time kitchen management duties since the Beneficiary had the requisite experience to manage kitchen management as a result of his qualification as a Mexican Specialty Cook. The job description for that job as approved by the Labor Department includes managerial responsibilities and duties, such as supervising kitchen workers. See Form ETA 750A and 750B and approved Labor Certification. As a result of this anticipated substitution, the officer would not receive the remuneration noted in the 2001 tax return of \$16,800, and this remuneration would be available to pay the Beneficiary. Adding (a) the sums paid to the two employees listed above amounting to \$21,677, (b) the sum paid to the officer in respect of part-time kitchen management amounting to \$16,000, and (c) the depreciation expense, a non-cash expense deducted from the Petitioner's taxable income amounting to \$1,242, results in Petitioner's having additional funds of \$39,719, which amount exceeds the prevailing wage of \$39,292. Thus, Petitioner had sufficient funds in 2001 to pay the Beneficiary the prevailing wage.

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 2000 and 2001 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.⁴ 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 2000 and 2001 were -\$14,768 and -\$16,457, respectively. The petitioner could not have paid the proffered wage in 2000 or 2001 from its net current assets.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner

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.

looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has only provided tax returns for two years, 2000⁵ and 2001, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry. While it is evident that the petitioner was affected by the tragedy of September 11, 2001, the petitioner has provided no verifiable evidence of its loss (amount of loss in figures compared to previous years or subsequent years) other than a copy of a grant and a loan from the World Trade Center Small Business Fund. The petitioner also does not explain when the funds were received, who received the funds, if the funds were received in 2001, and why the loan and grant are not included in its 2001 federal tax return. The petitioner's existent loans as reflected in the balance sheet provided in the tax return or audited financial statement is fully considered in the evaluation of the corporation's net current assets. However, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel also points to the petitioner's CD for \$25,000 as evidence of its ability to pay the proffered wage. That CD, however, was not opened until 2002, and, therefore, it was not available to pay the proffered wage in 2001. In addition, if a CD had been available in 2001, it would have appeared on Schedule L of the petitioner's tax return for that year.

Furthermore, even though counsel advised that the beneficiary will replace two other workers and a part-time corporate officer, there is no evidence that the positions held by the other two employees involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them. In addition, even though counsel states that the beneficiary will assume the duties of kitchen management currently performed by the part-time corporate officer, counsel has not named this corporate officer or provided evidence of the corporate officer's wages (Form W-2). 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

⁵ The petitioner's 2000 tax return reflected an ordinary income of \$8,005 and net current assets of -\$14,768. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2000.

the petition and continuing to the present. In addition, the Form ETA 750 signed both by the petitioner and the beneficiary under penalty of perjury indicates that the beneficiary has already been performing kitchen management duties since August 1998. It is unclear why the corporate officer would be paid for work already being performed by the beneficiary.

The 2000 tax return reflects an ordinary income of \$8,005 and net current assets of -\$14,768. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2000.

The 2001 tax return reflects an ordinary income of -\$2,716 and net current assets of -\$16,457. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2001.

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.