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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

MAR 10 2006



FILE: EAC-02-013-51472 Office: VERMONT SERVICE CENTER Date:

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

PETITION: 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:
[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 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 an Italian restaurant & pizzeria. It seeks to employ the beneficiary permanently in the United States as an Italian cook. 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 director failed to adequately consider the petitioner's status as an S corporation owned by a single individual, and states that the petitioner's evidence established that it had sufficient resources to pay the proffered wage during the relevant period.

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 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 either 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 petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$24,627.80 per year. On the Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 2000 and continuing through the date of the ETA 750B.

On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$629,986.00, and to currently have 16 employees. In the item for net annual income were the words "Privately Held."

In support of the petition, the petitioner submitted a copy of the petitioner's Form 1120 U.S. Income Tax Return for an S Corporation for 2000; and a letter dated January 20, 2001 from a restaurant in Chiquimula, Guatemala, with certified English translation, stating the beneficiary's employment with that restaurant from January 1991 to June 1993.

In a request for evidence (RFE) dated November 26, 2001 the director requested additional evidence of the petitioner's ability to pay the proffered wage.

In response to the RFE, counsel submitted a letter dated February 20, 2002 requesting additional time to respond, on the grounds that the petitioner's tax returns for 2001 would not be due until March 1, 2002.

In a second RFE dated March 12, 2002 the director again requested evidence of the petitioner's ability to pay the proffered wage, and specifically requested a copy of the petitioner's federal tax return for 2001. The second RFE set a deadline of June 7, 2002 for the petitioner's response, noting that regulations require that the requested evidence be submitted within 12 weeks.

In a decision dated August 21, 2002 the director found that no response had been received to the second RFE. The director therefore denied the petition on the grounds of abandonment, under the regulation at 8 C.F.R. § 103.2(b)(13).

In response to the director's decision of August 21, 2002, counsel submitted a letter dated September 11, 2002; a copy of the second RFE and a copy of a FED EX shipping report showing that a package was sent by counsel on April 18, 2002 and that the package was delivered to the director's office on April 19, 2002. With those documents, counsel submitted a copy of an undated letter from the petitioner's owner, a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001, and a copy of Pennsylvania Schedule RK-1, 2001 Resident Schedule of PA S Shareholder/Partner Pass-Through Income, Loss, and Credits, which counsel described in his letter as copies of the evidentiary documents which had been submitted on April 19, 2002. Counsel's letter of September 11, 2002 and the documents enclosed therein were received by the director on September 13, 2002.

In a decision dated December 9, 2002 the director found that the petitioner had submitted a response to the second RFE, but that through no fault of the petitioner, the petitioner's response had not reached the record. The director therefore reopened the petition on his own motion and considered all the evidence which had been submitted by the petitioner. The director found that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the petitioner obtains lawful permanent residence. The director accordingly denied the petition.

On appeal, counsel states that the petitioner is an S corporation wholly owned by a single individual who also owns the real estate property where the petitioner is located. Counsel states that the owner had the authority to allot income received by the corporation among officer compensation, rent payments to the owner, and ordinary income, and that the analysis of the petitioner's ability to pay should not be limited to the petitioner's ordinary income. Counsel also asserts that depreciation deductions do not represent cash expenditures and that depreciation deductions therefore represent further financial resources of the petitioner.

On the Form I-290 notice of appeal was signed by counsel on January 9, 2003 and was received by CIS on January 10, 2003. On that form counsel checked the block indicating that a brief and/or evidence would be submitted to the AAO within 30 days.

Counsel later submitted a letter dated June 23, 2003, and the following evidence: a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002; a copy of the petitioners Form RCT-101, Pennsylvania Corporate Tax Report for 2002; and a copy of the petitioner's Form PA-20S Pennsylvania S Corporation/Partnership Information Return for 2002. The foregoing documents were received by CIS on July 1, 2003.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, 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 instant case, on the Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 2000 and continuing through the date of the ETA 750B.

In counsel's letter dated February 20, 2002 in response to the first RFE, counsel stated that the beneficiary was not currently authorized to work, and that he was not on the petitioner's payroll. Counsel stated that the only evidence of the petitioner's ability to pay the proffered wage in 2001 would be the petitioner's tax return for 2001, which would be submitted later. Counsel's statements imply that no documentary corroboration exists for the beneficiary's claim to have worked for the petitioner beginning in November 2000.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. Where an S corporation has income from sources other than from a trade or business, net income may be found on Schedule K. In the instant petition, however, all of the petitioner's income is stated to be from a trade or business, and no additional income is stated on the Schedule K's attached to the petitioner's tax returns.

The taxpayer's name on the tax returns in the record is a name of a corporation which is not identical with the petitioner's name as it appears on the I-140 petition. However, the Form ETA 750 application for labor certification gives the corporation name, and shows the trade name of that corporation as the same name which appears on the I-140 petition. This evidence is sufficient to establish that the name which appears on the I-140 petition is a trade name and to establish that the copies of the tax returns in the record are the petitioner's tax returns, filed under its official name as a corporation.

The petitioner's tax returns show the following amounts for ordinary income: -\$596.00 for 2000; and -\$917.00 for 2001. The figure for 2000 is not directly relevant to the instant petition, since the priority date is April 27, 2001. The figure for 2001 is directly relevant, but since the petitioner's ordinary income figure for that year is negative, it fails to establish the ability of the petitioner to pay the proffered wage that year.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. 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 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -\$8,577.00 for the end of 2000; and \$625.00 for the end of 2001. The figure for the end of 2000 is indirectly relevant to the instant petition, since the priority date was approximately five months after the end of 2000. However, since the figure for the petitioner's net current assets for the end of 2000 is negative, that figure fails to provide support for the petitioner's ability to pay the proffered wage. The figure for the petitioner's net current assets at the end of 2001 is positive, but it is less than the proffered wage of \$24,627.80. Therefore it fails to establish the petitioner's ability to pay the proffered wage during 2001.

The record before the director also contained an undated letter from the petitioner's owner. In that letter, the owner states that he has sufficient funds to pay the beneficiary a salary of \$24,628.00 per year. The owner states that in 2001 he paid himself \$24,600.00 per year, and that he personally owns the real estate where the petitioner is located, for which he pays himself \$24,000.00 rent "per month." The reference to "per month" is an apparent typographical error, for the petitioner's tax return for 2001 shows a deduction for rent of \$24,000.00 for the year. The owner states that in 2001 he used a \$7,000.00 depreciation deduction. The owner states that his wife is employed outside the petitioning restaurant, employment which provides other sources of income, and that the owner is willing to pay the beneficiary from the funds which he receives personally.

With regard to the depreciation deduction referred to in the owner's letter, CIS does not distinguish among different categories of deductions when evaluating a petitioner's net income. Depreciation therefore is not considered as an additional financial resource of the petitioner. See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Concerning the other matters mentioned in the owner's letter, the owner asserts that he has discretion with regard to salary payments to himself as an officer of the petitioner's officer and rent payments to himself as the owner of the property where the petitioner is located. The owner's claim of full authority over the affairs of the petitioner is supported by the Schedule K-1's attached to the petitioner's tax returns, which show him as the owner of 100% of the petitioner's shares. Since the petitioner is an S corporation, any ordinary income of the corporation is taxable directly to the owner. Money received from the corporation by the owner in his other capacities is also taxable to the owner, such as his compensation for services as an officer or employee, and payments received by the owner as the petitioner's landlord. Therefore the owner's personal income tax liability will be similar, without regard to the manner in which money generated by the corporation is charged to the owner for tax purposes. Nonetheless, when funds are transferred by the corporation to the owner in the form of rent payments or as officer or employee compensation, the legal ownership of those funds passes from the corporation to the owner. Therefore any such funds are no longer the property of the corporation, and are no longer available to the corporation to satisfy the corporation's liabilities. Therefore CIS normally will not consider funds transferred by the corporation to the corporation's owner to be evidence of the petitioner's ability to pay the proffered wage.

Although the owner states in his letter that he is willing to forego compensation he receives from the petitioner as an officer, that statement is not legally binding on the owner, and in any event the evidence in the record lacks detailed information on the owner's personal financial situation which would be needed if CIS were to evaluate whether such an offer by the owner is a realistic one. In addition, the corporation's annual compensation to its sole owner is a consistent amount. This raises the question of whether or not the payments are discretionary.

In the notice of appeal, counsel asserts that the owner could have forgone rental payments from the petitioner, which would have been sufficient to pay substantially all of the proffered wage. However, the record contains insufficient evidence to establish that rent payments made by the petitioner to the owner in his capacity as landlord were discretionary, and counsel in fact suggests that rent payments were made at least in part to avoid a year-end tax liability. Rent payments were deducted from the petitioner's total income on the petitioner's Form 1120S tax returns, thereby reducing the amount of ordinary income shown on each return. As noted above with regard to depreciation deductions, CIS does not distinguish among different categories of deductions when evaluating a petitioner's net income.

In his decision, the director correctly stated the petitioner's ordinary income for 2001 and correctly calculated its year-end net current assets for 2001. The director correctly found that those figures failed to establish the petitioner's ability to pay the proffered wage in that year, which was the year of the priority date. The director's decision to deny the petition was therefore correct, based on the evidence in the record before the director.

On appeal, the petitioner submits additional evidence, consisting of a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002; a copy of the petitioners Form RCT-101, Pennsylvania Corporate Tax Report for 2002; and a copy of the petitioner's Form PA-20S Pennsylvania S Corporation/Partnership Information Return for 2002. Those documents were received by CIS on July 1, 2003, significantly more than 30 days after the submission of the notice of appeal on January 10, 2003. The tax returns submitted on appeal are dated March 11, 2003, therefore they were not available when the record before the director closed with the receipt of counsel's submissions of September 13, 2002. For this reason, the documents submitted on appeal would not be precluded from consideration on appeal by *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). But counsel has offered no explanation for the delay of more than two and one-half months beyond March 11, 2003 before submitting those tax returns in evidence.

The instructions to the Form I-290B notice of appeal state that requests extensions of time beyond 30 days for submitting evidence on appeal must be made in a separate letter, and that extensions will be granted only for good cause. The record in the instant petition lacks a basis for finding good cause for submitting copies of the petitioner's 2002 tax documents more than thirty days after the filing of the notice of appeal.

Nonetheless, even if the documents submitted on appeal were considered timely, they would not overcome the decision of the director. The petitioner's Form 1120S U.S. Income Tax Return for an S Corporation shows ordinary income on line 21 of \$26,855.00. That amount would be sufficient to pay the proffered wage of \$24,687.80 during 2002. However, the petitioner's 2002 return provides no evidence which would help to establish the petitioner's ability to pay the proffered wage during 2001, which is the year of the priority date. For the foregoing reasons, the petitioner's submissions on appeal fail to overcome the decision of the director.

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.