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U.S. Citizenship
and Immigration
Services

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FILE: EAC-02-279-53782 Office: VERMONT SERVICE CENTER Date: MAY 18 2005

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:
[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
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 restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 submits a brief statement 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 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 13, 2001. The proffered wage as stated on the Form ETA 750 is \$14.91 per hour, which amounts to \$31,012.80 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 1987.

On the petition, the petitioner claimed to have been established in 1987 and to currently employ four workers. In support of the petition, the petitioner submitted a letter from Christ J. Canaras, an accountant and tax preparer, who stated that he is the accountant for the petitioner and that the petitioner's net income has been in excess of \$150,000 with a net worth of over \$450,000.

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 6, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director requested such evidence for 2001 and 2002 as well as any evidence of wage payments actually paid to the beneficiary and bank statements.

In response, the petitioner submitted Form 1120S, U.S. Income Tax Return for an S Corporation, for Bronxdale Diner Corp. for the years 2001 and 2002¹. The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ²	-\$2,121	\$2,166
Current Assets	\$1,967	\$4,133
Current Liabilities	\$0	\$0
Net current assets	\$1,967	\$4,133

In addition, counsel submitted copies of the petitioner's checking account statements for June 2001 through January 2002.

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 October 22, 2003, denied the petition.

On appeal, counsel asserts that the director "overlooked factual evidence of [the] [p]etitioner's payroll that demonstrates [the] petitioner's ability in 2001 to pay the prevailing wage to the [b]eneficiary." The petitioner submits a letter from its owner, Mr. [REDACTED] (Mr. [REDACTED] stating that the beneficiary would replace 3 employees in the year 2001 who worked for the restaurant in that year and made a combined income of \$31,724. Counsel also asserted that the petitioner's total payroll of \$54,730 should be considered. The petitioner submits copies of three W-2 forms for 2001 for Mr. [REDACTED] showing combined wages of \$40,630, and a W-3 form for 2001 reflecting that the petitioner paid a total of \$54,730 in wages for that year.

At the outset, the balances in the petitioner's bank accounts do not illustrate the petitioner's continuing ability to pay the proffered wage. 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 will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner did not establish that it employed and paid the

¹ Counsel states that Bronxdale Diner Corp. is the petitioner. Bronxdale Diner Corp. lists the same employer identification number and address as the petitioner and the AAO is satisfied that they are the same.

² Ordinary income (loss) from trade or business activities as reported on Line 21.

beneficiary the full proffered wage in 2001 or 2002 despite the beneficiary's representation that he has been working for the petitioner since 1987 and the director's request for such evidence³.

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.

The petitioner reported a loss in 2001, and net income of \$2,166 in 2002, which is less than the proffered wage. As such, the petitioner cannot illustrate its continuing ability to pay the proffered wage beginning on the priority date out of its net income in either year.

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 through 6. Its 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 out of those net current assets. The petitioner's net current assets during the years in question, 2001 and 2002, however, were only \$1,967 and \$4,133, respectively, which are both lower than the proffered wage. As such, the petitioner cannot illustrate its continuing ability to pay the proffered wage beginning on the priority date out of its net current assets.

³ The petitioner did not submit payroll records, paystubs, paychecks, or 1099 forms either.

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.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In both years, the petitioner shows net income and net current assets that are less than the proffered wage and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel and the petitioner's owner, Mr. [REDACTED] advised that the beneficiary would replace three workers in 2001. The record of proceeding is insufficient on this point. The beneficiary has represented that he works for the petitioner since 1987 at least until the petitioner filed the labor certification application in 2001. If the beneficiary is or was actually employed and paid wages by the petitioner in 2001, then the AAO cannot logically ascertain why those three workers were working for the petitioner at all in 2001 if it was the petitioner's intention to replace them with the beneficiary. Moreover, the AAO cannot determine that Mr. [REDACTED] only spent his time cooking and not on matters incidental to owning a business.

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 if they are for employment roles that are different than the proffered position. There is no evidence that the positions held by Mr. [REDACTED] 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. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). If those employees performed other kinds of work, then the beneficiary could not have replaced them. Even if the petitioner could overcome this factual issue in any additional proceedings, the petitioner only addressed 2001 and not 2002. The petitioner must demonstrate the ability to pay the proffered wage in 2002 in addition to 2001 because it must show a continuing ability to pay the proffered wage according to 8 C.F.R. § 204.5(g)(2).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it 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.