



U.S. Citizenship
and Immigration
Services

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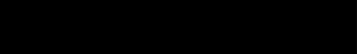


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FILE: 
EAC-03-048-51297

Office: VERMONT SERVICE CENTER

Date: NOV 10 2005

IN RE: Petitioner: 
Beneficiary: 

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:



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 sustained. The petition will be approved.

The petitioner is a Tuscan 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.

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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petitioner'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 3, 2000. The proffered wage as stated on the Form ETA 750 is \$14.96 per hour, which amounts to \$31,116.80 annually. On the Form ETA 750B, signed by the beneficiary on February 18, 2000, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on November 2, 2002. On the petition, the petitioner claimed to have been established on April 6, 1992, to have a gross annual income of \$1,306,515.00, and to have a net annual income of \$874,046.00. The item on the petition for the petitioner's current number of employees was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated October 27, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on January 20, 2004.

In a decision dated May 13, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that any one of several methods of analysis would show that the evidence establishes the petitioner's ability to pay the proffered wage during the relevant period. Counsel states that items which should be included as additional financial resources of the petitioner include depreciation expenses and assets other than current assets, valued either at their original value or at their depreciated value. Counsel also states that income and assets figures should be combined when evaluating the petitioner's ability to pay the proffered wage. Finally, counsel states that bank statements of the petitioner consistently show substantial ending balances which are sufficient to establish the petitioner's ability to pay the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 February 18, 2000, the beneficiary did not claim to have worked for the petitioner. However, the record contains a copy of a Form W-2 Wage and Tax Statement of the beneficiary for 2003 showing compensation from the petitioner, in the amount as shown in the table below.

| Year | Beneficiary's actual compensation | Proffered wage | Wage increase needed to pay the proffered wage. |
|------|-----------------------------------|----------------|-------------------------------------------------|
| 2000 | no W-2 submitted | | |
| 2001 | no W-2 submitted | \$31,116.80 | \$31,116.80 |
| 2002 | no W-2 submitted | \$31,116.80 | \$31,116.80 |
| 2003 | \$12,600.00 | \$31,116.80 | \$18,516.80 |

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As another 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 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. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2000, 2001 and 2002. The record before the director closed on January 20, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 is the most recent return available.

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. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

In the instant petition, the petitioner's tax returns for 2001 and 2002 indicate small amounts of income from activities other than from a trade or business, namely interest. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns do not include those portions of the petitioner's income. For this reason, the petitioner's net income must be considered as the total of its income from various sources as shown on the Schedule K, minus certain deductions which are itemized on the Schedule K. The results of these calculations are shown on Line 23 of the Schedule K, for income.

The petitioner's tax returns show the amounts for income on line 23, Schedule K as shown in the table below.

| Tax year | Net income | Wage increase needed to pay the proffered wage | Surplus or deficit |
|----------|-------------|------------------------------------------------|--------------------|
| 2000 | \$9,908.00 | \$31,116.80* | |
| 2001 | \$13,502.00 | \$31,116.80* | -\$21,208.80 |
| 2002 | \$15,427.00 | \$31,116.80* | -\$17,614.80 |
| | | | -\$15,690.80 |

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in the years 2000, 2001 or 2002.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2000, 2001 or 2002.

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 current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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 amounts for net current assets as shown in the following table.

| Tax year | Net Current Assets | | Wage increase needed to pay the proffered wage |
|----------|--------------------|-------------|------------------------------------------------|
| | Beginning of year | End of year | |
| 2000 | \$40,158.00 | \$15,854.00 | |
| 2001 | \$15,854.00 | -\$8,214.00 | \$31,116.80* |
| 2002 | -\$8,214.00 | -\$1,883.00 | \$31,116.80* |
| | | | \$31,116.80* |

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in the years 2000, 2001 or 2002.

The figures for the petitioner's net current assets at the beginning of each year, as shown above, reflect the assets available to the petitioner at the beginning of its tax year. Those assets could be drawn upon by the petitioner, if necessary, to pay the proffered wage to the beneficiary. The figures for the petitioner's net current assets at the end of each year, also shown above, reflect the assets available to the petitioner at the end of its tax year as a result of the petitioner's activities during the tax year. Those assets could be drawn upon by the petitioner during the year as they are accumulated if needed to pay the proffered wage to the beneficiary. Therefore in evaluating the petitioner's ability to pay the proffered wage it is appropriate to base the analysis either on the petitioner's net current assets for the beginning of each tax year or its net current assets for the end of each tax year.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in the year 2000, based on the petitioner's net current assets at the beginning of the year. But the above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 or 2002.

Counsel asserts that depreciation expenses should be considered as additional financial resources of the petitioner. While it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. See *Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements. Moreover, even in situations where a petitioner's net income and net current assets for a given year are insufficient to establish the petitioner's ability to pay the proffered wage, the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel asserts that all assets should be considered in evaluating the petitioner's ability to pay the proffered wage. But, as noted above, CIS considers only current assets, since those are items which are expected to be converted into cash within one year. Depreciable assets, such as buildings, therefore are not included in such calculations, either at their original value or at their depreciated value. CIS also considers only current liabilities, since those are items which are expected to require cash payments by the petitioner within one year.

Counsel also states that income and assets figures should be combined when evaluating the petitioner's ability to pay the proffered wage. However, CIS does not combine such figures when analyzing the petitioner's ability to pay the proffered wage, since a petitioner's income earned during the year may affect its year-end net current assets. Therefore to combine net income and net current assets could result in double counting some funds.

Counsel also asserts that the petitioner's bank statements for the period in question consistently show substantial ending balances sufficient to pay the proffered wage. The record contains copies of bank statements for an account of the petitioner for each month beginning in April 2000 through May 2004. Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. However, the regulation allows for evidence such as bank statements "in appropriate cases," in addition to evidence in one of the required alternative forms, namely annual reports, federal tax returns, or audited financial statements. See 8 C.F.R. § 204.5(g)(2).

On the petitioner's bank statements the ending balances are as follows:

| 2000: | Ending balances | 2001 | Ending balances |
|-----------|-----------------|-----------|-----------------|
| January | | January | \$42,106.27 |
| February | | February | \$66,374.19 |
| March | | March | \$59,816.56 |
| April | \$84,775.80 | April | \$97,246.68 |
| May | \$90,460.07 | May | \$120,236.08 |
| June | \$114,811.07 | June | \$77,758.74 |
| July | \$136,025.08 | July | \$118,499.28 |
| August | \$144,948.36 | August | \$114,347.46 |
| September | \$155,233.18 | September | \$79,873.22 |
| October | \$80,299.06 | October | \$55,731.92 |
| November | \$80,316.68 | November | \$72,437.20 |
| December | \$40,355.70 | December | \$47,926.62 |

| 2002 | Ending balances | 2003 | Ending balances |
|-----------|-----------------|-----------|-----------------|
| January | \$52,259.26 | January | \$65,819.76 |
| February | \$57,062.13 | February | \$75,725.49 |
| March | \$56,391.42 | March | \$98,862.58 |
| April | \$84,131.43 | April | \$120,485.61 |
| May | \$102,989.35 | May | \$59,394.86 |
| June | \$148,466.46 | June | \$84,461.62 |
| July | \$111,825.67 | July | \$183,888.21 |
| August | \$141,456.94 | August | \$178,898.41 |
| September | \$209,338.84 | September | \$195,904.76 |
| October | \$126,539.69 | October | \$137,506.97 |
| November | \$89,719.58 | November | \$98,079.19 |
| December | \$41,304.35 | December | \$7,473.72 |

| 2004: | Ending balances |
|----------|-----------------|
| January | \$34,710.06 |
| February | \$35,974.17 |
| March | \$22,756.41 |
| April | \$50,458.02 |
| May | \$61,743.59 |
| June | |
| July | |

The above figures show that in from April 2000 through May 2004, the ending bank balances were greater than the proffered annual wage of \$31,116.80 in all months except December 2003 and March 2004. In many months the ending balances were several multiples of the proffered annual wage.

Under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. 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.

On the instant petition, the petitioner claimed to have been established on April 6, 1992 and the petitioner's tax returns state the date of the petitioner's incorporation as that same date. As of the April 3, 2000 priority date, therefore, the petitioner had been in business for a few days less than eight years.

The petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation also contain additional information relevant to the totality of the petitioner's financial circumstances.

The petitioner's figures for gross receipts or sales and for total income have shown increases during the relevant period. The petitioner's Form 1120S tax returns show the following amounts on line 1c for gross receipts or sales: \$1,306,515.00 for 2000; \$1,397,102.00 for 2001; and \$1,458,800.00 for 2002. The petitioner's total income figures on line 6 of the Form 1120S show \$874,046.00 for 2000; 992,702.00 for 2001; and \$1,022,104.00 for 2002.

Schedule K-1's attached to the petitioner's Form 1120S tax returns for 2001 and 2002 show that two individuals are the owners of 100% of the shares of the petitioner, with each individual owing 50% of the shares. The Form 1120S tax returns also show substantial expenses each year for compensation of officers. The tax returns for 2000, 2001 and 2002 bear the signatures of one of the owners on the line for signature of officer. For the foregoing reasons, it is reasonable to assume that the payments made for compensation of officers were made to the two owners of the petitioner's shares.

The sole shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's Form 1120S tax returns show the following amounts as expenses on line 7 for compensation of officers: \$440,200.00 in 2000; \$500,450.00 in 2001; and \$509,300.00 in 2002. Each of those amounts if more than ten times the proffered wage of \$31,116.80. As noted above, the petitioner's net income figures were positive in each of those years, though the net income figures were less than the proffered wage in each year. The differences between the proffered wage and net income were \$21,208.80 in 2000; \$17,614.80 in 2001 and \$15,690.80 in 2002. If those amounts had been taken from the amounts spent on compensation of officers, the amounts remaining for compensation of officers would have been \$418,991.20 in 2000; \$482,835.20 in 2001; and \$493,609.20 in 2002.

The foregoing figures are sufficient to show that the petitioner had ample financial resources available to pay the proffered wage during each of the relevant years. The job offer to the beneficiary was therefore a realistic one throughout the relevant period.

For the above reasons, in considering the totality of the petitioner's financial circumstances, the evidence in the record is sufficient to establish the petitioner's ability to pay the proffered wage during each of the years at issue in the instant petition.

In his decision, the director considered the petitioner's figures for ordinary income to be the petitioner's net income in 2000, 2001 and 2002. The director failed to include the small amounts of interest income shown on the Schedule K's for 2001 and 2002, but that error did not affect the director's analysis. The director

correctly calculated the petitioner's year-end net current assets for 2000 and 2001 and made a small calculation error in calculating the petitioner's year-end net current assets for 2002, but that error also did not affect the director's analysis. The director found that the petitioner's figures for net income and net current assets failed to establish the petitioner's ability to pay the proffered wage in the relevant years.

The director did not conduct any further analysis based on the principles in *Matter of Sonogawa*. But in certain circumstances, it is appropriate to do so. As shown above, under those principles, the petitioner's evidence is sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are sufficient 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 sustained. The petition is approved.