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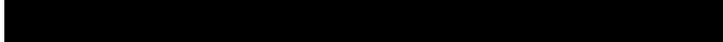
**U.S. Citizenship
and Immigration
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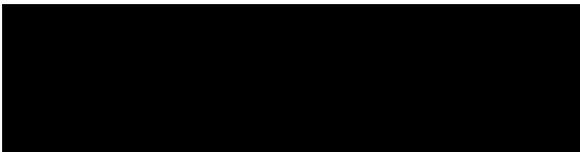


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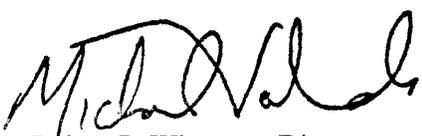
IN RE: Petitioner: 
Beneficiary: 

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 dismissed.

The petitioner is a restaurant specializing in Chinese cuisine. 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.

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 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 March 16, 2001. The proffered wage as stated on the Form ETA 750 is \$11.47 per hour, which amounts to \$23,858 annually. On the Form ETA 750B, signed by the beneficiary on March 6, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 2000 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on September 12, 2002.¹ On the petition, the petitioner claimed to have been established in 2002, to currently have no employees, to have a gross annual income of \$442,120, but made no claim as to the amount of its annual income for that year.²

In support of the petition, the petitioner submitted:

- Counsel's G-28;
- A duplicate of the original ETA 750;
- The petitioner's Form 1120 return for its fiscal year ending September 30, 2001;
- Copies of the petitioner's bank statements from January 2001 to June 2002; and,
- The beneficiary's Form W-2 showing \$3,800 earned issued by the petitioner for calendar 2001.

¹ The petitioner had filed an I-140 petition on the beneficiary's behalf on September 26, 2001, which the director denied on March 18, 2002, deeming the petition abandoned for failure to respond to a November 9, 2001 request for evidence (RFE) by the February 4, 2002 deadline. On the petitioner's motion to reopen, brought on March 29, 2002, the director on July 18, 2002, affirmed his prior denial.

² On the September 26, 2001 petition, the petitioner claimed a March 1996 establishment, six current employees, a \$430,000 gross annual income and left blank the box for the petitioner's net income.

In a request for evidence (RFE) dated January 21, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director also specifically requested submission of the petitioner's federal income tax returns for 2001 "covering the period October 1, 2001 through September 30, 2002.

In response to the RFE, the petitioner submitted:

- The beneficiary's W-2 showing \$9,500 earned, and Form 1099 showing \$9,600 earned, both issued by the petitioner for calendar-year 2002;
- The petitioner's Form 1120 return for its fiscal year ending September 30, 2002; and,
- The petitioner's bank statements for 2001-2002.

In a decision dated May 19, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the March 16, 2001 priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition, adding that the evidence of the average balances in the petitioner's bank account used assets already accounted for in the petitioner's Schedule L balance sheets.

On appeal, counsel submits a brief and additional evidence, including:

- A letter from a CPA analyzing the petitioner's Form 1120 returns for its fiscal years ending September 30, 2001 and 2002; and,
- A Form W-2 Wage and Tax Statement the petitioner issued to the beneficiary for calendar year 2002

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 March 6, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 2000 and continuing through the date of the ETA 750B.

Counsel claims on appeal that the beneficiary has been working as the petitioner's full time cook for the petitioner, earning \$20,800 in 2001 and \$19,100 in 2002. While \$3,800 of the beneficiary's earnings for 2001 is documented with a W-2, the record contains no documentation for the remaining \$17,000. For 2002, all \$19,100 of the beneficiary's is documented, \$9,500 with a W-2 and \$9,600 with a Form 1099. The beneficiary's Form 1040 return for 2001 reported a \$17,500 in "Misc. Service" business income for calendar year 2001 but fails to show he earned any of that from the petitioner. Without a Form 1099 from the petitioner for 2001, the

beneficiary's Form 1040 return does not establish counsel's claim, that the beneficiary received some \$17,000 in 2001 from the petitioner beyond the \$3,800 listed on the W-2 for 2001. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also asserts that for 2002, the petitioner's average monthly bank balance was \$ 29,283.64, more than enough to cover the \$4,757.60 shortfall below the proffered wage that remains, taking into account the beneficiary's the \$19,100 of actual wages paid in 2002. In the bank statements submitted with the appeal, the petitioner had bank balances averaging \$30,910 for calendar year 2001 (ranging between \$9,094.99 and \$47,848), and \$29,284 for calendar year 2002 (ranging between \$21,531 and \$34,947).

Counsel's reliance on the balances in the petitioner's bank account is misplaced for other reasons as well. 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets

The record contains copies of Form W-2 Wage and Tax statements of the beneficiary. The beneficiary's Form W-2's for 2001 and 2002, and his Form 1099 for 2002, show compensation received from the petitioner, as shown in the table below.

Calendar Year	Beneficiary's Actual Compensation	Proffered Wage	Wage Increase Needed To Pay The Proffered Wage.
2001	\$3,800	\$23,858	\$20,058
2002	\$19,100	\$23,858	\$4,758

The petitioner established that it employed and paid the beneficiary \$3,800 in calendar year 2001 and \$19,100 in calendar year 2002. Since the proffered wage is \$23,858, the petitioner must show that it can pay the remainder of the proffered wage for each year, which is \$20,058 in 2001, and \$4,758 in 2002.

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 a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner’s tax returns show a taxable income is (\$20,788) for the fiscal year 2000 ending September 30, 2001; and, \$3,232 for the fiscal year 2001 ending September 30, 2002. Since the petitioner’s taxable income for fiscal 2000 is negative, taxable income for that year does not demonstrate the petitioner’s ability to pay the proffered wage. For fiscal 2001, the petitioner’s taxable income rose to \$3,232, and because the petitioner only paid the beneficiary \$19,100 in wages, or \$4,758, less than the proffered wage.

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 those an employer would expect to convert to cash as the proffered wage became 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: (\$12,466) for the fiscal year ending September 30, 2001; and \$590 for the fiscal year ending September 30, 2002.

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.

Fiscal Year End 9/30	Net Current Assets	Surplus/(Deficit) For Paying Proffered Wage**
2001	(\$12,466)	(\$32,524)
2002	\$590	(\$4,168)

** Crediting the petitioner with the \$3,800 and \$19,100 actually paid to the beneficiary in wages in fiscal 2000 and fiscal 2001 respectively.

Since each of those figures is negative, the petitioner’s Net Current Assets amounts fail to establish its ability to pay the proffered wage.

The CPA’s tax analysis of the petitioner’s financial health reveals a \$7,759 loss for the fiscal year 2000 ending September 30, 2001, despite adding back \$13,029 in depreciation deductions taken in the Form 1120 return for that fiscal year. For the fiscal year ending September 30, 2002, the same analysis finds \$16,117 in income. A depreciation deduction, while not representing actual cash paid in the year claimed, reflects value lost as buildings and equipment deteriorate. Although buildings and equipment are depreciated, rather than expensed, this represents the expense of buildings and equipment spread out over a number of years. The diminution in value of buildings and equipment is an actual expense of doing business, whether it is spread over more years or

concentrated into fewer. The deduction expense is an accumulation of funds necessary to replace perishable equipment and buildings, and is not available to pay wages. Accordingly, the analysis, at least for fiscal year ending September 30, 2001, again fails to demonstrate the petitioner's ability to pay the proffered wage.³

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.

³ The accountant said the petitioner's operations "were drastically affected" by the September 11, 2001 terrorist attacks, suggesting the resulting "business interruption is reflected in the substantial loss of \$20,788 [for the fiscal year ending September 30, 2001]." Such an analysis is not persuasive given that the attacks occurred when only 19 days remained of the petitioner's fiscal year.