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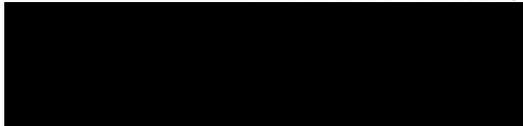
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OCT 14 2005

FILE: EAC-03-100-51170 Office: VERMONT SERVICE CENTER

Date:

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.

A handwritten signature in black ink, appearing to read "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 petition will be remanded to the director.

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.

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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13.01 per hour, which amounts to \$27,060.80 annually. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on February 6, 2003. On the petition, the petitioner claimed to have been established on January 22, 1996, to currently have 25 employees, to have a gross annual income of \$1,180,618.00 and to have a net annual income of \$544,955.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated January 6, 2004, 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 April 2, 2004.

In a decision dated June 4, 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 denied the petition. On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the director failed to properly credit the petitioner with compensation actually paid to the beneficiary in 2001 and that the evidence established the petitioner's ability to pay the amount needed to raise the beneficiary's actual compensation to the proffered wage in that year. Counsel also states that depreciation expenses represent additional resources available to the petitioner.

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 April 27, 2001, the beneficiary did not claim to have worked for the petitioner. However, the record contains evidence that the beneficiary began working for the petitioner at some time during 2001.

The record contains copies of Form W-2 Wage and Tax statements of the beneficiary for 2001 and 2002. The record before the director closed on April 2, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. The RFE dated January 6, 2004 requested information only about the year 2001. When the record closed on April 2, 2004 the petitioner's federal tax returns for 2003 were not yet due. For the foregoing reasons, the most recent year for which complete federal tax information was available when the record closed was 2002. Therefore the years at issue in the instant petition are 2001, which is the year of the priority date, and 2002. The beneficiary's Form W-2 for 2002 was not submitted for the record prior to the director's decision, but it has been submitted on appeal.

The beneficiary's Form W-2's in the record state compensation from the petitioner as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$8,936.00	\$27,060.80	\$18,124.80
2002	\$15,102.50	\$27,060.80	\$11,958.30

The above information fails to establish the petitioner's ability to pay the proffered wage in either of the two 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 and 2001. As noted above, the record before the director closed on April 2, 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. However, the petitioner's tax return for 2002 should have been available. That return was not requested in the RFE, which sought evidence pertaining only to the year 2001. However, the RFE quoted from the regulation at 8 C.F.R. § 204.5(g)(2), which states "The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." The record contains no explanation for the failure of the petitioner to submit a copy of its federal income tax return for 2002. On appeal, as noted above, the petitioner did not submit a copy of the beneficiary's Form W-2 for 2002 prior to the decision of the director, but it has submitted that Form W-2 on appeal. The petitioner did not submit a copy of its federal income tax return for 2002 prior to the decision of the director, nor has it submitted that return on appeal.

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. 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 indicate no income from activities other than from a trade or business. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns will be considered as the petitioner's net income.

The petitioner's tax returns show the amounts for ordinary income on line 21 as shown in the table below.

Tax year	Ordinary income	Wage increase needed to pay the proffered wage	Surplus or deficit
2000	\$20,409.00	not applicable	not applicable
2001	\$19,331.00	\$18,124.80*	\$1,206.20
2002	not submitted	\$11,958.30**	no information

* Crediting the petitioner with the \$8,936.00 actually paid to the beneficiary in 2001.

** Crediting the petitioner with the \$15,102.50 actually paid to the beneficiary in 2002.

The foregoing figures establish the petitioner's ability to pay the proffered wage in the year 2001, but since no tax return for 2002 was submitted, they fail to establish the petitioner's ability to pay the proffered wage in the year 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	-\$71,687.00	-\$52,307.00	not applicable
2001	-\$52,307.00	-\$32,117.00	\$18,124.80*
2002	not submitted	not submitted	\$11,958.30**

* Crediting the petitioner with the \$8,936.00 actually paid to the beneficiary in 2001.

** Crediting the petitioner with the \$15,102.50 actually paid to the beneficiary in 2002.

The foregoing figures provide no further support to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002. It may be noted that the figure for net current assets for the end of the year 2001 is equivalent in accounting terms to the figure for net current assets for the beginning of the year 2002. Therefore in the absence of a copy of the petitioner's tax return for 2002, the petitioner's net current assets for the end of the year 2001 are relevant to the year 2002. However, since the figure for net current assets for the end of the year 2001 is negative, that figure fails to establish the petitioner's ability to pay the proffered wage in 2002.

In his brief, counsel asserts that the petitioner's depreciation expenses in the year 2001 should be considered as additional financial resources available to the petitioner. As noted above, CIS does not consider depreciation expenses as additional financial resources of the petitioner. See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. However, the above analysis shows that when the petitioner is credited for the compensation actually paid to the beneficiary in 2001, the petitioner's net income is sufficient to establish the petitioner's ability to pay the proffered wage in that year, even without treating depreciation expenses as additional financial resources of the petitioner.

In his decision, the director found that the evidence failed to establish the petitioner's ability to pay the proffered wage in the year 2001. The director therefore denied the petition. For the reasons stated above, the assertions of counsel on appeal and the evidence submitted on appeal are sufficient to overcome the decision of the director concerning the petitioner's ability to pay the proffered wage in the year 2001.

In his decision, the director made no reference to the year 2002, which is the other year at issue in the instant petition. On appeal, counsel states that the beneficiary's Form W-2 for 2002 shows that the beneficiary's salary increased by 75% in 2002 and counsel submits a copy of the beneficiary's Form W-2 for 2002 in support of that statement. Counsel offers that Form W-2 as additional evidence that the petitioner's financial condition in 2001 was strong enough to grant the beneficiary a raise the following year. Counsel does not directly address the issue of the petitioner's ability to pay the proffered wage in the year 2002, presumably because the director did not discuss the year 2002 in his decision. Since the director's decision did not discuss the year 2002, the petition must be remanded to the director for consideration of the petitioner's ability to pay the proffered wage in the year 2002.

In summary, the evidence in the record establishes the petitioner's ability to pay the proffered wage in the year 2001. Therefore, the decision of the director is withdrawn with regard to its determination on the petitioner's ability to pay the proffered wage in the year 2001. The petition will be remanded to the director for consideration of the petitioner's ability to pay the proffered wage in the year 2002 and any additional years documentation that the director deems appropriate.

ORDER: The petition is remanded to the director for further action consistent with this decision.