



U.S. Citizenship
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Services

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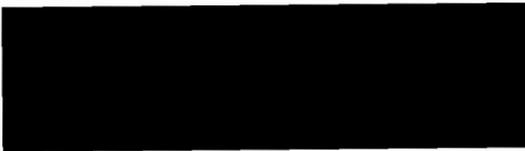
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker 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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a men and women's clothing manufacturer. It seeks to employ the beneficiary permanently in the United States as a laborer. 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 contends that the director that the petitioner has demonstrated its continuing financial ability to pay the proffered salary.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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) provides:

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. 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 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$9.00 per hour based on a 36-hour workweek, which amounts to \$16,848 per annum. On the Form ETA 750B, signed by the substituted beneficiary¹ on April 24, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed October 24 2003, the petitioner claims to have been established in 1996, have a gross annual income of \$417,593 and a net annual income of \$20,518. In support of its ability to pay the

¹ The petitioner substituted this beneficiary for a previous alien named "Sung Bai Cho."

beneficiary's proposed wage offer of \$16,848 per year, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and 2002. They reflect that the petitioner files its returns using a standard calendar year. The tax returns contain the following information:

	2001	2002
Ordinary Income ²	\$20,888	\$20,518
Current assets (Schedule L)	\$46,870	\$20,700
Current liabilities (Schedule L)	-0-	-0-
Net current assets	\$46,870	\$20,700

It is noted that besides net taxable income, CIS will examine a petitioner's net current assets as a measure of its liquidity during a given period and as an alternative method of reviewing a petitioner's ability to pay a proffered salary. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. 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 documentation also included copies of three Form(s) 1099, Miscellaneous Income for 2001, issued to three individuals as nonemployee compensation, copies of two 1099(s) issued to two workers in 2002, copies of three Wage and Tax Statements (W-2s) issued to three workers for 2002 including the principal shareholder and one employee who also received one of the 1099s in 2002. The petitioner further supplied a copy of a customer list and a copy of a letter, dated October 21, 2003, signed by [REDACTED] as a senior business specialist of the Fleet Bank. The letter expressed thanks to the petitioner for opening an account and stating that it had a balance of \$57,400.94 in its money market account.

A transmittal letter from the petitioner's president, [REDACTED] states that the petitioner has paid \$25,620 as salaries in 2001 and \$23,000 in 2002. He adds that independent contractors have been paid \$52,504 in 2001 and \$28,393 in 2002, claiming these amounts could cover the proffered wage. [REDACTED] concludes by stating that the petitioner is owed over \$183,000 from the end of 2000 and that after the economic slowdown following the September 11th, 2001, attacks, the vendors have slowly paid these amounts back to the petitioner, which it has placed in the bank.

In concluding that the petitioner failed to demonstrate its continuing ability to pay the proffered wage, the director reviewed the petitioner's documentation and concluded that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage. The director noted that the petitioner had filed preference petitions on behalf of five other beneficiaries, who were subsequently approved and who had four similar priority dates as the current beneficiary in April 2001. He determined that the petitioner's 2002 tax return failed to demonstrate that either the

² Ordinary income will be treated as net taxable income for the purpose of this review.

³ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

net taxable income of \$20,518 or the net current assets of \$20,700 could support the addition of another proffered wage. The director also found that the approximately \$185,000 owed to the petitioner and receipt of over \$57,000 should have been reflected on the tax return(s) balance sheets as accounts receivable in 2001 and 2002 if sufficient amounts were available to pay the proffered wages to these beneficiaries as the returns indicated that the accrual basis accounting method was used.

On appeal, counsel states that out of the five beneficiaries mentioned by the director in his denial, three had changed employment following the six month pendency of their application for permanent resident status.⁴ Counsel contends that this would establish sufficient available financial resources to pay the proffered wage to the beneficiary in this case.

Counsel's assertion as to availability of additional financial resources due to the change of employment of three beneficiaries is not supported by anything in the record. Counsel's contentions in this regard 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). Moreover, relevant to [REDACTED] statement of the availability of funds due to the payment of cumulative amounts to various workers as independent contractors is not convincing in view of the fact that there is no direct evidence specifically identifying the position, duties, and termination of the worker(s) who performed the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during a given period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If any shortfall between the proffered wage and any actual wages paid can be covered by either a petitioner's net taxable income or its net current assets, then the petitioner will be deemed to have demonstrated its ability to pay the proposed wage offer during a given period. In this case, the record does not suggest that the petitioner has employed the beneficiary.

CIS will also examine the net taxable 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. 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

⁴ The American Competitiveness in the Twenty-First Century Act (Public Law 106-313)(AC21) allows a beneficiary to change employment if his Application to Adjust Status (I-485), based on an approved employment-based petition, is unadjudicated for 180 days or more and his new job is in a same or similar occupation.

specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Depreciation as the decreased value of the assets of a business is considered to be a relevant factor in determining the financial viability of the business and will not be added back to a petitioner's net income. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537.

If a petitioner files for multiple beneficiaries, it must show that it has the continuing ability to pay the proffered wage for each beneficiary beginning at each respective priority date. CIS electronic records indicate that the petitioner has filed at least three preference petitions in addition to the ones mentioned by the director. Electronic records also indicate that none have been withdrawn. They were filed under the petitioner's name as [REDACTED] in 2004 and 2005.⁵ All were approved in 2004 and 2005 with two of the priority dates designated as the same date as in this case, excepting one with a priority date from 1998. While it is not clearly identified what the positions or salaries were, it raises sufficient doubt that the same financial information for 2001 and 2002 could support yet another approval. The petitioner does not present any persuasive evidence to otherwise specifically demonstrate how either the petitioner's 2001 net taxable income of \$20,888 or net current assets of \$46,870 could establish that an additional beneficiary's salary would be covered. A similar conclusion is relevant to 2002, where the petitioner's 2002 tax return does not demonstrate that any additional salary at the beneficiary's level of \$16,848 per year could be supported by either a net taxable income of \$20,518 or net current assets of \$20,700. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its continuing ability to pay the proposed wage offer beginning at the priority date. In this case, the evidence fails to demonstrate that the petitioner has had the continuing ability to pay the certified wage beginning at April 27, 2001.

Based on the evidence contained in the record and after consideration of the argument presented on appeal, the AAO concludes that the petitioner has failed to demonstrate its continuing financial ability to pay the proffered salary as of the priority date of the petition.

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.

⁵ EAC0414251406 received on April 13, 2004; EAC0601752272 received on October 24, 2005; and EAC0411254051 received on March 8, 2004.