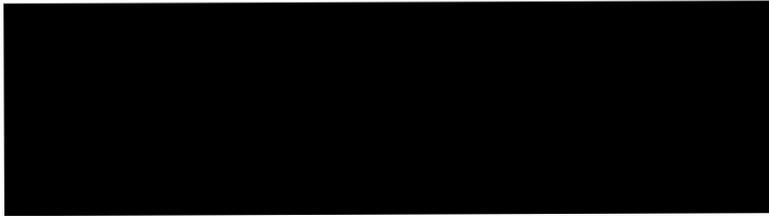


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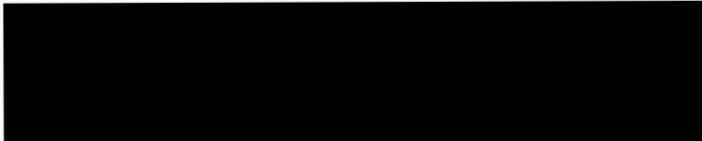


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OCT 20 2006

FILE: EAC 03 201 50336 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



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:



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 "Michael Valdes".

Robert P. Wiemann, Chief
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 case will be remanded for further investigation and entry of a new decision.

The petitioner is a Middle Eastern restaurant. It seeks to employ the beneficiary permanently in the United States as a Middle Eastern cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 petitioner has established its continuing ability to pay the certified wage.

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 25, 2001.. The proffered wage as stated on the Form ETA 750 is \$19.00 per hour, which amounts to \$39,520 annually. On the Form ETA 750B, signed by the beneficiary on April 4, 2001, the beneficiary claims to have worked for the petitioner since January 2000.

On Part 5 of the petition, which was filed on June 26, 2003, the petitioner claims that it was established in 1999, has a gross annual income of \$504,566, a net annual income of \$61,117, and currently has two employees.

In support of the petitioner's ability to pay the proffered wage of \$39,520 per annum, the petitioner provided a copy of its Form 1120, U.S. Corporation Income Tax Return for 2000. It indicates that the petitioner files its taxes using a fiscal year running from November 1st to October 31st of the following year. Thus, the 2000 return covers the priority date and the period from November 2000 to October 31, 2001. The return shows that the petitioner declared \$34,262 in taxable income before the net operating loss (NOL) deduction. Schedule L shows that the petitioner had \$40,057 in current assets and declared no current liabilities, resulting in \$40,057 in net current assets. Besides net taxable income, CIS will consider *net current assets* as a measure of a petitioner's

liquidity during a given period and 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.¹ A petitioner's year-end current assets and current liabilities may be found on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of a corporate tax return. If a petitioner's year-end 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.

On May 12, 2004, the director requested additional evidence in the form of the 2001 federal tax return, copies of the beneficiary's Wage and Tax Statement (W-2) for 2001 if the petitioner employed the beneficiary and copies of "accredited" profit/loss statements, bank account records, or personnel records for 2001.

In response, counsel submitted another copy of the petitioner's 2000 income tax return indicating that it covered the period from November 1, 2000 until October 30, 2001.

The director denied the petition on March 28, 2005. The director erroneously concluded that the petitioner's current liabilities exceeded its current assets as shown on the 2000 tax return and determined that the petitioner had not demonstrated the ability to pay the proffered wage.

On appeal, counsel submits another copy of the 2000 tax return and makes several arguments in support of overturning the director's decision and approving the petition. As the AAO does not concur with the director's conclusion as to the 2000 tax return and remands the case for further investigation, these assertions need not be further addressed.

While we note that the petitioner failed to provide additional financial evidence of its ability to pay the proposed wage offer beyond the 2000 federal tax return,² because we find that the petitioner's net current assets were sufficient to establish its ability to pay the proffered wage for the period from November 1, 2000 to October 31, 2001, as shown by the 2000 tax return submitted to the record, this case will be remanded for further review of the petitioner's continuing ability to pay the proffered wage.

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 may have employed and paid the beneficiary during the relevant 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 a shortfall results from a comparison of wages paid to the proffered wage can be covered by either the petitioner's net income or net current assets, the petitioner's ability to pay the proposed wage offer may also be shown for a designated period. In this case, no

¹ 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.

² The 2001 tax return would have covered the period until November 2002 and could have been provided with the petition. It is noted that the director could have requested the 2002 tax return with the request for evidence issued in May 2004.

evidence of employment or wages paid to the beneficiary has been provided. The director's decision mentions a request for evidence dated February 3, 2004, and counsel's reference to the petitioner having paid the beneficiary "off the books," but the AAO cannot locate these documents.

CIS will also 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). 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.

As noted above, as an alternative method of reviewing a petitioner's ability to pay the proffered wage, net current assets will also be considered. In this case, at least for the period covered by the 2000 tax return, the net current assets were sufficient to cover the proffered wage.

Upon remand, in addition to soliciting additional financial information such as federal tax returns or audited financial statements, it is recommended that director request pertinent corporate documents identifying the corporate ownership and officers from its inception until the present, including any relationship between the beneficiary and the corporation.

Beyond the decision of the director and upon remand, it is further noted that the letter submitted in support of the beneficiary's qualifying work experience contains an illegible signature and makes no reference to the signer's title, position, or basis of knowledge that the beneficiary owned the specified restaurant in Syria from 1970 until 1998. This issue should be addressed on remand as well.

In view of the foregoing the director's decision is withdrawn. The case is remanded to the director to request additional evidence from the petitioner pursuant to the foregoing discussion and the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.