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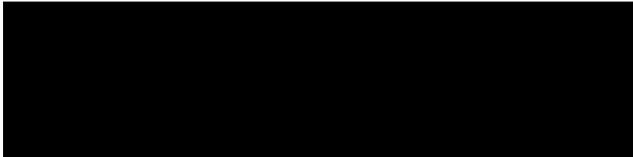
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



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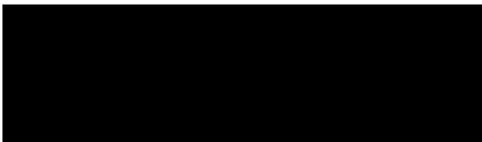


FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: OCT 24 2006
EAC 04 223 50054

IN RE: Petitioner: [Redacted]
Beneficiary [Redacted]

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the 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 restaurant/nightclub. It seeks to employ the beneficiary permanently in the United States as an Italian specialty 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 submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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) 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 August 3, 2001. The proffered wage as stated on the Form ETA 750 is \$13.80 per hour, which amounts to \$28,704 per annum. The ETA 750-B, signed by the beneficiary on August 1, 2001, does not indicate that the petitioner has employed the beneficiary.

On Part 5 of the visa petition, filed on July 15, 2004, the petitioner claims to have been established in 1997, have a gross annual income of \$2,200,000 and to currently employ more than five workers.

In support of the ability to pay the proposed wage offer of \$28,704, the petitioner initially submitted incomplete federal tax returns for 2001-2003.

On November 16, 2004, the director advised the petitioner that it must submit evidence establishing its ability to pay the proffered salary from the date of filing and continuing until the present. He further requested complete copies of the petitioner's federal tax returns for 2001, 2002 and 2003, as well as copies of any Wage and Tax Statements (W-2s) issued by the petitioner disclosing any wages paid to the beneficiary during these years.

In response, the petitioner provided complete copies of its ¹Form 1065, U.S. Return of Partnership Income for 2001, 2002, and 2003. They reflect that the petitioner files its federal returns using a standard calendar year. They contain the following information:

	2001	2002	2003
Ordinary Income	-\$ 1,394	\$22,221	-\$74,357
Current Assets	\$61,823	\$57,158	\$35,363
Current Liabilities	\$23,323	\$41,252	\$90,387
Net Current Assets	\$38,500	\$15,906	-\$55,024

As shown above, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.² Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a readily available resource out of which a proffered wage may be paid. Here, the year-end current assets and current liabilities are shown on Schedule L of Form 1065. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 15(d) through 17(d). If the company'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.

The director denied the petition on April 4, 2005, concluding that although the net current assets of \$38,500 could cover the certified wage of \$28,704 in 2001, the evidence does not demonstrate that the petitioner continues to have the ability to pay the proffered wage.

¹The petitioner is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else. An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

² 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel submits copies of the petitioner's bank statements for January through September 2003 and for November 2003. Counsel contends that these statements show that the petitioner's monthly balances demonstrate its ability to pay the proffered wage.

This assertion is not persuasive. Consistent with current CIS policy, 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 the relevant period. If the petitioner establishes by reliable documentary evidence that it may have 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. To the extent that the petitioner paid wages less than the proffered salary, those amounts will also be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In the instant matter, the record does not indicate that the petitioner has employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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 as counsel advocates here on appeal. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Counsel's reliance on the petitioner's 2003 bank statements is misplaced. 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), consisting of federal tax returns, annual reports, or audited financial statements are not applicable or otherwise provide an inaccurate financial portrait of the petitioner. Bank statements show only a portion of a petitioner's financial status and do not sufficiently reveal other encumbrances or liabilities that may affect a petitioner's financial situation. The 2003 bank statements will not be considered in lieu of the petitioner's 2003 tax return. Cash assets, should also be shown on the corresponding federal tax return as part of the listing of cash on line 1 of Schedule L. As such, they are already included in the calculation of a petitioner's net current assets for a given period. In this instance, there is no evidence that the funds represented the 2003 bank statements offered on appeal somehow represent additional available funds.

As the record indicates, the petitioner's 2001 federal tax return shows that its \$38,500 in net current assets could cover the proffered wage of \$28,704 and demonstrate the petitioner's ability to pay the certified salary in this year.

In 2002, however, the figures shown on the 2002 tax return indicate that neither the petitioner's ordinary income of \$22,221, nor its net current assets of \$15,906 was sufficient to pay the certified wage.

Similarly, in 2003, the proposed wage offer could not be met by either the petitioner's -\$74,357 in ordinary income, nor its -\$55,024 in net current assets.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage beginning at the priority date. In this case, based on a review of the evidence submitted to the underlying record and on appeal, the petitioner's ability to pay the proffered wage of \$28,704 has not been established for 2002 or 2003. As such, the petition may not be approved.

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.