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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: APR 19 2005

EAC 02 207 53006

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

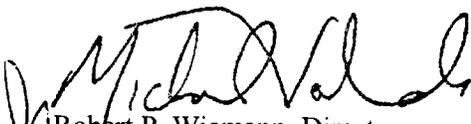
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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. It seeks to employ the beneficiary permanently in the United States as a specialty 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.

On appeal, counsel submits a brief and additional evidence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 9, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour, which amounts to \$24,689.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on January 1, 1994, and to have a gross annual income of \$563,458. The petitioner did not disclose how many employees it employs. In support of the petition, the petitioner submitted:

- A Form G-28;
- A certified Form ETA 750, labor certification application;
- A letter of recommendation from a former employer of the beneficiary; and
- The petitioner's Form 1120S tax return for 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director on June 6, 2003, requested additional evidence pertinent to that ability. The director specifically requested documentary proof of:

- The names of all other aliens for whom the petitioner has petitioned;
- The number of the petitioner's employees on the priority date;
- The petitioner's complete 2002 federal income tax return;
- All of the petitioner's Form W-2's, Form W-3's, Form 1099's and Form 1096's (Annual Summary and Transmittal of U.S. Information Returns) issued for wages paid in 2001 and 2002; and
- The 12 monthly bank statements for 2001 for the petitioner's business bank accounts reflecting account balances.

While counsel did not submit the requested bank statements, he did submit:

- A July 15, 2003 letter from the petitioner's sole shareholder asserting that retained earnings in 2001 (\$70,297) and 2002 (\$54,122) would be available to pay the proffered wage;
- The petitioner's 2002 Form 1120S tax return;
- All of the companies issued Form W-2s and Form W-3s for 2001 ("the Petitioner employed 14 workers in 2001") and 2002; and
- A 2002 Form W-2, his year-to-date pay stubs, the Form I-140 approval notice, and the Form I-485 application receipt for the "only other worker" the petitioner has sponsored.

The tax returns reflect the following information for the following years:

	2001	2002
Net income	\$12,000	\$10,366
Current Assets	\$16,995	\$8,587
Current Liabilities	\$6,323	\$7,586
Net current assets	\$10,672	\$1,001

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 22, 2003, denied the petition. The director found that the petitioner's 2001 net income and depreciation fell \$3,786.60 short of the proffered wage. He further stated, "[Y]our 2001 liabilities are \$21,702.00 more than your assets."

On appeal, counsel submits text on the topic of retained earnings. In her brief he asserts that the director erred by:

- Miscalculating the petitioner's current assets available to pay the proffered wage;
- Failing to differentiate between actual expenses and "artificial losses" on the petitioner's tax returns; and
- Ignoring the sole shareholder's stated willingness to cover the proffered wage with the petitioner's retained earnings.

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 employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in either 2001 or 2002.

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 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 specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets.

We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* 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 corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 net current assets during the years in question, 2001 and 2002, however, were \$10,672 in 2001, and \$1001 in 2002.

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

Counsel correctly noted the director made a mistake in calculating the petitioner's liabilities for 2001 as \$21,702. As noted above, the calculation should only consider current liabilities, in this case \$6,323 for 2001. By adding in the \$32,374, reported on Line 21 of Schedule L as "other liabilities," the director has overstated the amount of income the petitioner would need to establish its ability to pay the proffered wage for 2001. Instead, the petitioner's \$10,672 in net current assets for 2001 means that the petitioner's current assets totaled \$10,672 above its current liabilities.

Such a net current asset analysis nonetheless still leaves a \$14,017.60 deficit in establishing the petitioner's ability to pay the proffered wage in 2001. The same analysis results in a \$23,688.60 deficit for 2002.

Counsel, relying upon the sole shareholder's July 15, 2003 letter, asserts that the petitioner's retained earnings, as reported on Schedule L of the 2001 and 2002 Form 1120S tax returns, should suffice to enable the petitioner to pay the proffered wage.

In addition, counsel's assertion with regard to the definition, and hence, the use of retained earnings is not persuasive. As noted above, net current assets, as a measure of liquidity, are examined as reflected on Schedule L of the petitioner's tax return. Net current assets include only cash or cash equivalents that would reasonably be available to pay the proffered wage during the year covered by the Schedule L balance sheet. They do not take into account the longer-term resources that are reflected in the petitioner's "total assets." Similarly, they only take into account the petitioner's current liabilities as set forth on Schedule L. These do not include retained earnings. Generally Schedule L is a balance sheet that subtracts an entity's total liabilities from its assets. The "balance" (if any) remaining is considered the value of the entity as expressed in shareholder equity. Shareholder equity can include such non-cash items as goodwill, equity in non-current assets, etc. Retained earnings fall under the heading of shareholder's equity on Schedule L and normally represent the non-cash value of the company's assets. As the definitions provided by counsel on appeal make clear, retained earnings represent funds reinvested into the current business or used to pay off debts. Thus, retained earnings do not represent current assets that can be liquefied during the course of normal business, but rather the net income over the life of the corporation, and the owner's equity, minus distributions.

The petitioner has thus not demonstrated that it paid any wages to the beneficiary during 2001 and 2002. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portions of 2001 and 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.