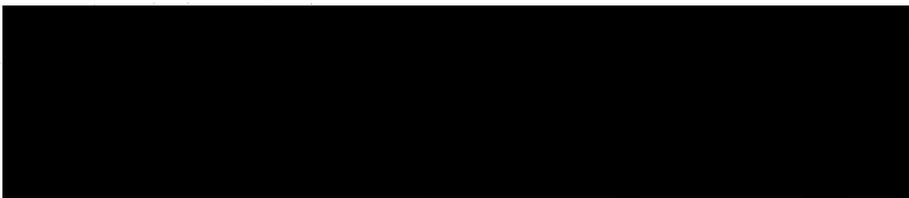


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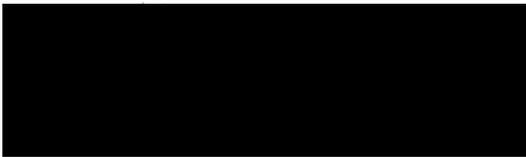
APR 13 2005

FILE: WAC 02 224 53276 Office: CALIFORNIA SERVICE CENTER Date:

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, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office 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 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 granting 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 June 24, 1997. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which equals \$24,024 per year.

On the petition, the petitioner stated that it was established on July 29, 1988 and that it employs 15 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The Form I-140 petition indicates that the petitioner would employ the beneficiary at its address in Long Beach, California. The Form ETA 750 indicates that the petitioner would employ the beneficiary at

In support of the petition, counsel submitted a copy of the petitioner's 1998 Form 1120 U.S. Corporation Income Tax Return, a copy of its 1999 Form 1120-A U.S. Corporation Short-Form Income Tax Returns, and copies of the petitioner's bank statements from various months. The tax returns show that the petitioner declared taxes pursuant to a fiscal year running from July 1 of the nominal year to June 30 of the following year.

Counsel also provided copies of the December 31, 2001 and January 31, 2002 financial statements of [REDACTED] proprietorship. The accountant's reports that accompany those financial statements indicate that they were prepared pursuant to a compilation, rather than an audit.

The petitioner's 1998 tax return, which covers the fiscal year running from July 1, 1998 to June 30, 1999, shows that the petitioner declared a loss of \$25,986 during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The 1999 return, which covers the fiscal year running from July 1, 1999 to June 30, 2000, shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,457 during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 5, 2002, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested the petitioner's 1997 and 2001 income tax returns, noting that counsel previously provided the petitioner's 1998 and 1999 returns. Why the Service Center did not request the petitioner's 2000 returns is unknown to this office.

In response, counsel submitted a copy of the petitioner's 1997 Form 1120-A U.S. Corporation Income Tax Return and another copy of the previously submitted financial statements. Although counsel submitted a cover letter, dated October 25, 2002, with those submissions, counsel did not state why he had not included the requested 2001 tax return.

The 1997 tax return shows that, during the fiscal year running from July 1, 1997 to June 30, 1998, the petitioner declared a loss of \$21,605 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

On April 3, 2003 the California Service Center issued another Request for Evidence in this matter. The Service Center requested, *inter alia*, complete copies of the petitioner's 2000, 2001, and 2002 tax returns. The Service Center made clear that the financial statements submitted would not suffice to show its continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested that the petitioner state whether it currently employed the beneficiary.

In response counsel submitted copies of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return, which shows that the petitioner reported taxes during that year based on a fiscal year running from July 1, 2000 to June 30, 2002. During that fiscal year the petitioner declared a loss of \$25,232. The corresponding Schedule L shows that at the end of that year the petitioner had neither current assets nor current liabilities, which yields net current assets of \$0.

Counsel also submitted the petitioner's owner's and owner's spouse joint 2001 Form 1040 U.S. Individual Income Tax Return. That return shows that they had one dependent. A Schedule C, Profit or Loss From Business attached to that return shows that the petitioner reported income as a sole proprietorship during that year. Because the petitioner was held as a corporation during the fiscal year ending June 30, 2001, that Schedule C is believed to cover the petitioner's income and expenses from July 1, 2001 to December 31, 2001. That Schedule C shows that the petitioner suffered a loss of \$13,402 during that period. The petitioner's owner and owner's spouse declared adjusted gross income of \$26,913 during that year, including the petitioner's loss.

Counsel did not submit a 2002 return, although, if the petitioner continued to be held as a sole proprietorship during that year and its profit or loss was reported on its owner's Form 1040 U.S. Individual Income Tax Return, that return was then due and should have been available. Counsel also submitted no explanation for the absence of that specifically requested tax return.

Counsel also submitted evidence of wages paid by the beneficiary's employer, who is not the petitioner. That evidence has no apparent relevance to the petitioner's ability to pay the proffered wage and will not be further discussed.

On July 7, 2003 the California Service Center issued a third Request for Evidence in this matter. The evidence requested in that Request for Evidence, however, is not salient to the petitioner's ability to pay the proffered wage.

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.

On appeal, counsel argues that the evidence provided is sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel stresses the petitioner's gross receipts and the amount of its depreciation deduction in making that assertion.

Counsel provides the petitioner's financial statements as of November 30, 2001 and November 30, 2002. The accountant's reports that accompanied those financial statements make clear that they were prepared pursuant to a compilation.

Counsel also provides the petitioner's owner and owner's spouse joint 2002 Form 1040 U.S. Individual Income Tax Return. That return shows that the petitioner's owner and owner's spouse had one dependent during that year. The Schedule C, Profit or Loss from Business attached to that return shows that the petitioner suffered a loss of \$13,210 during that year. The petitioner's owner and owner's spouse declared adjusted gross income of \$14,723 during that year, including the petitioner's loss.

Counsel's reliance on the unaudited financial statements submitted is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's reports that

accompanied the financial statements in this case make clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's reliance on the petitioner's depreciation deduction is misplaced. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel's reliance on the amount of the petitioner's gross receipts is also misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹ or otherwise increased its net income,² the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736

¹ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

² The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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. Similarly, showing that the petitioner paid wages in excess of 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$24,024 per year. The priority date is June 24, 1997.

During its 1997 fiscal year, which ran from July 1, 1997 to June 30, 1998, the petitioner declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of profits that fiscal year. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that fiscal year. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage during that fiscal year. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during its 1997 fiscal year.

During its 1998 fiscal year, which ran from July 1, 1998 to June 30, 1999, the petitioner declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of profits that fiscal year. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that fiscal year. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage during that fiscal year. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during its 1998 fiscal year.

During its 1999 fiscal year, which ran from July 1, 1999 to June 30, 2000, the petitioner declared taxable income before net operating loss deduction and special deductions \$5,457. That amount is insufficient to pay the proffered wage. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets

during that fiscal year. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage during that fiscal year. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during its 1999 fiscal year.

During its 2000 fiscal year, which ran from July 1, 2000 to June 30, 2001, the petitioner declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of profits during that year. At the end of that fiscal year the petitioner had no net current assets. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that fiscal year. The petitioner has not demonstrated that any other funds were available to it with which it could have paid the proffered wage during that fiscal year. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

From July 1, 2001 to December 31, 2001 the petitioner operated as a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and assets are included in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their business on their individual (Form 1040) Federal tax return each year. The business-related income and expenses are reported on the Schedule C and the profit or loss carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses and pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents on the amount remaining. *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982, *aff'd* 703 F2d 571 (7th Cir. 1983).

The Schedule C attached to the petitioner's owner's 2001 tax return shows that during that period the petitioner suffered a loss. The petitioner's owner reported adjusted gross income of \$26,913 during that year, including the petitioner's loss. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income during that half year he would have been left with only \$14,901 with which to support his family of three. To expect that the petitioner's owner could have supported his family on that amount is unreasonable. The petitioner's owner, however, has submitted no evidence of any other funds with which he could have paid the proffered wage or supported his family. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during the last half of 2001.

The petitioner was a sole proprietorship during all of 2002. During 2002 the petitioner suffered a loss. The petitioner's owner declared adjusted gross income of \$14,723 during that year. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during its fiscal years 1997, 1998, 1999, of 2000. The petitioner failed to demonstrate that it had the ability to pay the proffered wage during the last half of 2001. The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Issues exist in this case that were not noted in the decision of denial. As was stated above, the approved Form ETA 750 labor certification in this case states that the petitioner would employ the beneficiary in Santa Ana,

California, which is in Orange County. The Form I-140 petition states that the petitioner would employ the beneficiary in Long Beach, California, which is in Los Angeles County.

The regulation at 20 C.F.R. § 656.30(c)(2) provides that,

A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the [Form ETA 750] *Application for Alien Employment Certification Form*.

The approved labor certification upon which this petition relies is invalid for employment in Long Beach, California. The petition should also have been denied for this reason.

Further, notwithstanding that the petitioner has not changed owners, it has changed its ownership from a corporation to a sole proprietorship during the pendency of this petition. In such a situation the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

In this case, the substituted petitioner has submitted no evidence that, by the nature of the transaction pursuant to which it acquired the interests of the original petitioner, it assumed all of the rights, duties, obligations, and assets of the original petitioner. The petitioner should have been denied for this additional reason.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.