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U.S. Citizenship
and Immigration
Services

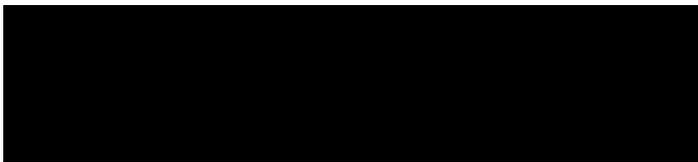
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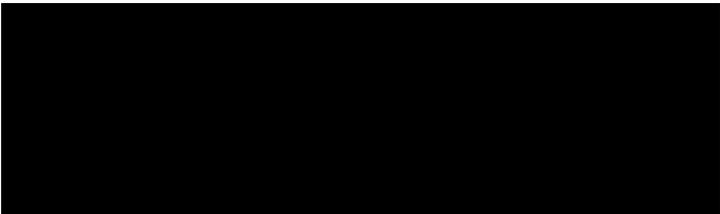
FILE: WAC 03 093 50639 Office: CALIFORNIA SERVICE CENTER Date:

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.

[Handwritten signature]
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.

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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on February 24, 2000. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which equals \$24,024 per year. The Form ETA 750 states that the proffered position required two years of experience in the job offered.

On the petition, the petitioner stated that it was established during July 1989 and that it employs 24 workers. The petition does not state the petitioner's gross and net annual income in the spaces provided. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since July 1996. The beneficiary also stated that he worked as a cook at the [REDACTED] Motel, in Jerez, Zacatecas, Mexico, from February of 1992 to April of 1995. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Tarzana, California.

In support of the petition, counsel submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. As to the beneficiary's claim of qualifying experience, the petitioner provided a letter in Spanish, dated July 28, 1992, and an English language translation from J. [REDACTED] owner of the Motel [REDACTED] in Jerez. That letter states that the petitioner worked for that company's restaurant from February 15, 1992 to April 17, 1995 as a cook.

On June 3, 2003, the California Service Center requested evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. 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 copies of the petitioner's 2000, 2001, and 2002 income tax returns. The Service Center also specifically requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters, its 2000, 2001, and 2002 Form W-3 transmittals, and copies of the Form W-2 Wage and Tax Statements showing wages paid to the beneficiary from 1996 to 2002.

In response, counsel submitted the 2000 and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation of [REDACTED], Incorporated. Because those returns used the petitioner's address as that of [REDACTED], Incorporated, this office believes that [REDACTED], Incorporated is the petitioner's actual name, notwithstanding that it was misstated on the Form I-140 petition and the Form ETA 750 labor petition. Those tax returns show that the petitioner reports taxes pursuant to a calendar year. In an accompanying letter dated August 25, 2003 counsel stated that the petitioner's 2003 tax return was not due until mid-September.

The 2000 tax return shows that the petitioner declared a loss of \$54,503 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$26,476 and current liabilities of -116, which yields net current assets of \$26,592.

The 2001 tax return shows that the petitioner declared a loss of \$33,703 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$31,607 and current liabilities of \$29,594, which yields net current assets of \$2,013.

Counsel submitted the California Form DE-6 Quarterly Wage Reports of Number 748, Incorporated for the second and third quarters of 2002 and the first and second quarters of 2003. Those returns show that the petitioner employed between 25 and 33 employees during those quarters. Those returns do not show that the petitioner employed E [REDACTED], the beneficiary.

However, counsel also provided an affidavit, dated August 6, 2003, from a purported former coworker of the beneficiary, stating that he first knew the beneficiary by the name [REDACTED], because the beneficiary worked with him at the International House of Pancakes under that assumed name. That affidavit avers that [REDACTED] are the same person.

Counsel, in her letter of August 25, 2003, states, "It should also be noted that the beneficiary has been on the payroll of the Petitioner since 1996 utilizing the name of [REDACTED]"¹ Counsel submitted no evidence in support of that assertion.

Counsel provided 1996, 1998, 1999, 2000, 2001 and 2002 W-2 forms showing amounts paid by [REDACTED] Incorporated. Although counsel stated, in her letter of August 25, 2003 that she was providing W-2 forms "from 1996 until present," the requested 1997 W-2 form was not included. Further, although the Request for Evidence specifically requested the petitioner's 2000, 2001, and 2002 W-3 transmittals, those documents were not included. In the August 25, 2003 letter counsel made no reference to the missing W-3 transmittals.

The 1996, 1999, 2000, and 2001 W-2 forms show that [REDACTED] earned \$13,525.90, \$25,138.18, \$24,786.53, and \$18,216.71 during those years, respectively. The 1998 W-2 form shows that [REDACTED] the beneficiary, earned \$16,401.57 during that year. The 2002 W-2 form shows that [REDACTED] earned \$14,502.50 during that year.

On October 9, 2003 the California Service Center issued a Notice of Intent to Deny in this matter. In that notice the Service Center stated that an investigation had revealed that the petitioner's claim of employment for Motel [REDACTED] is fraudulent. The notice further stated that if the beneficiary wished to press his claim of qualifying employment with [REDACTED] or with any other company, that he would be obliged to support his employment claim with objective evidence.

The Service Center also requested that, if the petitioner wished to respond to the Notice of Intent to Deny, that it provide evidence that [REDACTED] are the same person. The notice further asked that, if the petitioner wished to respond to the Notice of Intent to Deny, that it provide the previously requested evidence of its ability to pay the proffered wage during 2002.

Counsel responded with a letter, dated November 7, 2003. In that letter counsel stated that the investigator had failed to contact the owner of Motel [REDACTED].² Counsel provided another letter from the owner of [REDACTED] dated October 27, 2003, and an English translation, restating that the beneficiary had worked for his establishment from 1992 through mid-1995 as a cook.

Counsel stated that the petitioner's 2002 tax returns would not be finalized until the end of November 2003, but provided no evidence of that assertion. Counsel also stated that the beneficiary was unable to obtain additional evidence in support of his use of assumed names without additional time.

The director determined that the evidence submitted does not establish that the beneficiary is qualified for the proffered position and does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on November 22, 2003, denied the petition.

¹ The Form DE-6 for the third quarter of 2002 shows that the petitioner employed [REDACTED] a during that quarter. With that exception, none of the four quarterly wage statements show that the petitioner employed [REDACTED] or the beneficiary, [REDACTED]

² The report of the investigation shows that assertion to be incorrect.

In that decision the director noted that the Fraud Prevention Manager of the Consulate General of the United States of America in Guadalajara, Jalisco, Mexico reported to CIS that an investigator had contacted ██████████ and been told that, (1) he had personally typed and signed the beneficiary's employment verification letter as a favor requested by the beneficiary, (2) the beneficiary had never worked at the ██████████ in any capacity, and (3) that ██████████ and the beneficiary are long-time friends. The Fraud Prevention Manager also stated that a search of the Mexican Social Security (IMSS) database did not reveal that the beneficiary had ever held any registered employment.³

On appeal, counsel states, "a further check with ██████████ revealed that he felt threatened and pressured into making a statement that would satisfy the investor. [sic]" Counsel further states "While ██████████ admitted he did not pay into the IMSS (Mexican Social Security), he felt this was a matter for himself and his government and not that of the United States. However, he felt that he would get into trouble if he was [Sic] turned into the Mexican Government [Sic] and therefore, made statements that he should not have made."

As to the petitioner's ability to pay the proffered wage, counsel stated that the issue of the beneficiary's use of assumed names could have been settled at in interview, but provided no additional evidence pertinent to the beneficiary's alleged use of assumed names. Counsel further stated, "All restaurants do not have their returns ready by Mid-September. They have different fiscal years. This was a wrong assumption on the part of the Service." Counsel concludes, "In any case, the employer may not have shown sufficient funds to pay the proffered wage on paper he did [sic] in fact actually paid [sic] the offered wage, as proven by the furnishing of W-2 forms from the beneficiary."

Other than counsel's statement, the record contains no indication that ██████████ repudiated the employment verification letter because he was intimidated. The assertions of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BLA 1980).

Further, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition, and the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). There is no competent objective evidence, as sought by the RFE, to verify the petitioner's claimed version of events.

In the Notice of Intent to Deny the Service Center noted that an investigation had shown that the beneficiary's claim of employment at Motel ██████████ is fraudulent. The petitioner was instructed to provide objective evidence in support of the beneficiary's employment claim. Even if the petitioner had provided an additional statement from the beneficiary's alleged former employer addressing his retraction of his support for the beneficiary's employment claim, rather than a *précis* by counsel, that would not be objective evidence of where the truth lies in this matter, and would not have overcome the adverse evidence. The evidence indicates that the beneficiary's claim of employment for ██████████ is fraudulent.

³ A copy of the Fraud Prevention Manager's report, dated July 11, 2003, is in the non-record side of the file.

The W-2 forms are the only objective evidence in the record of the beneficiary's claimed employment for the petitioner.

The 2002 W-2 form shows that [REDACTED] earned \$14,502.50 during that year. The record contains no evidence that [REDACTED] and the beneficiary are the same person. That evidence will not suffice to show that the beneficiary has any qualifying employment experience.

The 1996, 1999, 2000, and 2001 W-2 forms show that [REDACTED] worked for the petitioner during those years. The August 6, 2003 coworker affidavit states that the affiant knows [REDACTED] to be the same person as the beneficiary. Under normal circumstances that evidence might warrant consideration.

Because the evidence in this case indicates that the beneficiary has submitted fraudulent employment documentation, however, the California Service Center in the October 9, 2003 Notice of Intent to Deny, requested that the petitioner provide objective evidence in support of any claim of qualifying employment which he wished to press.⁴ Pursuant to *Matter of Ho, Supra*, the petitioner was obliged to provide that objective evidence. Having failed to do so, the petitioner has not established that the beneficiary worked for it under the name [REDACTED]

The 1998 return states that [REDACTED] the beneficiary, worked for the petitioner during at least some part of that year. That is objective evidence that the beneficiary worked for the petitioner during some portion of that year, though not necessarily as a cook.⁵

The evidence submitted does not demonstrate that the beneficiary has any qualifying experience. The petition, therefore, was correctly denied on that basis. The remaining issue upon which the petition was denied is the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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, although the petitioner has established that it employed and paid the beneficiary during some portion of 1998, it did not establish that it employed and paid the beneficiary at any time after the February 24, 2000 priority date.

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

⁴ That notice requested objective evidence, not only of the petitioner's claim of employment for [REDACTED] but of "any of the beneficiary's claimed work experience that has been or may be submitted."

⁵ As that evidence does not show that the beneficiary worked as a cook for the petitioner, neither does it show that the wages paid to the beneficiary during that year were available to pay the proffered wage for the proffered position.

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 corporate 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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

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 February 24, 2000. . The priority date is \$24,024 per year.

During 2000 the petitioner declared a loss of \$54,503. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its ordinary income during that year. At the end of that year, however, the petitioner had net current assets of \$26,592. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a loss of \$33,703. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its ordinary income during that year. At the end of that year the petitioner had net current assets of \$2,013. That amount is insufficient to pay the proffered wage. The petitioner has submitted no evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner did not provide copies of annual reports, federal tax returns, or audited financial statements to show its ability to pay the proffered wage during 2002 notwithstanding that it is required by 8 C.F.R. § 204.5(g)(2) and was specifically requested in the June 3, 2003 Request for Evidence and the October 9, 2003 Notice of Intent to Deny.

Counsel has consistently claimed that the petitioner's 2002 return is not yet complete. In response to the Request for Evidence counsel stated that the return would be complete until mid-September 2003, which counsel stated was true of all major restaurants in California. Counsel's response to the Notice of Intent to Deny, is dated November 7, 2003. In that response, counsel stated, "The [petitioner's] 2002 returns are not finalized until the end of November of this year and therefore cannot furnish them. [Sic]

Even in the appeal, which was submitted on December 23, 2003, counsel implied that the petitioner's 2002 tax returns were not yet prepared, and attributed this to the petitioner filing taxes based on a fiscal year, rather than pursuant to the calendar year. The petitioner's tax returns explicitly state, however, as was noted above, that the petitioner files taxes pursuant to the calendar year, and not pursuant to any fiscal year, as counsel alleges.

The petitioner, having failed to submit any evidence of its ability to pay the proffered wage during 2002, has not, therefore, demonstrated its 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 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date, and the petition was correctly denied on that additional ground.

An issue exists in this matter that was not addressed in the decision of denial. The June 3, 2003 Request for Evidence asked that the petitioner provide its 2000, 2001, and 2002 W-3 transmittals. Those requested documents have never been submitted. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition 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.