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FILE: WAC 04 100 52973 Office: CALIFORNIA SERVICE CENTER Date: DEC 21 2005

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 tax, accounting, and mortgage business. It seeks to employ the beneficiary permanently in the United States as a manager of its mortgage and accounting departments. 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 August 23, 2001. The proffered wage as stated on the Form ETA 750 is \$32.91 per hour, which equals \$68,452.80 per year.

On the petition, the petitioner stated that it was established during 1987 and that it employs six workers. The petition states that the petitioner's gross annual income is \$89,416. The petitioner did not state its net annual income in the space provided for that purpose on the petition. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Upland, California.

In support of the petition, counsel submitted the petitioner's 2001 and 2002 Form 1065, U.S. Returns of Partnership Income. Those returns show that the petitioner is a general partnership, that it was established on January 1, 1999, and that it reports taxes pursuant to the calendar year and cash convention accounting.

The 2001 return shows that during that year the petitioner reported ordinary income of \$31,162. The petitioner reported neither current assets nor current liabilities on the corresponding Schedule L. During 2001 [REDACTED] owned a 70% interest in the petitioner as a general partner and [REDACTED] owned the remaining 30%, also as a general partner

The 2002 return shows that during that year the petitioner reported ordinary income of \$18,155. The petitioner reported neither current assets nor current liabilities on the corresponding Schedule L. During 2002 [REDACTED] owned a 50% interest in the petitioner as a general partner and [REDACTED] owned the remaining 50%, also as a general partner

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 July 8, 2004, denied the petition.

On appeal, counsel argues that the petitioner is a general partnership and that the personal income and assets of its owners are therefore a valid consideration in assessing the petitioner's ability to pay the proffered wage. In addition, counsel states,

[The petitioner] fully expects a substantial increase in its net profits for the ensuing year as it has ventured into the financial and home loans business and formed Royal Star Financial, Inc., as a California-based corporation.

Counsel provides a notarized personal balance sheet pertinent to the assets and liabilities of [REDACTED] the petitioner's part-owner, as of the end of 2002, the end of 2003, and the end of June 2004. Counsel also provides monthly statements pertinent to the petitioner's part-owner's credit union investment accounts.

The balance sheet shows that the petitioner's part-owner had a balance of \$19,658 in her checking account, \$107,596 in certificates of deposit, \$350,000 equity in real estate, \$24,000 equity in automobiles, and \$15,000 in furniture and fixtures at the end of 2002, for a total of \$516,254 at the end of 2002.

The balance sheet shows that the petitioner's part-owner had a checking account balance of \$26,393, \$110,646 in certificates of deposit, \$400,000 equity in real estate, \$20,000 equity in automobiles, and \$20,000 in furniture and fixtures at the end of 2003, for a total of \$577,039 at the end of 2003.

The balance sheet shows that after the first half of 2004 the petitioner's part-owner had cash in checking of \$44,795, certificates of deposit off \$214,428, equity in real estate of \$450,000, and furniture and fixtures of \$30,000, for a total of \$757,123.

The petitioner's part-owner's investment account statements confirm the amounts of the petitioner's part-owner's certificates of deposit as shown on the balance sheet for all three years. No evidence was submitted in support of the other amounts shown on the balance sheet. The balance sheet was notarized, but no other assurance of its accuracy was provided. The balance sheet does not indicate by whom it was prepared.

The only assets of the petitioner's owner that are sufficiently evidenced are her certificate of deposit balances at the end of 2002, the end of 2003, and the end of June 2004. Those amounts are confirmed on the credit

union statements provided. The only evidence pertinent to the petitioner's owner's other assets is the statement provided by counsel. The evidence of those other assets is insufficiently reliable to be considered in determining the ability of the petitioner to pay additional wages.

Counsel provides no evidence that the petitioner, or the petitioner's owners, own a mortgage company named Royal Star Financial.¹ The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, absent evidence, the assertion that it will make a profit is speculative. No anticipated earnings from that company will be included in the determination of 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, 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 a given 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 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 total 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, the petitioner's year-end cash and those assets expected to be consumed

¹ The assertions of counsel 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 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

or 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.

Finally, if the other statistics fall short of demonstrating the petitioner's ability to pay the proffered wage, this office will consider, in the case of a partnership, the personal income and assets of its general partner or partners.

The proffered wage is \$68,452.80 per year. The priority date is August 23, 2001.

During 2001 the petitioner reported ordinary income of \$31,162. That amount is insufficient to pay the proffered wage. The petitioner reported no end-of-year net current assets. The petitioner has not, therefore, demonstrated the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has provided no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner reported ordinary income of \$18,155. That amount is insufficient to pay the proffered wage. The petitioner reported no end-of-year net current assets. The petitioner has not, therefore, demonstrated the ability to pay any portion of the proffered wage out of its net current assets. At the end of that year, however, the petitioner's part-owner retained \$107,596 in certificates of deposit. The petitioner's part-owner could have used her own funds as necessary to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The record does not contain the petitioner's 2003 tax return. At the end of that year, however, the petitioner's part-owner had \$110,646 in certificates of deposit. The petitioner's part-owner could have used her own funds as necessary to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The appeal in this matter was submitted on August 10, 2004. On that date the petitioner's 2004 tax return was clearly unavailable. The petitioner is excused from providing evidence of its ability to pay the proffered wage during 2004 and subsequent years. In any event, at the end of the first half of that year the petitioner's part-owner had certificates of deposit in the amount of \$214,428. The petitioner could have paid the proffered wage out of its part-owner's assets as necessary.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that ground.

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.