

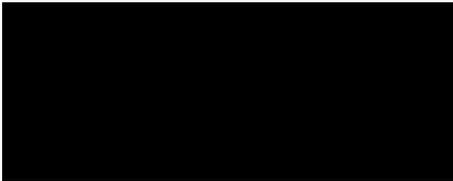
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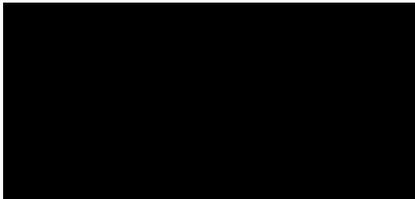
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: MAR 03 2005
LIN 02 253 50734

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

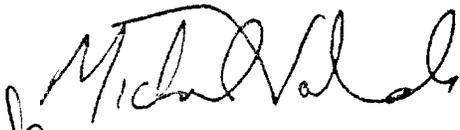
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Nebraska Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a cook. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition. The director also found that the petitioner had failed to demonstrate that the beneficiary had the requisite experience as of the priority date. The director denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, “*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.”

The instant motion qualifies as a motion to reopen because counsel provided new 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 or seasonal nature, for which qualified workers are unavailable in the United States.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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. The petitioner must also demonstrate that, as of the priority date, the beneficiary had the requisite education, training, employment experience, and other qualifications as stated on the Form ETA 750. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10.13 per hour, which equals \$21,070.40 per year. The Form ETA 750 states that the proffered position requires one year of training as a cook and two years of experience in the proffered position.

On the petition, the petitioner stated that it was established on April 1, 2000 and that it employs 35 - 40 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The Form ETA 750 states that the petitioner would employ the beneficiary at [REDACTED]

The Form I-140 petition states that the petitioner would employ the beneficiary [REDACTED] in Swansea, Illinois.

With the petition counsel submitted the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return states that the petitioner declared ordinary income of \$836 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner submitted no additional evidence pertinent to the petitioner's ability to pay the proffered wage. The petitioner submitted no evidence pertinent to the petitioner's employment experience.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date the Director, Nebraska Service Center, on October 28, 2002, issued a Request for Evidence in this matter. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date.

Because no evidence had been submitted to show that the beneficiary has the requisite training and experience the director requested letters from former trainers and employers to document that training and experience.

In response, counsel submitted an additional copy of the petitioner's 2001 tax return. The petitioner also submitted a letter in Spanish, dated December 23, 2002, with an English translation. That letter states that the beneficiary was trained as a chef from July 1994 through October 1994 and worked as a chef for the writer of that letter from November 1994 through May 1999.

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. The director also noted that, although the evidence demonstrates that the beneficiary has more than two years of experience, it does not demonstrate that he has the requisite year of training. On February 19, 2003, the director denied the petition.

On appeal, counsel submitted unaudited income and expense statements for 2002 and an unaudited balance sheet as of December 31, 2002. Counsel submitted bank statements for the months from October 2002 through February 2002.

In addition, counsel submitted another letter, dated March 3, 2003, from the same employer who provided the original employment verification letter, and an English translation. That letter states that the previous letter contained an error, and that the beneficiary was actually in training from July 1994 through October 1997, and then employed until May 1999.

The Director, AAO found that the evidence still did not demonstrate the petitioner's ability to pay the proffered wage and, on July 17, 2003, dismissed the appeal.

With the motion, counsel submits compiled financial statements for Zapata Mexican Restaurants. All of the financial statements cover the six months ending June 30, 2003. One is a profit and loss statement is for a restaurant in Swansea, the town in which the petitioner stated, on the Form I-140 petition, that it would employ the beneficiary. Another is a profit and loss statement for a restaurant in Collinsville. The third financial statement is a balance sheet as of June 30, 2003, possibly covering the assets of both restaurants.

Counsel also provided an affidavit, dated August 20, 2003, from the petitioner's owner. The petitioner's owner states that the petitioner owns and operates both restaurants.

Despite being characterized as audited the financial statements submitted by the petitioner are not audited, and counsel's reliance on unaudited financial records 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements submitted shall not be further considered.

Counsel also submits the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That tax return shows that the petitioner declared ordinary income of \$45,966 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$26,442 and no current liabilities, which yields net current assets of \$26,442.

Counsel asserts that,

Although earlier evidence of record did not necessarily demonstrate the ability to pay the proffered wage on the date the original petition was filed, this new and material evidence shows that petitioner's financial ability is above reproach concerning this petition.

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 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 priority date is April 30, 2001. The proffered wage is \$21,070.40 per year.

During 2001 the petitioner declared ordinary income of \$836. That amount is insufficient to pay the proffered wage. The petitioner ended the year with negative net current assets. The petitioner is unable to show the ability to pay the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002, declared ordinary income of \$45,966. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 2001. Therefore, the objection of the AAO has not been overcome on the motion.

In addition, this office shall now revisit the issue of the evidence pertinent to the beneficiary's qualifications. The Form ETA 750 states that the proffered position requires a year of training and two years of experience.

The first version of the petitioner's employment documentation, submitted in response to the Request for Evidence, stated that the beneficiary was in training from July 1994 through October 1994 and worked as a chef for the writer of that letter from November 1994 through May 1999. That version of the beneficiary's training and employment history, if believed, indicates that the beneficiary has the requisite two years of employment experience, but less than the requisite one year of training.

The second of the petitioner's employment documentation, submitted on appeal, stated that the beneficiary was in training from July 1994 through October 1997 and worked as a chef for the writer of that letter from then until May 1999. That version of the beneficiary's training and employment history indicates that the beneficiary has the requisite year of training, but has less than the requisite two years of employment in the proffered position.

Whichever version of the beneficiary's training and employment documentation is utilized, the beneficiary is not qualified for the proffered position. For this additional reason, the appeal should have been dismissed.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The motion is granted. The AAO's decision of July 17, 2003 is affirmed. The petition is denied.