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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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MAR 16 2005

FILE:

[REDACTED]
EAC 02 187 53472

Office: VERMONT SERVICE CENTER

Date:

IN RE:

Petitioner:
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:

[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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be remanded.

The petitioner is a vending food sales company. It seeks to employ the beneficiary permanently in the United States as a business manager. 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 statement.

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 November 6, 2000. The proffered wage as stated on the Form ETA 750 is \$48.09 per hour, which equals \$100,027.20 per year.

On the petition, the petitioner stated that it was established during 2000 and that it employs five workers. 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 Lakewood, New Jersey.

In support of the petition, counsel submitted a copy of the petitioner's owner's 2000 Form 1040 U.S. Individual Income Tax Return. A Schedule C attached to that return shows that the petitioner's owner operated the petitioner as a sole proprietorship during that year, and that it returned a profit of \$161,872. The tax return shows that the petitioner's owner declared adjusted gross income of \$155,952, including the petitioner's profit. That tax return also demonstrates that the petitioner's owner is married and has seven dependent daughters.

Although the petition was submitted on May 10, 2002, when the petitioner's 2001 tax return was presumably available, counsel did not submit a copy of that return and did not explain that omission.

On November 14, 2002 the Vermont Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Specifically, the Service Center requested an itemized list of the petitioner's owner's family's monthly expenses during 2001.¹

In response, counsel submitted a letter, dated February 6, 2003, in which he stated the monthly amount of the petitioner's owner's family's mortgage, food, utility, clothing, transportation, insurance, and medical expenses. According to counsel the petitioner's owner's monthly expenses total \$3,638 per month. That amount, annualized, equals \$43,656.

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 June 10, 2003, denied the petition.

On appeal, counsel submits a letter, dated June 29, 2003, in which he states that because the petitioner has no business manager it has been paying 25% more for materials and supplies than it otherwise would. Counsel urges that the savings of 25% of the price of its materials and supplies, added to the petitioner's net income, demonstrates the ability to pay the proffered wage. Counsel provides no evidence in support of the assertion that hiring the beneficiary would cause it to realize a 25% saving on materials and supplies.

The statements of counsel on appeal or in a motion 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); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. The savings counsel alleges would accrue by hiring the beneficiary are not supported by any evidence, and will not be considered.

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).

¹ Why the Service Center did not request copies of annual reports, federal tax returns, or audited financial statements pertinent to the petitioner's ability to pay the proffered wage during 2001 is unknown to this office.

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.² 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, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have covered his existing business expenses, paid the proffered wage out of his adjusted gross income, and supported himself on the amount remaining. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The proffered wage is \$100,027.20 per year. The priority date is November 5, 2000.

During 2000 the petitioner's owner declared adjusted gross income of \$155,952, including the petitioner's profit. If obliged to pay the proffered wage out of that amount, the petitioner would have been left with \$55,924.80 with which support his nine-member family.

Counsel submitted his own statement of the petitioner's owner's expenses, which equal \$43,656 per year. Counsel gave no indication where he obtained that information. As was noted above, the unsupported assertions of counsel are not evidence and shall be accorded no evidentiary value. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

If the petitioner had been able to hire the beneficiary during that year and had paid him the proffered wage, however, and even if hiring the beneficiary did nothing to enhance the petitioner's income, the petitioner's owner, after payment of the additional salary, would still have had over \$55,000 remaining to support his family. This office finds that to expect that the petitioner's owner could have supported even his large family on that amount is reasonable. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

² The decision of denial subtracted the petitioner's income taxes from its adjusted gross income in finding that the petitioner had not demonstrated the ability to pay the proffered wage during 2000. For several reasons, this office does not employ that additional calculation in determining a petitioner's ability to pay the proffered wage. First, the amount of the petitioner's income taxes would presumably have been substantially less if it had been obliged to pay the proffered wage during that year. Second, income taxes for 2000 are not due during 2000, but during 2001. Finally, the petitioner's personal deductions intervene between the amount of the petitioner's adjusted gross income and the amount of its taxes, and render any calculation of the taxes the petitioner would have owed hypothetical. Although the reasoning underlying the director's decision to include some amount of taxes in the calculation of the petitioner's ability to pay the proffered wage may be sound, a reliable formula for the taxes that petitioner would have paid pursuant to hypothetical changes in its circumstances may be unavailable.

The petitioner has submitted no evidence pertinent to its net income during 2001, nor any reliable evidence pertinent to assets it could have liquidated to pay the proffered wage.³ The Service Center did not request any evidence pertinent to the petitioner's income and assets during 2001. Further, although the petitioner did not so state, its 2001 tax returns may have been unavailable when it filed the petition. This office is unwilling, under these circumstances, to dismiss the appeal for the petitioner's failure to provide evidence pertinent to 2001, either with the petition or in response to the Request for Evidence. However, absent such evidence, the petition may not be approved.

The matter will be remanded so that the director may request additional evidence pertinent to the petitioner's finances during 2001. The director may also request evidence pertinent to the petitioner's finances during later periods, to the eligibility of the beneficiary for the proffered position, or to any other matter pertinent to the approvability of the instant petition.

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 petition is remanded for further consideration and action in accordance with the foregoing.

³ That is; although the petitioner submitted the requested 2001 budget, it submitted no copies of annual reports, federal tax returns, or audited financial statements covering that year.