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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

BC

FILE:

WAC-03-086-50893

Office: CALIFORNIA SERVICE CENTER

Date: MAY 10 2005

IN RE:

Petitioner:

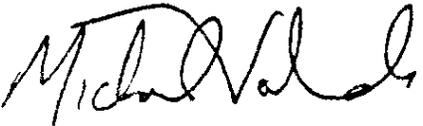
Beneficiary:

PETITION: 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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant with European and Asian cuisine. It seeks to employ the beneficiary permanently in the United States as a Cook, Specialty European - Asian Food. 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 states that the petitioner's evidence establishes its ability to pay the proffered wage.

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 not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 8, 2001. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which amounts to \$24,024.00 annually. On the Form ETA 750B, signed by the beneficiary on March 2, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on January 17, 2003. On the petition, the petitioner claimed to have been established in 1990, and to currently have 15 employees. In the petition's items for gross annual income and for net annual income the petitioner stated "see tax returns."

In support of the petition, the petitioner submitted a copy of a letter dated in 2001, with an illegible month and day of the month, from a restaurant in the Philippines stating the beneficiary's experience as a cook of Asian and European Cuisines from May 1985 to November 1988; a copy of a letter dated October 30, 2001 to the California Employment Development Department from an owner of the petitioner describing the petitioner's recruitment efforts; and a copy of the petitioner's Form 1065 U.S. Return of Partnership Income for 2001.

In a request for evidence (RFE) dated March 19, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and additional evidence relevant to the beneficiary's experience. The director specifically requested original computer printouts from the Internal Revenue Service (IRS), stamped by the IRS, of the petitioner's tax returns from 2001 to the present. The director also specifically requested copies of the petitioner's four most recent California quarterly wage reports, Forms DE-6. Finally, the director requested a statement of the beneficiary's work experience which included the duties and the hours worked per week by the beneficiary. The RFE set a deadline of June 11, 2003 for a response.

In response to the RFE, counsel submitted a letter dated June 3, 2003 and the following documents: a copy of the petitioner's Form 565 California Partnership Return of Income for 2001; a copy of the petitioner's Form 8736 Application for Automatic Extension of Time to File U.S. Return for a Partnership, [REDACTED] or for Certain Trusts for 2002; a copy of the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the fourth quarter of 2002; copies of the petitioner's California quarterly wage reports for all four quarters of 2002; a copy of the petitioner's Form 940-EZ Employer's Annual Unemployment (FUTA) Tax Return for 2002; and an undated letter from the same restaurant in the Philippines as had submitted the previous letter, stating the beneficiary's experience as a cook on a part-time basis from May 1985 to November 1988, at 30 to 33 hours per week, specializing in Asian and European cuisines.

In a second RFE dated June 17, 2003, the director requested further evidence relevant to the petitioner's ability to pay the proffered wage. The director specifically requested "signed and IRS certified copies of the U.S. company's Federal income taxes (with appropriate signature (s)), for the years 2001 and 2002," and copies of the petitioner's payroll summary, W-2's and W-3's evidencing wages paid to all employees for the years 2001 and 2002. The second RFE set a deadline of September 9, 2003 for submission of the requested evidence.

In response to the second RFE, counsel submitted a letter dated September 4, 2003 stating that the petitioner was awaiting IRS certified copies of its federal tax returns for 2001 and 2002 and requesting an extension of 60 days, until November 8, 2003, to respond to the second RFE. Counsel stated that the petitioner would also submit its payroll summary, W-2's and W-3's for 2001 and 2002 by November 8, 2003.

In a decision dated September 20, 2003, the director stated that pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) additional time could not be granted to the petitioner to respond to the second RFE. The director therefore evaluated the petition based on the evidence then in the record. The director determined that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner submitted an I-290B Notice of Appeal which was received by the director on October 27, 2003. Submitted with the I-290B was a copy of an envelope mailed to counsel by the director bearing a postmark of September 23, 2003.

In a Notice of Rejected Appeal dated December 9, 2003, the director informed the petitioner that its notice of appeal was untimely and that the notice of appeal was therefore rejected.

In a letter to the director dated December 12, 2003, counsel stated that the envelope containing the director's decision of September 20, 2003 bore a postmark of September 23, 2003. Counsel stated that the 33rd day after the postmark date fell on Sunday, October 26, 2003, and that by operation of the regulation at 8 C.F.R.

§ 1.1(h) the deadline for the notice of appeal was extended to Monday, October 27, 2003. Counsel stated that the notice of appeal was therefore timely.

No further decision of the director appears in the record, but the fact that the director has transmitted the notice of appeal and the file to the AAO suggests that the director agreed with counsel's assertion that the notice of appeal was timely.

On appeal, counsel submits a brief and additional evidence consisting of copies of the petitioner's Form W-3 Transmittal of Wage and Tax Statements for 2001 and 2002 and Form W-2 Wage and Tax Statements of the petitioner's employees for the years 2001 and 2002.

Counsel states on appeal that the IRS has still not provided the petitioner with certified copies of its tax returns for 2001 and 2002, but that the payroll information on the Form W-3's and Form W-2's submitted on appeal show that the petitioner is a stable company with the ability to pay the proffered wage to the beneficiary during the years relevant to the instant petition.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The fact that the director initially issued a Notice of Rejected Appeal in this case raises the issue of whether the instant appeal is timely. The director's decision denying the I-140 petition is dated September 20, 2003. That day was a Saturday. If the decision had been mailed on that day, the deadline for a notice of appeal, calculated as 30 days plus three days for services by mail, would have been Thursday, October 23, 2003. See 8 C.F.R. §§ 103.3(a)(2)(i), 103.5a(b).

As noted above, with the notice of appeal counsel submitted a copy of an envelope sent to counsel from the director's office, bearing a postmark of September 23, 2003, which was a Tuesday. That copy of the envelope is sufficient to establish that the director's decision was mailed on September 23, 2003. Thirty-three days from September 23, 2003 was Sunday, October 26, 2003. By operation of the regulation at 8 C.F.R. § 1.1(h), the appeal deadline was extended to the following Monday, October 27, 2003. The notice of appeal was received by the director's office on October 27, 2003. Therefore the notice of appeal was timely.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 2, 2001, the beneficiary did not claim to have worked for the petitioner, and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses.

The only annual tax return of the petitioner in the record is the petitioner's return for 2001. Concerning the year 2002, the record contains a copy of the petitioner's Form 8736 Application for Automatic Extension of Time to File U.S. Return for a Partnership, REMIC, or for Certain Trusts. The Form 8736 requested an automatic three-month extension for filing the petitioner's Form 1065 return for 2002. Since the petitioner's

return for 2002 was a calendar year return, the original due date was April 15, 2003. An automatic three-month extension would have extended the due date to July 15, 2003.

The record before the director closed on September 9, 2003 with the expiration of the deadline for the petitioner's response to the second RFE. As of that date the petitioner's tax return for 2002 should have been available, but no copy of that return was submitted for the record.

Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a partnership. Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065 U.S. Income Tax Return of Partnership Income state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 22 below." Where a partnership has income from sources other than from a trade or business, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1.

In the instant case, the petitioner's tax return for 2001 shows no income from sources other than from a trade or business. Therefore the petitioner's figure for ordinary income will be considered as the petitioner's net income. The petitioner's Form 1065 U.S. Income Tax Return of Partnership Income for 2001 shows the amount of -\$14,384.00 on line 22, for ordinary income. Since that figure is negative it fails to establish the ability of the petitioner to pay the proffered wage during the year 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a partnership's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A partnership's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 15 through 17. If a partnership's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L attached to the petitioner's tax return for 2001 yield the following amounts for net current assets: -\$117,012.00 for the beginning of 2001; and -\$114,577.00 for the end of 2001. Since each of those figures is negative, they also fail to establish the ability of the petitioner to pay the proffered wage either in 2001 or in 2002.

The record before the director also included a copy of the petitioner's Form 565 California Partnership Return of Income for 2001. The information on the petitioner's Form 565 state income tax return appears to be consistent with that on its Form 1065 federal tax return discussed above, and the state income tax return provides no additional evidence in support of the petitioner's ability to pay the proffered wage.

Other documents in the record before the director included copies of the petitioner's California quarterly wage reports for all four quarters of 2002; a copy of the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the fourth quarter of 2002; and a copy of the petitioner's Form 940-EZ Employer's Annual Unemployment (FUTA) Tax Return for 2002.

The state quarterly wage reports for 2002 show payroll expenses by the petitioner in that year at a level which is slightly higher than its salary and wage expenses shown for the previous year on the petitioner's Form 1065 tax return for 2001, which totaled \$110,937.00. The state quarterly wage reports for 2002 show the following figures for total number of employees and total payroll.

Quarter	Total number of employees	Total payroll amount
2002-1	20	\$35,525.12
2002-2	21	\$41,941.91
2002-3	16	\$33,279.12
2002-4	11	\$3,378.20
2002-total		\$114,124.35

The above figures show a sharp decline in the petitioner's payroll costs in the fourth quarter of 2002. Consistent with the California quarterly wage report for the fourth quarter, the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the fourth quarter of 2002 shows total payroll costs of \$3,378.20. On the Form 941 the amount of \$620.86 is listed as federal payroll tax liability for the quarter. The monthly breakdown on the Form 941 allocates all of that amount to the first month of the quarter, which was October 2002, and states zero federal payroll tax liability for the last two months of the quarter, November and December 2002. The foregoing information suggests that the petitioner had no employees during the months of November and December 2002.

The petitioner's Form 940-EZ Employer's Annual Federal Unemployment (FUTA) Tax Return for 2002 indicates a sharp decline in unemployment tax liability in the fourth quarter of 2002. The quarterly unemployment tax figures shown on that form are the following: \$284.20 for the first quarter, \$284.56 for the second quarter, \$204.84 for the third quarter, and \$18.80 for the fourth quarter.

The record contains no explanation for the significant declines in payroll and payroll tax liabilities in the fourth quarter of 2002. One reasonable inference from the above figures is that the petitioner ceased operations during the final two months of 2002. But whether that is the case or not, the petitioner's quarterly wage reports, federal quarterly tax return and federal unemployment tax returns in the record fail to establish the petitioner's ability to pay the proffered wage throughout the year 2002.

Concerning the absence of the petitioner's Form 1065 U.S. Return of Partnership Income for the year 2002 appears in the record, counsel asserts that IRS certified copies of the petitioner's income tax returns for 2001 and 2002 were not yet available as of the date of the submission of counsel's brief. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA

1980). Moreover, even if no certified copies of the petitioner's federal income tax returns for 2001 and 2002 were available from the IRS, no explanation is offered for the failure of the petitioner to submit a copy of its 2002 federal income tax return without any such certification by the IRS.

In his decision, the director correctly discussed the regulation at 8 C.F.R. § 103.2(b)(8) and correctly determined that no additional time could be granted to respond to an RFE beyond the twelve-week period mandated by that regulation. The director correctly stated the petitioner's net income to be -\$14,384.00. The director found that the petitioner's net current assets for 2001 were -\$15,640.00, a figure apparently intended by the director to reflect the petitioner's year-end net current assets. The basis for the director's calculation of that figure is not stated in the decision. As shown above, the correct figure for the petitioner's year-end net current assets for 2001 is -\$114,577.00. Despite this error in analysis, the director's conclusion that the evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant time period was correct, and the director's decision to deny the petition was therefore also correct, based on the evidence then in the record.

On appeal, the petitioner submits copies of the petitioner's Form W-3 Transmittal of Wage and Tax Statements for the years 2001 and 2002 and Form W-2 Wage and Tax Statements of its employees for the years 2001 and 2002. Those documents had been specifically requested by the director in his second RFE. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit that evidence prior to the September 9, 2003 date specified in the second RFE.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the petitioner was put on notice of the evidence required by the director in the second RFE, which specifically requested copies of W-2's and W-3's evidencing wages paid to all of the petitioner's employees for the years 2001 and 2002. Since the petitioner failed to submit those documents as requested, or to offer any explanation for its failure to do so, that evidence is precluded from consideration on appeal by *Matter of Soriano*, 19 I&N Dec. 764.

No other evidence is submitted for the first time on appeal. The assertions of counsel in his brief fail to overcome the decision of the director, for the reasons discussed above.

In summary, the petitioner's evidence fails to establish the petitioner's ability to pay the proffered wage to the beneficiary as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 appeal is dismissed.