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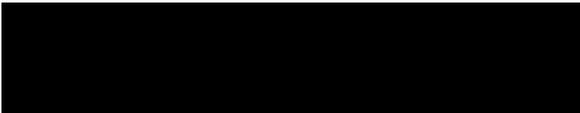


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FILE: 
WAC-03-138-55305

Office: CALIFORNIA SERVICE CENTER

Date: **NOV 02 2005**

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.


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 retail sales company. It seeks to employ the beneficiary permanently in the United States as a store manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director 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 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 nature, for which qualified workers are not available in the United States.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. 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 on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$19.62 per hour (\$40,809.60 per year). The Form ETA 750 states that the position requires 2 years experience.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$747,621.00 and a net annual income of \$326,507.00, and to currently employ 9 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents as supporting documentation regarding ability to pay: Form 1120S U.S. Income Tax Return for an S corporation for 2001 and 2000, Form 100 California S corporation Franchise or Income Tax Return for 2001 and 2000.

On May 15, 2003, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence (RFE) pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested this evidence for the year 2002 to the present.

In response, the petitioner submitted Application for Automatic Extension of Time to File Corporation Income Tax Return for the year 2002 that extended the time to file the income tax return until September 15, 2003, resubmitted Federal Tax Return for 2001 signed by Mr. Pradeep N. Hearath, unaudited Financial Statement for twelve months ended in December 31, 2002, Form 940-EZ Employer's Annual Federal Unemployment (FUTA) Tax Return for 2002, Form 941 Employer's Quarterly Tax Return ending March 31, 2003 with California Employment Development Department Form DE-6 Quarterly Wage Reports for the first quarter of 2003, and for all four quarters of 2002.

The director denied the petition on May 17, 2004, finding that the evidence submitted with the petition and in response to its RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the beneficiary is currently working for the petitioner and based on the memorandum issued by Citizenship and Immigration Service (CIS) dated May 4, 2004, the documents submitted as well as attached Form DE-3/DE-6 as the additional documents clearly evidence the petitioner's ability to pay the proffered wage of \$40,810.00 per annum.

Pursuant to the regulations set forth at 8 C.F.R. § 204.5(g)(2), CIS will first examine whether the petitioner employed and paid the beneficiary during a given period to determine the petitioner's ability to pay the proffered wage 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 submitted Form 941 with California Employment Development Department Form DE-6 Quarterly Wage Reports for the first quarter of 2003 and four quarters of 2002, however, no evidence shows that the petitioner employed and paid the beneficiary any amounts in 2001, the year of the priority date, 2002 and 2003 although the petitioner submitted Form DE-3/DE-6 for the first quarter of 2004 showing the petitioner employed and paid the beneficiary \$9,417.60 for that quarter¹. Therefore, the petitioner has not established that it employed and paid the beneficiary full of the proffered wage during the period from the priority date through 2004.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's

¹ This rate of pay would be approximately \$37,670.40 per year.

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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000 and 2001. As noted above, the record before the director closed on July 2, 2003 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2002 was not available because the petitioner filed extension for 6 months until September 15, 2003. The petitioner did not submit a copy of its federal income tax return for 2002 prior to the decision of the director, nor has it submitted that return on appeal. Therefore, the petitioner's tax return for 2001 is the most recent return available and that year is also the year of the priority date.

The petitioner's tax return for 2001 demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$40,809.60 per year from the priority date:

In 2001, the Form 1120S stated net income² of \$19,783.

Therefore, the petitioner did not have sufficient net income to pay the proffered wage for the year 2001, the year of the priority date.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

² Ordinary income (loss) from trade or business activities as reported on Line 21.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the year of 2001 were \$28,701. The petitioner did not have sufficient net current assets in 2001 to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel submitted the petitioner's unaudited and incomplete financial statements for calendar year 2002 with response to the director's RFE. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the response to the RFE are not persuasive evidence. The financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they represent audited statements. Furthermore, the financial statements show that the petitioner's net profit for the year of 2002 was \$29,790 and it does not provide any information on assets since it contains the statement of income and expense only. Therefore, the financial statements submitted would not establish that the petitioner had either sufficient net income or net current assets to pay the proffered wage in 2001 even if they were audited and had been accepted as acceptable evidence to demonstrate the petitioner's ability to pay.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states:

Furthermore, documentation supplied by individuals with personal knowledge of the employer's business and finance is persuasive. Such documentation includes, but is not limited to, affidavits by the employer's banker, accountant or shareholders, bank statements, inventory records, and tax returns. Please see *The Whisters*, 90-INA-569 (Jan. 31, 1992), *Azumano Travel Service, Inc.*, 90-INA-215 (Sept. 4, 1991), *Royal Antique Rugs, Inc.*, and *Ohsawa America*, 88-INA-240 (Aug. 20, 1988).

However, the record of proceeding, as currently constituted, does not contain any affidavits by the petitioner's banker, accountant or shareholders, bank statements, inventory records items as asserted by counsel except for

³According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

federal and California tax returns and the unaudited financial statements. AAO will discuss counsel's assertion as a legal application issue. Counsel's assertion of reliance on these documents to demonstrate the petitioner's ability to pay the proffered wage takes the applicable statutory and regulatory interpretations out of their context. First, counsel's statement and citations are quoted from Board of Alien Labor Certification Appeals (BALCA) Deskbook. *See Section I, Chapter 30, BALCA Deskbook.* This section and all cited cases provide the rules and requirements how an applicant for labor certification can show that it has enough funds available to pay the wage or salary offered to the alien. Therefore, they do not apply to the instant case since immigrant petitions for alien workers and applications for labor certification are two different objects of legal application. Secondly, the procedures governing the ability to pay the wage offered for labor certifications are set forth at 20 C.F.R. §656(c)(1) while the procedures governing the ability to pay the proffered wage for immigrant petitions are set forth at 8 C.F.R. § 204.5(g)(2). Finally, the four cases of *The Whislers*, 90-INA-569 (Jan. 31, 1992), *Azumano Travel Service, Inc.*, 90-INA-215 (Sept. 4, 1991), *Royal Antique Rugs, Inc.*, 90-INA-529 (Oct. 30, 1991), and *Ohsawa America*, 88-INA-240 (Aug. 30, 1988) are reviewed by BALCA of the United States DOL Certifying Officer's denial of labor certification applications under 20 C.F.R. § 656.

Counsel does not state how these rules applied to labor certification applications by BALCA are applicable to the instant petition before the Department of Homeland Security's AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The pay rate paid by the petitioner to the beneficiary in the first quarter of 2004 was still less than the proffered wage. The regulation 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.