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FILE: EAC-02-297-51578 Office: VERMONT SERVICE CENTER Date: **OCT 14 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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.

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 2, 2001. The proffered wage as stated on the Form ETA 750 is \$13.17 per hour, which amounts to \$27,393.60 annually. On the Form ETA 750B, signed by the beneficiary on January 18, 2001, the beneficiary claimed to have worked for the petitioner beginning in July 1998 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on September 23, 2002. On the petition, the petitioner claimed to have been established in February 1986, to currently have 16 employees and to have a gross annual income of \$776,000.00. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated August 1, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director stated that, according to CIS records, one I-140 petition of the petitioner had been approved on behalf of another beneficiary on June 5, 2002 and two other I-140 petitions were also pending. The director stated that the petitioner must therefore demonstrate its ability to pay the proffered wage of three beneficiaries. The instant petition was apparently one of the two pending petitions mentioned by the director in the RFE.

In response to the RFE, the petitioner submitted a letter dated October 22, 2003, and no additional evidence. The petitioner's submission in response to the RFE were received by the director on October 23, 2003.

In a decision dated May 12, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage to the beneficiary of the instant petition as well as to the beneficiaries of two other petitions filed by the same petitioner. The director therefore denied the petition.

On appeal, counsel submits an appeal statement and no additional evidence. Counsel states on appeal that the petitioner's tax returns show sufficient resources to pay the proffered wages to three beneficiaries. Counsel also states that the petitioner made a business decision to have additional cooks with the expectation that the business will increase and the company will make more money.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 January 18, 2001, the beneficiary claimed to have worked for the petitioner beginning in July 1998 and continuing through the date of the ETA 750B. However, the record contains no evidence corroborating the beneficiary's claimed employment with the petitioner nor indicating the amount of any compensation paid by the petitioner to the beneficiary.

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. 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 corporation. The record contains a copy of the petitioner’s Form 1120 U.S. Corporation Income Tax Return for 2001. The record before the director closed on October 23, 2003 with the receipt by the director of the petitioner’s submission in response to the RFE. As of that date the petitioner’s federal tax return for 2002 should have been available, but it was not submitted. The RFE did not specifically request a copy of the petitioner’s tax return for 2002, though the RFE referred to copies of the beneficiary’s Form W-2 Wage and Tax Statements for 2001 and 2002 as possible evidence which might be submitted to establish the petitioner’s ability to pay the proffered wage.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return.

The petitioner’s tax return for 2001 states an amount for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$30,173.00	\$27,393.60*	\$2,779.40
2002	not submitted	\$27,393.60*	no information

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

If the instant petition was the only petition submitted by the petitioner, the above information would be sufficient to establish the petitioner’s ability to pay the proffered wage in the year 2001. However, the above information fails to establish the petitioner’s ability to pay the proffered wage for even one beneficiary in the year 2002. Although the RFE did not specifically request a copy of the petitioner’s tax return for 2002, the burden of proof is on the petitioner in these proceedings. Moreover the petitioner is given notice of its evidentiary burden by the regulation at 8 C.F.R. § 204.5(g)(2), which states in part, “The petitioner must demonstrate this ability [to pay the proffered wage] at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence.” As noted above, the record before the director did not close until October 23, 2003, a date on which the petitioner’s federal tax return for 2002 should have been available. The petitioner has submitted no explanation of its failure to submit a copy of its federal tax return for 2002.

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 corporate taxpayer’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 corporation’s current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation’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 amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	-\$45,875.00	-\$20,620.00	\$27,393.60*
2002	not submitted	not submitted	\$27,393.60*

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The figure for net current assets at the end of the year 2001 is equivalent in accounting terms to the figure for net current assets for the beginning of the year 2002, and that figure is therefore relevant to the petitioner's ability to pay the proffered wage in 2002. However, since the figures for the petitioners net current assets for the beginning of 2001 and for the end of 2001 are both negative, they provide no further support to establish the petitioner's ability to pay the proffered wage in 2001 or in 2002.

Counsel states on appeal that depreciation expenses should be considered as additional financial resources of the petitioner. While it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>.

For the foregoing reasons, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. See *Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements. Moreover, even in situations where a petitioner's net income and net current assets for a given year are insufficient to establish the petitioner's ability to pay the proffered wage, the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel also states on appeal that the petitioner made a business decision to have additional cooks with the expectation that the business will increase and the company will make more money. However, the record contains no evidence pertaining to any increase of income expected as a result of hiring the beneficiary. The unsupported 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 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 (BIA 1980).

Counsel asserts that the evidence establishes the petitioner's ability to pay the proffered wage under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel states that the petitioner has been in business for 18 years, that it has labor costs in excess of \$152,000.00 and that the petitioner showed a profit during the relevant period. Counsel's statement that the petitioner has been in business for 18 years is supported by a statement of the petitioner on the I-140 petition that the petitioner was established in February 1986 and by

statements on the petitioner's Form 1120 tax return for 2001 that the petitioner's date of incorporation was February 26, 1986. Counsel's assertion concerning the petitioner's labor costs is supported by a figure of \$152,385.00 stated as a cost of labor on the Schedule A, line 3 attached to the petitioner's Form 1120 tax return for 2001. Finally, counsel's assertion that the petitioner showed a profit during the relevant period is supported by the figure of \$30,173.00 stated on line 28 of the petitioner's Form 1120 for 2001, for taxable income before net operating loss deduction and special deduction.

Although counsel's assertions are supported by the record, counsel's reliance on *Matter of Sonogawa*, is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Counsel points to evidence pertaining to the year 2001, but the petitioner has not submitted evidence concerning its financial situation in other years. No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case. Moreover, CIS electronic records show that the petitioner has filed other petitions for other beneficiaries. Any consideration of the totality of the petitioner's circumstances would have to include consideration of those other petitions, which counsel's assertions fail to mention.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2).

CIS electronic records show that the petitioner has filed three other I-140 petitions which have been pending at the same time as the instant petition. A petition with receipt number EAC-02-273-54008 was approved on June 5, 2003. Another petition, with receipt number EAC-03-062-50870, was denied on February 25, 2004, with no appeal taken. A third petition, with receipt number EAC-04-147-53104, was denied on July 26, 2005, with no appeal taken.

Even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification*

Beneficiaries, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996); see [REDACTED] Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 [REDACTED] & Company, Inc. 2004) (available at "LexisNexis" Mathew Bender Online). Therefore the approved ETA 750's underlying any withdrawn petitions retain potential relevance to the petitioner's total proffered wage commitments for a given year. Similarly, for any petition which has been denied, the underlying approved ETA 750 would remain available for a new I-140 petition for the same beneficiary or for a substituted beneficiary, provided that the reason for the earlier I-140 denial was one which could be cured by a new petition for same beneficiary, or for a substituted beneficiary.

As noted above, the RFE had requested information on the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition as well as to pay the proffered wages to the beneficiaries of other petitions submitted by the petitioner. In response to the RFE, counsel submitted a letter dated October 22, 2003, but submitted no additional evidence. As discussed above, the unsupported statements of counsel are not evidence and are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. at 188-89 n.6; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503. A failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 labor certifications.

In his decision, the director correctly stated the petitioner's net income in 2001 and correctly calculated the petitioner's year-end net current assets for that year. The director found that the petitioner's net income had been relied upon in establishing the petitioner's ability to pay the proffered wage to the beneficiary in the previously approved petition, receipt number EAC-02-273-54008, and that the petitioner could not rely upon that same figure to establish its ability to pay the proffered wage to the beneficiary of the instant petition. The director found that the petitioner's net current assets in 2001 failed to provide additional support to establish the petitioner's ability to pay the proffered wage. The director therefore denied the petition.

The decision of the director to deny the petition was correct. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition. Moreover, the evidence fails to establish the petitioner's ability to pay the proffered wage to the beneficiaries of other petitions submitted by the petitioner or to other potential substituted beneficiaries for whom petitions may be submitted based on the same approved Form ETA 750 labor certifications.

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.