

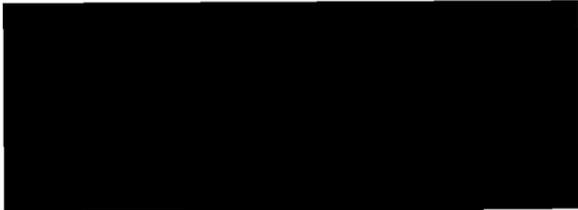


U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: APR 25 2006

EAC-03-013-50911

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition¹ was denied by the Acting Center Director (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 specialty foreign food cook. 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.²

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).

¹ This is a duplicate petition filed by the same petitioner on behalf of the same beneficiary. The previous identical petition was filed on December 26, 2001 based on the same certified labor certification application and denied on May 14, 2002 because of failure to establish the petitioner's ability to pay the proffered wage.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). 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.

Here, the Form ETA 750 was accepted on March 26, 2001. The proffered wage as stated on the Form ETA 750 is \$17.61 per hour or \$36,628.80 per year.³ The Form ETA 750 states that the position requires two (2) years of experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. On the petition, the petitioner claimed to have been established in 1989, to have gross annual income \$935,710 and currently to employ 20 workers. On the Form ETA 750B, signed by the beneficiary on March 23, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted its Form 1120S U.S. Income Tax Return for an S Corporation for 2000 and 2001 pertinent to the ability to pay the proffered wage.

On March 17, 2004, 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 such evidence as of March 26, 2001, the date of filing. The director requested the beneficiary's W-2 form.

In response, the petitioner submitted its tax returns for 2000, 2001 and 2002, and the beneficiary's W-2 form for 2001.

The director denied the petition on September 22, 2004, finding that the evidence submitted with the petition and in response to the 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 fact that the petitioner was paying the beneficiary more than the proffered wage in 2004 itself is sufficient to establish the petitioner's ability to pay, and that the petitioner is a sole proprietorship 100% owned by Mr. [REDACTED] and also as landlord Mr. [REDACTED] could waive or reduce the rental payment to him by the petitioner, thus, there could be an additional \$170,000 to be utilized to pay employee salaries.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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, supported by the petitioner's tax returns counsel claims on appeal that the petitioner paid wages and salaries of \$249,044 in 2000, \$288,372 in 2001, \$287,093 in 2002 and \$266,809 in 2003. However, the petitioner does not advise that the beneficiary will replace any workers. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

³ On appeal counsel mistakenly asserts that the certified ETA 750 sets forth an hourly wage of \$17.61 equaling \$32,050.20 per year for a 35-hour week. In fact, the ETA 750 expressly indicates 40 hours as basic total hours per week at Item 10. Counsel's assertion is without factual support. Therefore, the annual proffered wage should be \$36,628.80 instead of \$32,050.20.

The record of proceeding contains the beneficiary's W-2 forms for 2000 through 2001 and pay statements from September 29 to October 20, 2004. The beneficiary's W-2 form for 2000 is not relevant in the instant case since the priority date is March 26, 2001. The petitioner did not submit the beneficiary's W-2 forms for 2002 and 2003. The W-2 form shows that the petitioner employed and paid the beneficiary \$9,518.05 in 2001. The pay statements for 2004 show that as of October 20 the petitioner paid the beneficiary \$37,554.60, which is more than the proffered wage. Therefore, the petitioner established that it paid the beneficiary the full proffered wage in 2004, and partial proffered wages (\$27,110.75 less than the proffered wage) in 2001, the year of the priority date. However, the petitioner did not establish that it paid any compensation to the beneficiary during the years 2002 and 2003. Counsel's assertion that the petitioner established its continuing ability to pay the proffered wage with evidence that the petitioner paid the full proffered wage in 2000 and 2004 is misplaced.

Counsel also refers to the May 4, 2004 memorandum from William R. Yates concerning using one of three methods to make a positive ability to pay determination. The AAO notes that the purpose of the memorandum is to provide guidance to adjudicators on when requests for evidence are required or should not be issued according to the regulation at 8 C.F.R. § 204.5(g)(2). It is not the regulation for adjudicators to determine the ability to pay but just guidance to decide whether an RFE should be issued. In the instant case, the petitioner did not demonstrate its ability to pay the proffered wage through the methods set forth at 8 C.F.R. § 204.5(g)(2). The regulation at 8 C.F.R. § 204.5(g)(2) expressly requires the petitioner to demonstrate its ability to pay the proffered wage each year from the priority date until the beneficiary obtains lawful permanent residence. Wages already paid to the beneficiary in one year are not available to prove the ability to pay the proffered wage for other years.

Therefore, the petitioner is obligated to demonstrate that it had ability to pay the difference of \$27,110.75 between wages already paid to the beneficiary and the proffered wage in 2001, and the full proffered wage in 2002 and 2003.

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). On appeal counsel relies on the petitioner's gross receipts or sales in the amount of \$846,706 for 2000, \$935,710 in 2001, \$1,077,795 in 2002 and \$1,060,590 in 2003 in determining the petitioner's ability to pay the proffered wage. Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. 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 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 record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000 through 2003. However, the 2000 tax return is not dispositive in the instant case since the priority date is March 26, 2001. Therefore, the AAO will review and consider the petitioner's 2001 through 2003 tax returns. The tax returns in the record demonstrate the following financial information concerning the petitioner's ability to pay the difference of \$27,110.75 between the wages already paid to the beneficiary and the proffered wage in 2001 and the full proffered wage of 36,628.80 in 2002 and 2003.

In 2001, the Form 1120S stated net income⁴ of \$3,913.

In 2002, the Form 1120S stated net income of \$(11,561).

In 2003, the Form 1120 stated net income of \$36,976.

Therefore, for the years 2001 through 2002, the petitioner did not have sufficient net income to pay the difference between the wage paid and the proffered wage or the full proffered wage respectively, however, the petitioner established that it had sufficient net income to pay the proffered wage to the beneficiary for 2003.

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.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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 current assets in 2001 were \$22,863 and current liabilities were \$43,490, thus net current assets were \$(20,627). The petitioner's current assets in 2002 were \$25,869 and current liabilities were \$60,071, thus net current assets were \$(34,202). The petitioner had negative net current assets for both years. Therefore, the petitioner had

⁴ Ordinary income (loss) from trade or business activities as reported on Line 21 of Form 1120S.

⁵ According 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.

insufficient net current assets to pay either the difference between the wage paid to the beneficiary and the proffered wage in 2001 or the proffered wage in 2002 respectively.

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 or difference between the wage paid and 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 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 asserts that since the petitioner is a sole proprietorship, the owner owns the building the petitioner is doing in and the petitioner pays rents of \$170,000 to the owner, that therefore, this amount is available to be utilized to pay the beneficiary the proffered wage. Counsel's assertion is misplaced. The evidence in the record shows that the petitioner is structured as an S corporation and files Form 1120S U.S. Income Tax Return for an S Corporation although Schedule K-1 attached to Form 1120S evidences that Mr. [REDACTED] owns 100% of the shares of the petitioning entity. However, the record does not contain any evidence showing that the petitioner is a sole proprietorship. Because an S corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, in the instant case, [REDACTED] real property and rental income from the property cannot be considered in determining the petitioner's ability to pay the proffered wage.

Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the 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). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with an S corporation.

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 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.