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U.S. Citizenship  
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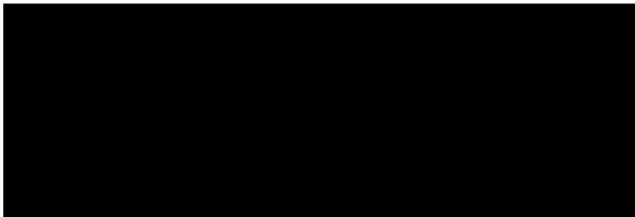
FILE: EAC 04 131 55106 Office: VERMONT SERVICE CENTER Date: AUG 15 2006

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Other Worker Pursuant to § 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 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 pizza and subs business. It seeks to employ the beneficiary permanently in the United States as a fast food 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 21, 2005 denial, the only issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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, 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. 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 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 CFR § 204.5(d). The priority date in the instant petition is April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$31.31 per hour or \$65,124.80 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on

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<sup>1</sup> 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).

appeal includes counsel's statement. Other relevant evidence includes copies of the petitioner's 2001 and 2002 Forms 1120, U.S. Corporation Income Tax Returns, for fiscal years February 1 through January 31, and copies of the petitioner's payroll records for the period February 2, 2004 through February 29, 2004 for six employees, not including the beneficiary. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's fiscal years 2001 and 2002 tax returns reflect a taxable income before net operating loss deduction and special deductions or net income of -\$19,355, and \$1,883, respectively. The petitioner's fiscal years 2001 and 2002 tax returns also reflect net current assets of -\$15,749, and -\$553, respectively.

On appeal, counsel claims that the petitioner was not given an opportunity to provide additional financial documentation, that CIS failed to consider the beneficiary's ability to generate income when determining the petitioner's ability to pay the proffered wage, and that the decision failed to consider the current payroll record submitted with the petition. Counsel also requests an extension of thirty days in which to file a brief to supplement the appeal. However, after the AAO faxed counsel regarding the brief, counsel stated that he did not file a brief or evidence in support of the appeal as indicated on Form I-290B and, instead, had filed a motion to reopen and was merely waiting for the director's decision on the motion to reopen. Counsel is mistaken, the record of proceeding contains no evidence that counsel filed a motion to reopen, and his statement on appeal contains no reference to a motion to reopen. Counsel does note that his law office has a change of address, but no evidence is in the record of proceeding of the change of address prior to counsel's reply to the AAO's fax. Therefore, in the instant case, a decision will be determined based on the record as it is currently constituted.

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 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 Sonogawa*, 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, dated April 23, 2001, the beneficiary included the petitioner as his present employer. However, the petitioner has not provided the beneficiary's Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary indicating that the petitioner employed the beneficiary in fiscal years 2001 and 2002. In addition, the petitioner's payroll records do not include the beneficiary as being paid by the petitioner. Therefore, CIS has no evidence that the petitioner compensated the beneficiary for his employment during fiscal years 2001 and 2002, and those funds cannot be used as evidence of the petitioner's ability to pay the proffered wage of \$65,124.80 during those years.

As an alternative 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, 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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 CIS 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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.<sup>2</sup> 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 a corporation's end-of-year 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 petitioner's net current assets in fiscal years 2001 and 2002 were -\$15,749, and -\$553, respectively. The petitioner could not have paid the proffered wage of \$65,124.80 in fiscal years 2001 and 2002 from its net current assets.

Counsel contends that the director failed to allow the petitioner to provide additional documentation in support of his petition. However, the director is not obligated to always issue a request for evidence (RFE). The regulation at 8 C.F.R. § 103.2(b)(8) states in pertinent part:

*Request for evidence.* If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. . .

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and **may** request additional evidence, including blood tests.

In the instant case, the petitioner submitted its fiscal years 2001 and 2002 income tax returns as proof of its ability to pay the proffered wage. The 2001 tax return reflected a net income of -\$19,355 and net current assets of -\$15,749. The 2002 tax return reflected a net income of \$1,883 and net current assets of -\$553. The petitioner could not have paid the proffered wage from either its net income or its net current assets in fiscal years 2001 and 2002. Since the 2001 tax return represented the year of the priority date and since the petitioner could not pay the wages from either its net income or its net current assets, the director determined that the petitioner was ineligible at that point and was not obligated to continue the adjudication further by issuing a RFE. In addition, the director's decision was further supported, since the petitioner's fiscal year 2002 tax return also established that the petitioner did not have sufficient funds to pay the proffered wage of \$65,124.80 from either its net income or its net current assets.

Counsel asserts that CIS failed to consider the beneficiary's ability to generate income when determining the petitioner's ability to pay the proffered wage of \$65,124.80. In this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a fast food manager will significantly increase profits for a pizza and subs business. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. In addition, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel claims that the director's decision failed to consider the current payroll records when determining the petitioner's ability to pay the proffered wage of \$65,124.80. However, the director is not obligated to consider payroll records that do not include the beneficiary when the petitioner claims that it employs the beneficiary, when the payroll records are not pertinent to the date of filing, April 26, 2001, and when the evidence in the record already establishes that the petitioner is unable to pay the proffered wage from either its net income or its net current assets.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the

employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner has provided tax returns for the fiscal years 2001 and 2002, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In fact, both tax returns show net incomes and net current assets below the proffered wage of \$65,124.80. There is also no evidence of the petitioner's reputation throughout the industry. Furthermore, it is noted that in both fiscal years 2001 and 2002, the petitioner's total salaries and wages were all below the proffered wage of \$65,124.80.

The petitioner's fiscal year 2001 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$19,355 and net current assets of -\$15,749. The petitioner could not have paid the proffered wage of \$65,124.80 from either its net income or its net current assets in fiscal year 2001.

The petitioner's 2002 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$1,883 and net current assets of -\$553. The petitioner could not have paid the proffered wage of \$65,124.80 from either its net income or its net current assets in fiscal year 2002.

Beyond the decision of the director, there is a second issue pertinent to this proceeding. That issue is whether the beneficiary met the experience requirements of the proffered job as specified by the Form ETA 750.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(ii) *Other documentation* – (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program

occupational designation. The minimum requirements for this classification are at least two years of training or experience.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 26, 2001.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14, which contains the only pertinent information, requires that the beneficiary have one year of experience in the job offered.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of fast food manager must have one year of experience as a fast food manager.

In the instant case, the petitioner failed to provide any evidence that the beneficiary possessed the one-year experience as a fast food manager as required by the labor certification. It is noted that the director failed to cite the lack of experience in his denial, but denied the petitioner based on the petitioner's ability to pay alone. However, since the petition was deniable on the petitioner's lack of funds to pay the proffered wage of \$65,124.80, the director was not obligated to request evidence of the beneficiary's experience, as the request would have been a moot point.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. In addition, the petitioner has not established that the beneficiary met the experience requirements of the labor certification at the time of filing of April 26, 2001. Therefore, the decision of the director to deny the petition was appropriate based on the evidence in the record before the director.

For the reasons discussed above, the assertions of the petitioner on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.