

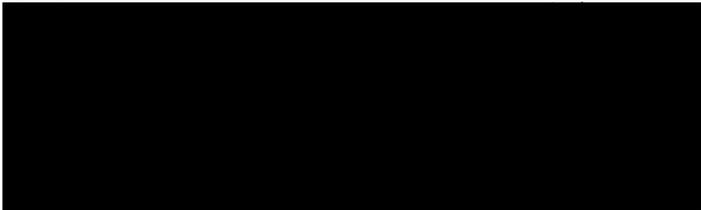
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FILE:



EAC-03-261-52675

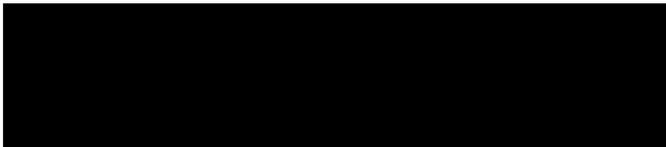
Office: VERMONT SERVICE CENTER

Date:

AUG 15 2006

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 petition 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 foreign food specialty 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.

Counsel filed an appeal timely but without a brief and additional evidence. 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 make its decision based on evidence already submitted and kept in the record only.

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 \$14.75 per hour (\$30,680.00 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of \$612,525, to have a net annual income of \$7,704, and to currently employ 2 part-time workers.

With the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 pertinent to its ability to pay the proffered wage. Because the tax return does not establish the petitioner's ability to pay the proffered wage, the director issued a request for evidence (RFE) on June 3, 2004, requesting additional evidence to establish that the petitioner had the ability to pay the proffered wage as of April 30, 2001 and continuing to the present. The director also requested the beneficiary's Form W-2 Wage and Tax Statements. In response to the RFE, counsel submitted the beneficiary's W-2 form<sup>1</sup> for 2001 and the petitioner's tax returns for 2001, 2002 and 2003. On October 19, 2004 the director denied the petition, finding that the submitted tax return shows that the petitioner did not have sufficient net income or net current assets to pay the beneficiary's proffered wage, therefore, did not establish that it had the ability to pay the proffered wage for 2001, the year of the priority date.

On appeal, counsel argues that the depreciation expenses should be considered as available income in 2001 per the AAO decision.

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, the petitioner submitted the beneficiary's W-2 form for 2001, which indicates that the petitioner paid the beneficiary \$3,600 in 2001. The petitioner did not submit any evidence of the beneficiary's compensation from the petitioner for 2002 and 2003. Therefore, the petitioner is obligated to demonstrate that it could pay the difference of \$27,080 between the wages actually paid to the beneficiary and the proffered wage in 2001 and the full proffered wage of \$30,680 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). Reliance on its gross receipts with depreciation and on wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid compensation to officers 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. In response to the director's RFE and on appeal, counsel claimed that the depreciation of \$20,448 in 2001 did

<sup>1</sup> The W-2 form appears the beneficiary's name as [REDACTED] instead of [REDACTED] as on forms ETA 750, I-140 and I-485. However, the record contains a copy of a birth certificate on which the beneficiary's name appears as [REDACTED] and his father's name is [REDACTED] and mother's name is [REDACTED]. Therefore, we assume [REDACTED] is the instant beneficiary.

not represent an expense to the business, and must be included as 'income' to the business in determining the petitioner's ability to pay the proffered wage. Counsel's reliance on depreciation is misplaced. The court in *Chi-Feng Chang* further clearly 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 2001, 2002 and 2003. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the difference of \$27,080 in 2001 and the proffered wage of \$30,680 per year in 2002 and 2003.

In 2001, the Form 1120S stated net income<sup>2</sup> of \$(12,744).

In 2002, the Form 1120S stated net income of \$33,521.

In 2003, the Form 1120S stated net income of \$50,302.

Therefore, for the years 2002 and 2003 the petitioner had sufficient net income to pay the proffered wage of \$30,680, however, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2001.

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. Contrary to counsel's assertion in the response to the director's RFE, the AAO rejects the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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>3</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 the total of a corporation's end-of-year net current assets and

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

<sup>3</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.

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.

Calculations based on the Schedule L's attached to the petitioner's 2001 tax return yields that the petitioner had current assets of \$103,686 and current liabilities of \$126,110, thus the net current assets in 2001 were \$(22,424). Therefore, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage for the year of 2001.

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 urged in response to the director's RFE that a combination of the petitioner's net income, total assets and year end cash should be considered in calculating the funds available to the petitioner to pay the proffered wage. The calculation adding cash on hand to the net profits would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Adding the petitioner's Schedule L Cash to its net income would likely be duplicative, at least in part. The petitioner's Schedule L Cash is included in the calculation of the petitioner's net current assets, which are considered separately from its net income.

Combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage is also unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

In response to the director's RFE counsel asserted that sum of \$90,737 in the "other current liabilities" on line 18 of Schedule L were future obligations and did not represent liabilities to the business in 2001. However, counsel did not submit any independent objective evidence, such as amended tax return for 2001 or other documentary evidence to correct that accounting and taxation mistake to support her assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On appeal counsel refers to two decisions issued by the AAO concerning consideration of depreciation as available funds in determining the petitioner's ability to pay the proffered wage, but does not provide their published citations. 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, unpublished 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).

Counsel's assertions in response to the RFE and on appeal cannot be concluded to outweigh the evidence presented in the tax return as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage in the year of the priority date.

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.