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FILE: EAC 04 133 51176 Office: VERMONT SERVICE CENTER

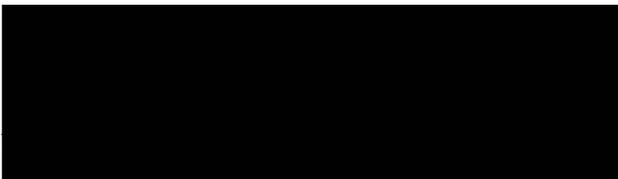
Date: DEC 06 2006

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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a catering company. It seeks to employ the beneficiary permanently in the United States as a chef or executive chef. 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.

On appeal the counsel submitted a statement pertinent to the issues of the case.

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 granting 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day 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). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$50,000 per year.

The Form I-140 petition in this matter was submitted on March 31, 2004. On the petition, the petitioner stated that it was established on June 21, 1999 and that it employs eight to ten workers. The petition states that the petitioner's gross annual income is \$300,000 and that its net annual income is \$200,000. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Commack, New York.

In support of the petition, counsel submitted the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, a letter dated March 25, 2004 from the petitioner's owner, and a letter dated March 29, 2004 from counsel.

The petitioner's 2001 tax return shows that it is a corporation, that it incorporated on June 21, 1999, and that it reports taxes pursuant to accrual convention accounting and the calendar year. During 2001 the petitioner

declared a loss of \$1,471 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. That return further shows that the petitioner paid no Line 7 Compensation of Officers, \$62,175 in Line 8 Salaries and Wages, and no Schedule A Line 3 Cost of Labor during that year.

In his March 25, 2004 letter the petitioner's owner stated that he is willing to allocate \$50,000 of his own salary toward payment of the wage proffered in this case. In his March 29, 2004 letter counsel reiterated that the petitioner's owner is prepared to reduce his own wages as necessary to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on August 6, 2004, requested, *inter alia*, additional evidence pertinent to that ability. The service center also specifically requested that, if it employed the beneficiary during 2001, 2002, and 2003 it provide Form W-2 Wage and Tax Statements showing the amounts it paid him during those years.

In response, counsel submitted the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, a letter dated November 1, 2004 from the petitioner's owner, and a letter dated December 3, 2004. The petitioner submitted no W-2 forms, an apparent acknowledgement that it did not employ the beneficiary during 2001, 2002, or 2003.

The petitioner's 2002 return shows that during that year it declared a loss of \$1,514 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. During that year the petitioner paid no officer compensation, salaries and wages of \$7,896, and no cost of labor.

In his November 1, 2004 letter the petitioner's owner acknowledged that the petitioner had operated at a loss but stated that its operations had required hall rental and a wait staff. The petitioner's owner further stated that the petitioner's current business plan is to become an off-premise caterer and thus reduce rent by \$87,000 and salary expenses by \$12,000, annually. The petitioner's owner continued that, if that plan succeeded and the petitioner's gross receipts remained unchanged, the petitioner would, therefore, have an additional \$92,000 annually, allowing it to turn a profit and pay the proffered wage.¹ The petitioner's owner also stated that the date for filing the petitioner's 2003 tax return had been extended, implying that the return was then unavailable.

In his December 3, 2004 letter counsel reiterated that the petitioner's owner is prepared to allocate \$50,000 of his own salary to payment of the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on January 21, 2005, denied the petition.

¹ The petitioner's owner initially referred to annual rent being reduced by \$87,000 as stated here. Later, in the same letter, the owner indicated that rent would be reduced by \$80,000. Consequently, the petitioner projected in its closing statement that the reduction in rent and salary expenses would free up a total of \$92,000, (rather than \$99,000.)

On appeal, counsel stated,

- 1) [CIS] erred in law and fact.
- 2) [CIS] failed to take into account available income that would be paid to the beneficiary from the petitioner's [owner's] own salary. [Emphasis in the original.]
- 3) The law requires income to be shown at the time of filing – as of April 2001 – and during this period the petitioner had the necessary income.
- 4) The events of September 11, 2001 created an economic situation of adversity beyond the petitioner's control which warrants favorable exercise of discretion.

Counsel asserted on appeal, and at various other times, that the petitioner's owner would reduce his own salary by an amount sufficient to pay the proffered wage. The petitioner's officer compensation, salaries and wages, and cost of labor, combined, equaled \$63,275 during 2001 and \$7,896 during 2002. The petitioner stated on the Form I-140 that it employs eight to ten workers. The evidence does not support that the petitioner paid its owner \$50,000 during 2001 and flatly contradicts the assertion that it paid him \$50,000 during 2002. The evidence does not, therefore, support the assertion that the petitioner's owner could have reduced his own wages by an amount sufficient to pay the proffered wage during those years.

The petitioner's owner also asserted that he intended to reduce the petitioner's rent and the petitioner's other employees' salaries sufficiently that he would be able to pay the proffered wage. The record contains no other evidence, however, that the petitioner can reduce its rent payments and salary expense without lowering its gross receipts or adding to its other expenses. The assertion that it can is speculative. The savings and increased profits postulated by the petitioner's owner will not be included in the determination of the petitioner's ability to pay the proffered wage.²

Counsel asserts that the petitioner is obliged to show the ability to pay the proffered wage on the priority date, which is correct. Counsel implies, however, that the petitioner is not required to show the ability to pay the proffered wage after that date. However, the regulation at 8 C.F.R. § 204.5(g)(2), set out above, states that, "The petitioner must demonstrate [the ability to pay the proffered wage] at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." That regulation clearly states that the petitioner is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, rather than merely the ability to pay the proffered wage on a particular date or during some other period.

Counsel states that the events of September 11, 2001 adversely affected the petitioner's profits. The petitioner is located on Long Island, more than 40 miles from Manhattan. The record contains no evidence that the events of September 11, 2001 adversely affected the catering business in the petitioner's area and, more concretely, no evidence that those events adversely affected the petitioner's business. The only indication in the record that those events affected the petitioner's profits is counsel's own statement.

² Further, although the petitioner's owner states that the change will decrease wages by \$12,000 per year, \$7,896 is the maximum amount by which he could have reduced wages during 2002.

The assertions of counsel 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 Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. Absent supporting evidence, counsel's assertion that the petitioner's poor performance was a result of the events of September 11, 2001 will not be considered.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Chi-Feng Chang* at 537. *See also Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are

typically³ shown on lines 16(d) through 18(d). 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.

The proffered wage is \$50,000 per year. The priority date is April 30, 2001.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to the petitioner with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to the petitioner with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

³ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.