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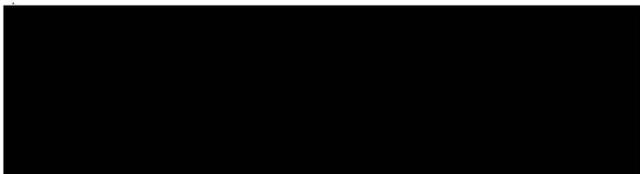
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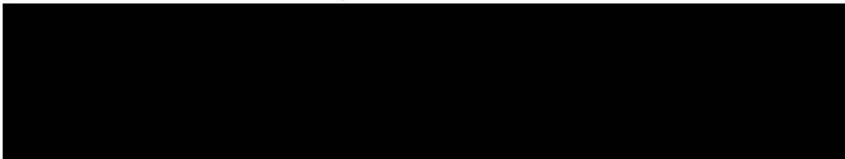


FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: DEC 27 2006
SRC 04 047 50403

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas 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 food service manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. As set forth in the director's February 24, 2005 decision denying 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.

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

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Section 203(b)(3)(A)(iii) of 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:

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$731.60 per week, which amounts to \$38,043.20 annually.

The AAO reviews appeals on a *de novo* basis. *See Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, counsel submits a letter and additional evidence.

Relevant evidence submitted on appeal includes a letter from the petitioner's CPA and a copy of the "Minutes of ESC/AILA Liaison Teleconference, Nov. 16, 1994, reprinted in AILA Monthly Mailing 44, 46-47 (Jan. 1995)" (AILA minutes). Other relevant evidence in the record includes the petitioner's federal income tax returns for 2001 and 2002 and the petitioner's unaudited financial statement for 2002.

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).

On appeal, counsel states, in part: "The officer failed to credit that the depreciation in this case represents actual cash available to the petitioner to pay the beneficiary's salary." Counsel cites unpublished decisions as supporting documentation.

The petitioner's CPA states, in part: "The depreciation expense listed on the 2001 and 2002 tax return form A&I ALP, Inc. [sic] should be added back to the loss listed on both years' returns."

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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 on April 25, 2001, the beneficiary claimed to have worked for the petitioner beginning in November of 1996 and continuing through the date of the ETA 750B. The petitioner, however, has not submitted any evidence of payment of the beneficiary wages, such as W-2 forms or pay stubs. 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)).

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 *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); see also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001 and 2002. The record before the director closed on February 22, 2005 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date the petitioner's federal tax return for 2004 was not yet due. It is noted that the petitioner did not submit federal tax returns or other regulatory-prescribed evidence for 2003. Thus, CIS is able to analyze the petitioner's federal tax return information for 2001 and 2002 only.

In the instant case, the petitioner's tax returns show the following amounts for income on line 21 of page one of the petitioner's Form 1120S as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	-\$32,255.00	\$70,298.20*	-\$70,298.20
2002	-\$14,974.00	\$53,017.20*	-\$53,017.20

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

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's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	-\$490,328.00	\$528,371.20*	-\$528,371.20
2002	-\$45,039.00	\$83,082.20*	-\$83,082.20

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

Counsel's comments on appeal pertaining to the AILA minutes are noted. AILA minutes are said to compel the addition of depreciation. Counsel's reliance on the AILA minutes is misplaced.

The letter on appeal misstates the AILA minutes. Net current assets, as a measure of the ability to pay the proffered wage, are current assets minus current liabilities. At (deficits) of \$490,328.00 in 2001 and \$45,039.00 in 2002, they are less than the proffered wage.

Counsel does not provide a published citation relating to the use of total assets or depreciation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Service or INS, are binding on all CIS 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).

Also noted are the statements by the petitioner's CPA that the depreciation expense listed on the petitioner's 2001 and 2002 tax returns should be added back to the loss listed on those returns, and that the depreciation deducted is for assets purchased in prior years. The depreciation expense, however, would not be converted to cash during the ordinary course of business and, therefore, would not become funds available to pay the proffered wage.

The record also contains the petitioner's unaudited financial statements for 2002. The regulation at 8 C.F.R. § 204.5(g)(2) makes it clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The record also contains bank statements of the beneficiary. CIS, however, would not be examining the personal assets of the beneficiary, but, rather, the ability of the petitioner to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

The record contains no other evidence relevant to the petitioner's financial situation.¹

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

¹ An inquiry on the Corporations Online website of the Florida Department of State, Division of Corporations, at <http://ccfcorp.dos.state.fl.us/corpweb/inquiry/corinam.html>, lists the petitioner's current status as "inactive" and its last event as "revoked for annual report."

In her decision, the director correctly stated the petitioner's ordinary income loss in 2001 and 2002, and correctly calculated the petitioner's year-end net current assets for each of those years. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

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.

Beyond the decision of the director, the evidence fails to establish that the beneficiary is qualified to perform the duties of the proffered position. To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The ETA 750 stipulates, in part, that three years of college are required to perform the proposed job duties. The record, however, contains no evidence that the beneficiary possesses three years of college education. The ETA 750 also stipulates, in part, that five years of employment experience are required to perform the proposed duties. The evidence in the record related to the beneficiary's employment, however, contains inconsistencies. In a letter dated July 2, 1999, the human resources representative from the Royal Caribbean International in Miami, Florida, certified the beneficiary's employment as "assistant waiter/waiter" from December 26, 1991 to February 1, 1997. These employment dates conflict with the following dates provided by the beneficiary on Form ETA 750B for his employment at Royal Caribbean Cruise Line: December 1991 to July 1996. They also conflict with the dates provided in a letter, dated February 10, 2005, from the owner of the Miami Subs Grill in Tampa, Florida, who certifies the beneficiary's employment as general manager and coordinator since November 1996. The record contains no explanation for these inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For these additional reasons, the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.