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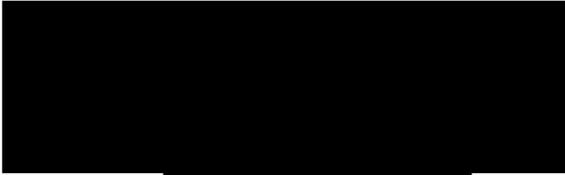
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: DEC 29 2006

IN RE:

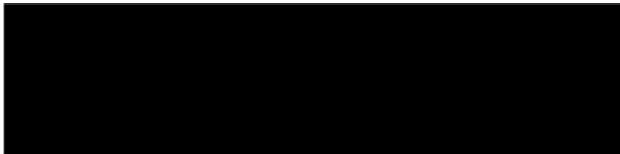
Petitioner:

Beneficiary:



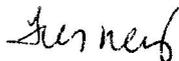
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 instant preference visa petition. The Administrative Appeals Office (AAO) denied an appeal in this matter. The matter was reopened pursuant to a motion and the petition denied again. The matter is now before the AAO pursuant to a second motion to reconsider. **The motion will be granted. The previous decisions of the director and the AAO will be affirmed. The petition will be denied.**

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, 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.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant pleading qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law. The record shows that the motion was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 Application for Alien Employment Certification 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 July 7, 1994. The proffered wage as stated on the Form ETA 750 is \$10.46 per hour, which equals \$21,756.80 per year.

The Form I-140 petition in this matter was submitted on June 8, 1996 by [REDACTED] of 8739 Flower Avenue in Silver Spring, Maryland. That entity, then, is the petitioner in this matter. On the petition, the petitioner left blank the spaces reserved for it to report the date it was established, the number of workers it employs, and its net and gross annual income. On the Form ETA 750, Part B, signed by the beneficiary on June 23, 1994, 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 Silver Spring, Maryland.

The AAO reviews *de novo* issues raised in decisions challenged on appeal or on motion. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal or on motion.¹

In the instant case the record contains (1) the 1994 Form 1120, U.S. Corporation Income Tax Return of [REDACTED] of Maryland, Incorporated, (2) a checking account statement of [REDACTED] of Maryland, (3) a checking account statement of [REDACTED] (4) an account statement pertinent to the [REDACTED] Trust Fund in the name of [REDACTED] and [REDACTED] (5) a 1994 Form W-2 Wage and Tax Statement issued to [REDACTED] by [REDACTED] of Washington, D.C., (6) pay stubs issued by [REDACTED] to [REDACTED] (7) unaudited financial statements of [REDACTED] and (8) a letter dated September 11, 1996 from counsel. The record contains no other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The tax return submitted shows that [REDACTED] of Maryland incorporated on April 1, 1990, and that it reports taxes pursuant to accrual convention accounting and a fiscal year running from April 1 of the nominal year to March 31 of the following year. [REDACTED] of Maryland declared a loss of \$11,016 as its taxable income before net operating loss deductions and special deductions during its 1994 fiscal year, which ran from April 1, 1994 to March 31, 1995. The corresponding Schedule L shows that at the end of that year [REDACTED] of Maryland's current liabilities exceeded its current assets.

In the September 11, 1996 letter counsel stated that [REDACTED] had restaurants in Washington, D.C. and Maryland that were established in 1986 and 1990, respectively, and that after the Washington, D.C. location burned down in 1995 it established another location in Virginia. Counsel states that the beneficiary would replace the incumbent in the proffered position, [REDACTED], when hired, and that [REDACTED] would then work at the Virginia restaurant.

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

The W-2 form submitted shows that during 1994 [REDACTED] in Washington, D.C. paid [REDACTED] \$10,188. The pay stubs submitted show that during each of seven consecutive weeks of 1996 [REDACTED] of Silver Spring, Maryland paid [REDACTED] \$221.74, for a total of \$1,552.18.

The cover sheet submitted with the financial statements is dated October 31, 1995. It shows that it was produced to accompany the financial statements of [REDACTED] and is dated October 31, 1995. The balance sheet submitted under that cover states that it shows the assets and liabilities of [REDACTED] of Maryland [REDACTED] as of December 31, 1995. The Income Statement submitted, which is also pertinent to the finances of [REDACTED] of Maryland [REDACTED], indicates that it reported income for the six months ended December 31, 1995. The cover sheet provided obviously was not produced with the financial statements with which it was submitted.

On the Income Statement the word "six" was crossed out and "one" written in by hand to indicate that the statement reported one month of income, rather than six months. Although the accountant's report that should have accompanied those financial statements was not provided, the statements clearly indicate that they were produced pursuant to a compilation, rather than an audit.

On the instant motion, counsel asserted that the petitioner's depreciation deduction, its checking account balance, and the wages it paid to [REDACTED] demonstrate its ability to pay the proffered wage.

The record contains evidence pertinent to various entities, at least some of which are unlikely to be identical to the petitioner. [REDACTED] of Flower Avenue in Silver Spring, Maryland filed the Form ETA 750 and the Form I-140 visa petition and is the petitioner. The 1994 corporate tax return submitted is that of [REDACTED] of Maryland Incorporated. The financial statements submitted are those of [REDACTED] of Maryland [REDACTED] and were accompanied by a cover sheet pertinent to the financial statements of [REDACTED]. The W-2 forms submitted were issued by [REDACTED] Restaurant on 18th Street N.W. Washington, D.C. The check stubs provided purport to have been issued by [REDACTED] of Silver Spring, Maryland, with no street address provided. One bank statement submitted is of [REDACTED] of Maryland Incorporated of 18th Street, N.W. Washington, D.C. Another bank statement is that of [REDACTED] and shows a post office box address in Silver Spring, Maryland. In his September 11, 1996 letter counsel refers to the petitioner as [REDACTED] Corporation.

This office is unable to determine precisely what portion of the evidence actually pertains to the petitioner in this matter [REDACTED] of Flower Avenue in Silver Spring. As such, the relevance of much of the evidence submitted is unclear. If the petitioner feels that clarification of this matter would serve its purpose this may be accomplished pursuant to a motion. In the absence of any such clarification this office will not assume that all, or any, of the various entities pertinent to which evidence was provided is identical to the petitioner.

Counsel's reliance on the W-2 forms issued by [REDACTED] of Washington, D.C. is misplaced, given that whether that entity is identical to the petitioner is not in evidence. Similarly, the stubs evidencing

that [REDACTED] issued paychecks to [REDACTED] are not relevant evidence in this matter because the petitioner did not document that [REDACTED] is identical to the petitioner. Given that those two entities have not been shown to be identical to the petitioner this office cannot count wages they paid to [REDACTED] as having been available to the petitioner to pay the wages of the proffered position.

Further, counsel indicated in his September 11, 1996 letter that if it were able to replace [REDACTED] with the beneficiary it would transfer [REDACTED] to the Virginia [REDACTED]. If the Virginia restaurant is part of the petitioner, then transferring [REDACTED] to that other restaurant would not free any funds that the petitioner might use to pay additional wages.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.² Third, no evidence was submitted to demonstrate that the funds reported on the bank statements somehow reflect additional funds available to the petitioner that were not reported on its tax returns.

Finally, one bank statement is for an account of [REDACTED] of Maryland, and one is for an account of [REDACTED]. Whether either of those entities is the petitioner in this case, [REDACTED] on Flower Avenue in Silver Spring, Maryland, is unknown. A third statement is pertinent to an account of the [REDACTED] Trust Fund, which is clearly not the petitioning restaurant. For these various enumerated reasons none of the bank balances shown on the bank statements submitted will be considered in the determination of the funds available to the petitioner to pay the proffered wage.

Counsel's reliance on the unaudited financial statements submitted in this matter is similarly misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The financial statements submitted, however, were produced pursuant to a compilation rather than an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Further, the financial statements submitted are those of [REDACTED] of Maryland [REDACTED] and were accompanied by a cover sheet intended to accompany the financial statements of [REDACTED]. Whether either of those entities is identical to the petitioner, [REDACTED] of 8739 Flower Avenue in Silver Spring, Maryland, is unclear. For both reasons the unaudited financial statements, whether or not they pertain to the petitioner, will not be considered.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.³ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

The petitioner must establish that its job offer to the beneficiary is realistic. 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. 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, Citizenship and Immigration Services (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. (Reg. Comm. 1967).

³ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

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.

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 minus 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 typically⁴ 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 \$21,756.80 per year. The priority date is July 7, 1994.

⁴ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

In addressing the petitioner's ability to pay the proffered wage this office will momentarily assume, *arguendo*, that the 1994 tax return of [REDACTED] of Maryland is that of the petitioner, [REDACTED]. If that return were sufficient to show the petitioner's continuing ability to pay the proffered wage beginning on the priority date, however, the matter would be remanded for evidence that [REDACTED] of Maryland is, in fact, identical to the petitioner.

During its 1994 fiscal year, which ran from April 1, 1994 to March 31, 1995, [REDACTED] of Maryland declared a loss of \$11,016. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of the profits of [REDACTED] of Maryland during that year. At the end of that year [REDACTED] of Maryland had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of the net current assets of [REDACTED] of Maryland during that year.

The petition in this matter was submitted on June 8, 1996. On that date the fiscal year 1995 tax returns of [REDACTED] of Maryland may not have been available. Further, no additional tax returns were subsequently requested by CIS. Assuming that [REDACTED] of Maryland is the petitioner in this matter, the petitioner is excused from showing its ability to pay the proffered wage during [REDACTED] of Maryland's 1996 fiscal year and subsequent years. If the petitioner attempts to overcome today's decision on motion, however, it should provide evidence that it remained able to pay the proffered wage during the ensuing years.

The petitioner failed to demonstrate that it is identical to [REDACTED] of Maryland and failed to demonstrate that [REDACTED] of Maryland had the ability to pay the proffered wage during its 1994 fiscal year. For both reasons the petitioner has failed to show that it was able to pay the proffered wage from April 1, 1994 to March 31, 1995 and has failed, therefore, to demonstrate 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 motion is granted. The director's decision of denial and the AAO's decisions on appeal and on the previous motion are affirmed. The petition is denied.