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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

EAC 05 074 51834

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

JAN 09 2006

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:

[REDACTED]

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a bakery. It employs 5 workers, and, it was established according to the petition in 1967.¹ It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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.

On appeal, counsel submits a brief and additional evidence.

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 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, 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. 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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,689.60 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 2001, 2002, and 2003; pay stubs and checks; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8

¹ The petitioner's ownership commenced July 2003.

C.F.R. § 204.5(g)(2), the Director issued an intent to deny the petition on May 13, 2005, and requested additional evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel by letter dated June 6, 2005, submitted documents from petitioner's prior petition for the same beneficiary; the beneficiary's pay stubs; and a W-2 for the year 2004.

The director denied the petition on July 18, 2005, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the petitioner has employed the beneficiary since January 2004, and that he already is receiving a wage from the petitioner at the proffered wage level of \$474.80 per week. Also, counsel contends that the beneficiary replaced a previous named worker, Yve Ebendeng, who received "a similar" salary in 2001² and who left the petitioner's employment in October of 2003.³ Counsel states that CIS approved an immigrant petition for another alien beneficiary. Counsel makes reference in his brief to the prior petition's⁴ record of proceeding and its exhibits⁵, which he has submitted in this case.

Counsel submitted additional evidence on appeal that were copies of the following documents: wage payments stubs all in the amount of \$474.80 and documents from another approved immigrant petition.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary. A W-2 Wage and Tax Statement (W-2) for 2004 was submitted evidencing wages of \$20,338.80 paid. Wage evidence was produced stating weekly wage payments in the amounts of \$474.80. Wage stubs and two checks were submitted into evidence. From the evidence submitted, the petitioner has not paid the beneficiary the proffered wage in the first year of employment, 2004. Petitioner is now paying on a weekly basis weekly payments that if continued would equate to the proffered wage in year 2005⁶.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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

² According to a quarterly wage report for the first quarter of 2001, Yve Ebendeng received \$4,500.00 in wages indicating a yearly salary of \$18,000.00.

³ If the prior employee left the business three months before the beneficiary was hired, the beneficiary could not have replaced him; rather, it is the position that the prior employee held and his wages that are probative in this case.

⁴ There was a prior employment based immigrant petition involving the same parties.

⁵ Counsel references "quarterly wage reports" that are for the first calendar quarters for 2001 and 2004 found in the evidence submitted in the prior proceeding.

⁶ The AAO notes that the according to 8 CFR § 204.5(g)(2), the petitioner must demonstrate its ability to pay starting from the priority date and until the date the beneficiary obtains lawful permanent resident status. Despite counsel's statement to the contrary, the fact that the beneficiary has paid the proffered wage for some period of time less than the entire period starting from the priority date does not demonstrate its ability to pay from the priority date until the date the beneficiary obtains lawful permanent resident status.

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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. 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." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,689.60 per year from the priority date of April 19, 2001:

- In 2001, the Form 1120S stated a taxable income loss⁷ of <\$20,798.00>⁸.
- In 2002, the Form 1120S stated a taxable income loss of <\$604.00>.
- In 2003, the Form 1120S stated taxable income of \$1,015.00.

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. Counsel has submitted pay stubs and two checks evidencing wages paid to the beneficiary of \$474.86 each week into 2005, and a W-2 statement for 2004.⁹

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

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.¹⁰ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's 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.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

⁷ IRS Form 1120S, Line 21.

⁸ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁹ Since no tax return was submitted for 2004, a determination using wages paid for that year cannot be made.

¹⁰ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2001, petitioner's Form 1120S return stated current assets of \$21,474.00 and \$1,500.00 in current liabilities. Therefore, the petitioner had \$19,974.00 in net current assets. Since the proffered wage was \$24,689.60 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$9,844.00 and \$1,672.00 in current liabilities. Therefore, the petitioner had \$8,172.00 in net current assets. Since the proffered wage was \$24,689.60 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120S return stated current assets of \$2,200.00 and \$1,356.00 in current liabilities. Therefore, the petitioner had \$844.00 in net current assets. Since the proffered wage was \$24,689.60 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 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 ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,¹¹ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel asserts that the beneficiary is "already" is receiving a wage from the petitioner at the proffered wage level of \$474.80 per week. Counsel has produced pay stubs and two checks evidencing that amount. There is a quarterly wage report for the first quarter of 2004 submitted that stated the beneficiary name and wages paid that quarter. It is \$4,582.00. Calculating that wage for one quarter by the remaining quarters for the remainder of the year would indicate \$18,328.00, or \$352.46 weekly. This figure is below the proffered wage of \$24,689.60 per year. There is also a W-2 form issued for 2004 that stated the wage paid in that year is \$20,338.80, again below the proffered wage. Counsel has submitted pay stubs in several submittals stating weekly wages of \$474.80 per week. Based upon all the information submitted concerning the beneficiary's wages, the petitioner has not paid the proffered wage in 2004, but is currently making weekly wage payments that if continued would equal the proffered wage.

Counsel asserts that the beneficiary replaced a previous named worker who received "a similar"¹² salary in 2001 and who left the petitioner's employment in October of 2003, and that this evidences petitioner's ability to pay the proffered wage by employing the beneficiary and replacing existing or former workers. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the worker indicated by name involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. According to counsel, the prior employee has produced an affidavit found in the record of the prior proceeding documenting his duties. However, a review of that statement only indicates that "...[the beneficiary]

¹¹ 8 C.F.R. § 204.5(g)(2).

¹² The quarterly wage report for the prior employee stated wages for the quarter calculated on a yearly basis that is under the proffered wage. (i.e. \$18,000.00/yearly). Moreover, the evidence in the record of proceeding demonstrates that the petitioner paid the other worker \$4,500 in 2001. There is no W-2 for 2001, 2002, and 2003 demonstrating any additional compensation.

... has taken up employment in my place with the same company as of January of this year 2004...." There is no recitation of his job or duties in that statement.¹³

If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's current employment as a baker will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Further counsel states that CIS approved an immigrant petition for another alien beneficiary. The petitioner noted that CIS approved other petitions that had been previously filed on behalf of the petitioner. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of [the beneficiary], the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Beyond the decision of the director, CIS electronic database records show that the petitioner filed I-140 petitions on behalf of one other beneficiary at about the same time as the instant petition was filed. Although the evidence in the instant case indicated financial resources of the petitioner under the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the beneficiaries.

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.

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.

¹³ The AAO notes that the purpose of the instant visa category is to provide U.S. employers with the ability to employ alien workers when there are no U.S. workers available. If the petitioner is terminating the employment of a U.S. worker in order to hire the beneficiary or to demonstrate its ability to pay the proffered wage, then the petition may not be approved. This issue does not constitute any part of today's decision, however in any future proceedings, the petitioner must address this issue.

ORDER: The appeal is dismissed.