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U.S. Citizenship
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Services

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FILE:

EAC 03 259 53141

Office: VERMONT SERVICE CENTER

Date: JUL 10 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 Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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 kitchen supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by 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 December 13, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 DOL. *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 DOL 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 May 29, 1997. The proffered wage as stated on the Form ETA 750 is \$19.07 per hour (\$39,665.60 per year based on a 40 hour work week). The Form ETA 750 states that the position requires two years of experience in the job offered.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all

pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief, the New Jersey tax filings for EAT, Inc. for the first three quarters of 2004 and the payroll list for EAT, Inc. for the fourth quarter of 2003. Other relevant evidence in the record includes IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 1997 and 1998 for P&S Inc., IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 1999, 2000, 2001, 2002 and 2003 for EAT, Inc., IRS Forms W-2 issued to the beneficiary by [REDACTED] for 1997, 1998, 1999, 2000 and 2001, IRS Forms W-2 issued to the beneficiary by EAT, Inc. for 2002 and 2003 and the beneficiary's pay stubs issued by [REDACTED] Companies for certain pay periods in 2003 and 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The ETA 750 was filed on May 29, 1997 by the petitioner [REDACTED]. The I-140 petition was filed on September 15, 2003 by the petitioner [REDACTED]. On the petition, the petitioner claimed to have been established in 1984 and to currently employ 125 workers. On the petition, the petitioner's IRS tax number shown is a number ending with the three digits [REDACTED]. The tax returns submitted in evidence for 1997 and 1998 are in the name of [REDACTED] and show an employer identification number ending with the three digits [REDACTED]. The tax returns show that [REDACTED] was incorporated in 1989. The tax returns submitted in evidence for 1999, 2000, 2001, 2002 and 2003 are in the name of [REDACTED] and show an employer identification number ending with the three digits [REDACTED]. The tax returns show that [REDACTED] was incorporated in 1991. The record contains no evidence firmly establishing that the tax returns in evidence are those of the petitioner. Notably, the names of the entities listed on the tax returns are different from the petitioner's name, the IRS tax identification number of the petitioner differs from that shown on the 1997 and 1998 tax returns in the record, and the dates of incorporation of [REDACTED] and [REDACTED] differ from the petitioner's date of establishment listed on the petition.

Further, the petitioner submitted IRS Forms W-2 issued to the beneficiary by [REDACTED] Companies in 1997, 1998, 1999 and 2000) for 1997, 1998, 1999, 2000 and 2001, and IRS Forms W-2 issued to the beneficiary by [REDACTED] Companies in 2003) for 2002 and 2003. The W-2 Forms issued to the beneficiary by [REDACTED] show an employer identification number ending with the three digits [REDACTED]. The W-2 Forms issued to the beneficiary by [REDACTED] show an employer identification number ending with the three digits [REDACTED]. Pursuant to a letter in the record dated July 10, 2004, the petitioner claimed that [REDACTED] is a trade name used by [REDACTED]. The petitioner submitted no evidence to support this claim. The letter also states that [REDACTED] and other corporations were consolidated into [REDACTED] as of January 1, 2002. The petitioner submitted a certificate of merger filed with the New Jersey state treasurer indicating that [REDACTED], [REDACTED] and [REDACTED] merged into [REDACTED] effective December 31, 2001. However, the record contains no evidence that the petitioner qualifies as a successor-in-interest to [REDACTED]. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor companies.

On appeal, counsel asserts that the petitioner has shown its ability to pay the proffered wage in 1997 based on its gross receipts and ordinary income. Counsel further asserts that the petitioner employs approximately 160 employees and pays quarterly gross wages in excess of \$600,000.00. Counsel contends that petitioning employers who employ more than 100 workers are not required to establish ability to pay through submission

¹ 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).

of tax returns but, instead, may do so through the statement of a financial officer or other evidence. Counsel asserts that based on the petitioner's current number of employees and its wage expense, the petitioner has shown its ability to pay the proffered wage from the priority date.

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).

Even assuming that the financial evidence in the record pertains to the petitioner, that evidence fails to establish the petitioner's ability to pay the proffered wage during the relevant period.

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. On the Form ETA 750B, signed by the beneficiary on April 23, 1997, the beneficiary claimed to have worked for the petitioner as an operations manager from January 1996 to the date he signed the labor certification application and as an assistant operations manager from July 1992 to August 1993. The beneficiary's Form W-2s for 1997, 1998, 1999, 2000, 2001, 2002 and 2003 in the record show compensation as shown in the table below.

- In 1997, the Form W-2 stated compensation of \$19,914.63.
- In 1998, the Form W-2 stated compensation of \$23,442.86.
- In 1999, the Form W-2 stated compensation of \$23,171.08.
- In 2000, the Form W-2 stated compensation of \$26,353.60.
- In 2001, the Form W-2 stated compensation of \$29,922.60.
- In 2002, the Form W-2 stated compensation of \$31,736.58.
- In 2003, the Form W-2 stated compensation of \$34,117.77.

Therefore, for the years 1997, 1998, 1999, 2000, 2001, 2002 and 2003, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in each year. Since the proffered wage is \$39,665.60 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$19,750.97 in 1997, \$16,222.74 in 1998, \$16,494.52 in 1999, \$13,312.00 in 2000, \$9,743.00 in 2001, \$7,929.02 in 2002 and \$5,547.83 in 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 the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The record before the director closed on September 13, 2004 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 income tax return for 2003 is the most recent return available. The petitioner's tax returns demonstrate its net income for 1997, 1998, 1999, 2000, 2001, 2002 and 2003, as shown in the table below.

- In 1997, the Form 1120S stated net income² of \$132,183.00.
- In 1998, the Form 1120S stated net income of \$(11,536.00).
- In 1999, the Form 1120S stated net income of \$5,835.00.
- In 2000, the Form 1120S stated net income of \$(132,464.00).
- In 2001, the Form 1120S stated net income of \$88,262.00.
- In 2002, the Form 1120S stated net income of \$19,293.00.
- In 2003, the Form 1120S stated net income of \$15,786.00.

Therefore, for the years 1998, 1999 and 2000, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage. The petitioner had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 1997, 2001, 2002 and 2003.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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 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. The petitioner did not provide Schedule L to any of its tax returns and, therefore, this office is unable to compute the petitioner's net current assets.⁴ Therefore, for the years 1998, 1999 and 2000, the petitioner did not establish that it had sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Therefore, even if it is assumed that the tax returns in the record are the petitioner's tax returns and that the Forms W-2 were issued to the beneficiary by the petitioner, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the

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

³ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴ The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of the schedules to its 1997-2003 federal income tax returns. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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 asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel contends that petitioning employers who employ more than 100 workers are not required to establish ability to pay through submission of tax returns but, instead, may do so through the statement of a financial officer or other evidence. The I-140 petition states in Part 5 that the petitioner has 125 employees. The regulation at 8 C.F.R. § 204.5(g)(2) states that "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." Although the petitioner was permitted by this regulation to submit a statement from one of its financial officers in order to establish the petitioner's ability to pay the proffered wage, the petitioner did not do so. Instead, the petitioner submitted the New Jersey tax filings for EAT, Inc. for the first three quarters of 2004 and the payroll list for EAT, Inc. for the fourth quarter of 2003. State tax records and payroll records are not acceptable forms of evidence to establish the petitioner's ability to pay the proffered wage pursuant to the regulation at 8 C.F.R. § 204.5(g)(2). In addition, the record contains a letter dated February 11, 2003 from the petitioner's Vice President indicating that the petitioner "has 45 people performing in different capacities." This letter is not a qualifying statement under 8 C.F.R. § 204.5(g)(2), as it indicates that the petitioner employs less than 100 workers, the petitioner's Vice President has not been established to be a financial officer of the petitioner, and the letter does not establish the petitioner's ability to pay the proffered wage. Finally, the regulation uses the word "may" to provide CIS with discretion whether or not to accept such a statement. In this case, the documents in the record show that the majority of EAT Inc.'s employees are not employed in a full-time capacity. Given this, the fact that no officer's statement is in the record and the information provided by the tax returns, the petitioner has not established its ability to pay through the number of employees it employs.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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.