

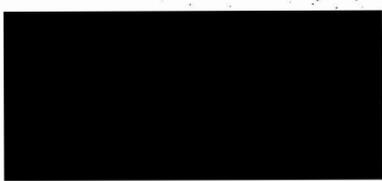


U.S. Citizenship  
and Immigration  
Services

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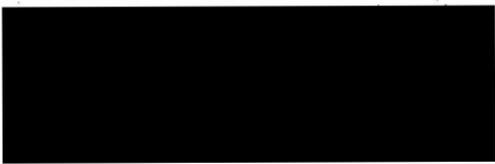
FILE: EAC 04 143 52034 Office: VERMONT SERVICE CENTER Date: **NOV 13 2006**

IN RE: Petitioner:  
Beneficiary:



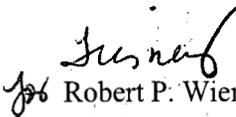
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a 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.

On appeal counsel submitted a statement.

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 13, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour for a 35-hour week, which equals \$34,379.80 per year.<sup>1</sup>

The Form I-140 petition in this matter was submitted on April 10, 2004. On the petition, the petitioner stated that it was established during October 1970 and that it employs five workers. The petition states that the petitioner's gross annual income is \$250,000. The space reserved for the petitioner to report its net annual income was left blank. The Form ETA 750, Part B work history, signed by the beneficiary on April 6, 2001, lists the petitioner as an employer. In the spaces reserved to state the beginning and ending dates of that employment "Upon Approval" was entered. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Katonah, New York.

In support of the petition, counsel submitted (1) a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, and (2) a copy of portions of the joint 2001 Form 1040 U.S. Individual Income Tax

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<sup>1</sup> The director erred in his April 8, 2005 denial and calculated the annual proffered wage to be \$39,291.20.

Return and 2001 Form 1040X Amended U.S. Individual Income Tax Return of the beneficiary and his spouse, and (3) a copy of the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return.

The petitioner's tax returns show that the petitioner is a corporation, that it incorporated on October 1, 1970, and that it reports taxes pursuant to accrual convention accounting and a fiscal year running from October 1 of the nominal year to September 30 of the following year.

During its 2001 fiscal year, which ran from October 1, 2001 to September 30, 2002, the petitioner declared taxable income before net operating loss deductions and special deductions of \$5,791. At the end of that year the petitioner had current assets of \$10,286 and current liabilities of \$5,907, which yields net current assets of \$4,379.

During its 2002 fiscal year, which ran from October 1, 2002 to September 30, 2003, the petitioner declared a loss of \$4,396 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner had current assets of \$9,492 and current liabilities of \$9,509, which yields net current assets of -\$17.

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 October 14, 2004, requested, *inter alia*, additional evidence pertinent to that ability. The service center also specifically requested that, if the petitioner employed the beneficiary during 2001, it provide the Form W-2 Wage and Tax Statement showing the wages it paid to him.

In response, counsel submitted a letter dated January 6, 2005 from the petitioner's accountant. Counsel submitted no W-2 forms and did not explain their absence.

The petitioner's accountant's letter cites the market value of the petitioner's total assets and its total payroll expense as evidence of its continuing ability to pay the proffered wage beginning on the priority date. The accountant also stated that more than three-fourths of the wages the petitioner paid were paid to its officers, who also cook, and to kitchen help. Finally, the accountant stated that both of the owner-officers of the restaurant have expressed the wish to decrease the hours they work at the restaurant and plan to take a 50% cut in their wages in exchange.

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 April 8, 2005, denied the petition.

On appeal, counsel stated,

The beneficiary, self-employed, earned \$19,600 as a cook in 2004. This is reflected by Schedule C (Net Profit from Business) previously submitted along with a copy of the beneficiary's taxes. While true that the beneficiary does not have a W-2 Wage and Income Statement from the prospective employer (the petitioner) the explanation is that the proposed beneficiary is self-employed. The ETA 750 Application (Part B) further reflects that the beneficiary has worked for the petitioner Katonah Restaurant from 1994 to the present. The

wage offered is \$17.43 per hour. Given these circumstances, the prospective petitioner has shown sufficient ability to pay the proffered wage.

The proffered wage in this case is not, as counsel states, \$17.43 per hour. The Form ETA 750 submitted states that the proffered wage is \$18.89 per hour.

The Form ETA 750 does not, as counsel asserts, support the proposition that the petitioner has employed the beneficiary since 1994. Rather, the employment history to which the beneficiary attested states that the petitioner will employ the beneficiary upon approval of the petition, and had not ever employed the beneficiary as of April 6, 2001.

Although counsel's assertions are not entirely clear, he appears to be asserting that the beneficiary has worked for the petitioner since 1994 as a contractor, rather than an employee. While this would explain the absence of W-2 forms, it does not explain why no Form 1099 Miscellaneous Income statement or other evidence of that alleged employment was submitted.

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. Counsel's statement that the beneficiary worked for the petitioner, absent any evidence in its support, is insufficient to establish that asserted fact.

Counsel also stated that the previous submissions included a 2004 Schedule C showing self-employment of the beneficiary and that he earned \$19,600 during that year. In fact, the record contains no tax forms pertinent to 2004. The only tax documents pertinent to the beneficiary are the 2001 Form 1040 U.S. Individual Income Tax Return and Form 1040X Amended U.S. Individual Income Tax Return described above. The Form 1040X amended return indicates, at Part IV, that a Schedule C-EZ was included when that amended form was filed. However, that schedule was never placed into the record.

Line 12 of the corrected Form 1040 U.S. Individual Income Tax Return does show that the beneficiary received business income of \$10,150 during 2001. The nature of that business, however, and whether it pertained in any way to the petitioner, is unknown to this office. The beneficiary's income from self-employment will not be considered a fund available to the petitioner to pay additional wages.

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, contrary to counsel's assertions, 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. *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.

Contrary to counsel's assertions, however, the petitioner's total assets 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 typically<sup>2</sup> 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 \$34,379.80 per year. The priority date is April 13, 2001.

The petitioner's 2001 fiscal year began on October 1, 2001. The petitioner submitted no evidence of its ability to pay the proffered wage prior to that. The petitioner has not demonstrated its ability to pay the proffered wage from April 13, 2001 to October 1, 2001.

During its 2001 fiscal year, which ran from October 1, 2001 to September 30, 2002, the petitioner declared taxable income before net operating loss deductions and special deductions of \$5,791. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$4,379.

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<sup>2</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during that fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during its 2001 fiscal year.

During its 2002 fiscal year, which ran from October 1, 2002 to September 30, 2003, the petitioner declared taxable income (loss) before net operating loss deductions and special deductions of (\$4,396). That amount is not sufficient to pay the proffered wage. At the end of that year the petitioner had net current assets (liabilities) of (\$17). That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during that fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during its 2002 fiscal year.

Because the petitioner's 2003 fiscal year ended on September 30, 2004 and the request for evidence was issued on October 14, 2004 that tax return may then have been unavailable. The petitioner is excused, therefore, from demonstrating its ability to pay the proffered wage during its 2003 fiscal year and subsequent fiscal years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during the period from April 13, 2001 to October 1, 2001, during its 2001 fiscal year, and during its 2002 fiscal year. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Reliance on any undocumented assertions that the beneficiary would be assuming a portion of the officers' duties or those of other employees at the petitioner's company, and that, as such, a portion of these individuals' compensation should be considered funds available to pay the proffered wage are misplaced. The petitioner failed to provide any Form W-2, Wage and Tax Statement, or other documentation to identify the employees or officers whose workload would be reduced or to verify what salary the petitioner paid these other workers from the priority date onwards. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary will in part replace these other workers and the precise percentage of their duties that he would assume. In addition, there is no evidence in the record that these officers and employees performed the duties of the proffered position. 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)).

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.