



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
SRC-04-237-51568

Office: TEXAS SERVICE CENTER Date: **SEP 28 2006**

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

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, 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 motel. It seeks to employ the beneficiary permanently in the United States as an executive housekeeper. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification or the Form ETA 750), approved by the 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 additional evidence.¹

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 U.S. Department of Labor. 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 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 January 30, 2004. The proffered wage as stated on the Form ETA 750 is \$32,000 per year. On the petition, the petitioner claimed to have been established in 2000, and to currently employ five (5) workers. The petitioner did not provide information about its gross and net annual

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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

income on the form. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.²

The petition was submitted on August 30, 2004 with the petitioner's Form 1120S tax return for 2002 and 2003 pertinent to its ability to pay the proffered wage. On January 26, 2005, the director denied the petition, finding that the petitioner did not establish that it had the ability to pay the proffered wage beginning on the priority date with its net income of \$(39,446) and net current assets of \$(9,828) in 2002, and its net income of \$(55,359) and net current assets of \$(5,441) in 2003.

On appeal counsel asserts that the petitioner has been doing well financially in 2004 and has been generating strong cash flows from operations, and submits the petitioner's bank statements to establish the petitioner's ability to pay the proffered wage in 2004.

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. In the instant case, the beneficiary did not claim to have worked for the petitioner, nor did the petitioner submit W-2 forms or any other compensation documents for the beneficiary. The petitioner failed to establish its ability to pay through wages paid to 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 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 its gross receipts with depreciation and on wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

² The beneficiary signed but did not date the Form ETA 750B.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002 and 2003. According to the tax returns in the record, the petitioner was elected as an S corporation on January 1, 1997 and the petitioner's fiscal year is based on a calendar year. The petitioner's tax returns stated net income³ of \$(39,446) in 2002, and \$(55,359) in 2003. Therefore, the petitioner did not have sufficient net income to pay the proffered wage in 2002 or 2003.

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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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.⁴ 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.

Calculations based on the Schedule L's attached to the petitioner's tax returns for 2002 and 2003 yield that the petitioner had current assets of \$(2,233) and current liabilities of \$7,595, therefore, net current assets were \$(9,828) in 2002; the petitioner had current assets of \$(2,600) and current liabilities of \$2,841, therefore, net current assets were \$(5,441) in 2003. Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in 2002 or 2003.

Therefore, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage in 2002 and 2003 through an examination of wages paid to the beneficiary, or its net income or net current assets. The AAO notes that the priority date in the instant case is January 30, 2004, therefore, the petitioner's 2002 and 2003 tax returns are not necessarily dispositive. However, the record before the director closed on August 30, 2004 with the receipt by the director of the petitioner's initial submission. As of that date the petitioner's federal tax return for 2004 was not available yet. However, the petitioner did not submit any other regulatory-prescribed evidence to establish its ability to pay the proffered wage in 2004 and onwards. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. §1361. The petitioner had not established its ability in 2004 because of failing to submit evidence for that year.

On appeal counsel asserts that: "[the petitioner] has been doing well financially in 2004 and has been generating strong cash flows from operations." However, counsel does not submit any evidence to support

³ Ordinary income (loss) from trade or business activities as reported on Line 21.

⁴ 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.

his assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

Counsel submits bank statements for the petitioner's business account for 2004 and asserts that the bank statements may establish the petitioner's ability to pay the proffered wage. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was or would be considered in determining the petitioner's net current assets.

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 any office within the employment system of the Department of Labor.

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.