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U.S. Citizenship
and Immigration
Services

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FILE:

SRC-04-030-53049

Office: TEXAS SERVICE CENTER

Date:

SEP 28 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 Acting Center Director (Director), Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

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, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification application or 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 a brief and copies of evidence already submitted previously. 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). However, since counsel does not submit any additional evidence on appeal, the AAO will make its decision based on evidence already submitted and kept in the record only.

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).

¹ The petitioner filed another identical I-140 petition (SRC-05-159-50692) on behalf of the beneficiary in a position of specialty cook based on an approved labor certification with the Texas Service Center on May 16, 2005 after the instant petition was denied on February 11, 2005 and the instant appeal was pending with the AAO. The subsequent petition was denied on September 14, 2005.

Here, the Form ETA 750 was accepted on March 3, 2003. The proffered wage as stated on the Form ETA 750 is \$6.10 per hour (\$12,688 per year). The Form ETA 750 states that the position requires two (2) years training in Asian cooking and two (2) years experience in the job offered. On the Form ETA 750B signed by the beneficiary on February 21, 2003, he did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of \$253,092, and to currently employ 7 workers.

The petition was submitted on November 6, 2003 without any supporting documents pertinent to the petitioner's ability to pay the proffered wage. The director issued a request for additional evidence (RFE) on November 8, 2004 to establish the petitioner's ability to pay the proffered wage. The director specifically requested such evidence as of March 3, 2003 and continuing until the beneficiary obtains lawful permanent residence. In response to the RFE, counsel submitted the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2003 and financial statements as of November 2004.

The director denied the petition on February 11, 2005, finding that the evidence submitted with the petition and in response to the RFE 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 depreciation should be added back to the net income and the petitioner's current assets were greater than its current liabilities.

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 petitioner did not submit evidence that the petitioner paid any compensation to the beneficiary, nor did the beneficiary claim to have worked for the petitioner. Therefore, the petitioner has not established that it employed and paid the beneficiary the proffered wage during the period from the priority date to the present.

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). On appeal counsel requests considering depreciation of \$22,638 in 2003 together with net income in determining the petitioner's ability to pay the proffered wage. Counsel's reliance on the petitioner's depreciation deduction or wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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.

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

The record of proceeding contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2003. The tax returns show that the petitioner is structured as a C corporation and the petitioner's fiscal year is based on a calendar year. The tax return demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$12,688 from the priority date:

In 2003, the Form 1120 stated net income² of \$4,598.

Therefore, the petitioner did not have sufficient net income to pay the proffered wage in year 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.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. As the director correctly calculated and considered, the petitioner's current assets were \$18,788 and its current liabilities were \$14,075, and thus the petitioner had net current assets of \$4,713 in 2003. Therefore, the petitioner had insufficient net current assets to pay the proffered wage. Counsel's assertion that the petitioner had sufficient net current assets to pay the proffered wage because its current assets were greater than its current liabilities is misplaced.

Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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.

Therefore, 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 continuing ability to pay the beneficiary the difference between the wage paid and 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.

The record contains the petitioner's financial statements, such as Balance Sheet as of November 2004 and Profit & Loss Statement for 1/1/2004 through 11/30/2004. However, these statements are not audited. Counsel's reliance on unaudited financial records is 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel refers to a decision issued by the AAO that depreciation could be added back to taxable income, but does not provide its published citation. Counsel also cites to *Matter of Maqsons*, 97 INA 397 (BALCA June 15, 1998). However, counsel does not state how Board of Alien Labor Certification Appeals (BALCA) holdings are applicable to the instant petition before the Department of Homeland Security's CIS' AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return 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 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.