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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:

[Redacted]  
EAC 04 256 50548

Office: VERMONT SERVICE CENTER

Date: JAN 16 2007

IN RE:

Petitioner:  
Beneficiary:



PETITION: 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook of Indian food. 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.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 2, 2005 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's 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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case 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. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant

petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, based on a 35-hour work week, which amounts to \$34,379.80 annually.

The AAO reviews appeals on a *de novo* basis. *See Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a letter and additional evidence.

Relevant evidence submitted on appeal includes copies of the beneficiary's IRS Form W-2 Wage and Tax Statements issued by the petitioner for 2001 and 2002. Other relevant evidence in the record includes the petitioner's federal income tax returns for 2001, 2002, and 2003.

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).

On appeal, counsel states that the petitioner suffered from a depression in the local economy following the September 11, 2001 attack. Counsel projects that the petitioner's 2004 tax return, which has yet to be filed, will show its ability to pay the proffered wage. Counsel states further that the petitioner's assets should also be considered in determining its income and ability to pay the proffered wage.

At the outset, the record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that the petitioner's business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. Further, counsel's projection that the petitioner's 2004 income tax return, which has yet to be filed, will show its ability to pay the proffered wage, is noted. Without documentary evidence to support the claim, however, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary did not claim to have worked for the petitioner.

Despite the beneficiary's claim that he did not work for the petitioner, the record contains copies of Form W-2 Wage and Tax Statements of the beneficiary issued by the petitioner. The beneficiary's W-2 forms for 2001 and 2002 show compensation received from the petitioner, as shown in the table below.

| Year | Beneficiary's actual compensation | Proffered wage | Wage increase needed to pay the proffered wage. |
|------|-----------------------------------|----------------|---|
| 2001 | \$13,902.00                       | \$34,379.80    | \$20,477.80                                     |
| 2002 | \$21,846.00                       | \$34,379.80    | \$12,533.80                                     |

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *see also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence in the record of proceeding indicates that the petitioner is structured as a C corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001, 2002, and 2003. The record before the director closed on September 10, 2004 with the receipt by the director of the petition and supporting documentation. As of that date the petitioner's federal tax return for 2004 was not yet due. Therefore the petitioner's tax return for 2003 is the most recent return available.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return.

The petitioner's tax returns state amounts for taxable income on line 28 as shown in the table below.

| Tax year | Net income or (loss) | Wage increase needed to pay the proffered wage | Surplus or (deficit) |
|----------|----------------------|--|----------------------|
| 2001     | \$1,637.00           | \$18,840.80*                                   | -\$18,840.80         |
| 2002     | -\$6,097.00          | \$18,630.80*                                   | -\$18,630.80         |
| 2003     | \$3,658.00           | \$30,721.80**                                  | -\$30,721.80         |

\* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

\*\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in that year.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

| Tax year | Net current assets | Wage increase needed to pay the proffered wage | Surplus or (deficit) |
|----------|--------------------|--|----------------------|
| 2001     | -\$758.00          | \$21,235.80*                                   | -\$21,235.80         |
| 2002     | -\$2,333.00        | \$14,866.80*                                   | -\$14,866.80         |
| 2003     | blank <sup>1</sup> |  |                      |

\* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.<sup>2</sup>

<sup>1</sup> It is noted that the petitioner did not complete Schedule L of its IRS Form 1120 for 2003. It is doubtful that the IRS processed the return as submitted to the AAO by the petitioner. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly stated the petitioner's net income or net loss for 2001, 2002, and 2003. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in that year. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.

**ORDER:** The appeal is dismissed.

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<sup>2</sup> Counsel's assertion on appeal that the petitioner's assets should also be considered in determining its ability to pay the proffered wage, is noted. The petitioner's assets, however, are already accounted for in the calculation of the petitioner's net current assets, as shown above.