



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
WAC 05 204 50705

Office: CALIFORNIA SERVICE CENTER

Date: JUL 17 2007

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.

*Wiemann*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California 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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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 was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 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, 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 DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 14, 1997. The proffered wage as stated on the Form ETA 750 is \$12.46 per hour, which equals \$25,916.80 per year.<sup>1</sup>

The Form I-140 petition in this matter was submitted on June 30, 2005. On the petition, the petitioner stated that it was established during 1995 and that it employs two workers. The petition states that the petitioner's

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<sup>1</sup> Although counsel agreed that the hourly wage offered in this case is \$12.46, he asserted that this equals an annual wage of 23,923.20. Although the provenance of counsel's figure is unstated it appears to be based on a 48 week year. The instant visa category does not permit seasonal employment, but contemplates full employment. Section 203(b)(3)(A)(i) of the Act. This office notes that \$12.46 per hour x 40 hours per week x 52 weeks per year equals \$25,916.80 per year.

gross annual income is \$89,366. In the space reserved for the petitioner to state its net annual income the petitioner entered, "varies." Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in National City, California.

The instructions to the Form ETA 750B require that the beneficiary "List all jobs held during the past three (3) years [and] any other jobs related to the occupation for which the [beneficiary] is seeking certification . . . ." On the Form ETA 750, Part B, signed by the beneficiary on November 12, 1997, the beneficiary did not claim to have worked for the petitioner. Subsequently, in a letter dated August 31, 1998, the petitioner's then counsel asked that the Form ETA 750, Part B be amended to indicate that the petitioner had employed the beneficiary since August 1997.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup>

In the instant case the record contains (1) the 1997, 1998, 1999, 2000, 2001, 2002, 2003, and 2004 Form 1040 U.S. Individual Income Tax Returns of [REDACTED] and [REDACTED], (2) California Form DE-6 quarterly wage reports, (3) a statement of the [REDACTED] family's average monthly expenses, and (4) the June 30, 2005 personal financial statement of [REDACTED]. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The income tax returns submitted show that [REDACTED] held the petitioner as a sole proprietorship during each of the salient years. During 1997, 1998, 1999, and 2000 the petitioner's owner and owner's spouse had four dependents. During 2001, 2002, 2003, and 2004 they had three dependents.

During 1997 the petitioner showed a loss of \$3,818. The petitioner's owner and owner's spouse declared adjusted gross income of \$8,934 during that year, including the petitioner's loss.

During 1998 the petitioner showed a profit of \$10,311. The petitioner's owner and owner's spouse declared adjusted gross income of \$19,223 during that year, including the petitioner's profit.

During 1999 the petitioner showed a loss of \$2,274. The petitioner's owner and owner's spouse declared adjusted gross income of \$31,651 during that year, including the petitioner's loss.

During 2000 the petitioner showed a profit of \$16,407. The petitioner's owner and owner's spouse declared adjusted gross income of \$38,525 during that year, including the petitioner's profit.

During 2001 the petitioner showed a profit of \$14,244. The petitioner's owner and owner's spouse declared adjusted gross income of \$39,782 during that year, including the petitioner's profit.

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

During 2002 the petitioner showed a profit of \$4,619. The petitioner's owner and owner's spouse declared adjusted gross income of \$30,652 during that year, including the petitioner's profit.

During 2003 the petitioner showed a loss of \$3,296. The petitioner's owner and owner's spouse declared adjusted gross income of \$31,149 during that year, including the petitioner's loss.

During 2004 the petitioner showed a loss of \$11,304. The petitioner's owner and owner's spouse declared adjusted gross income of \$33,589 during that year, including the petitioner's loss.

The California quarterly wage reports submitted cover the first, second, and third quarters of 2005. During each of those quarters the petitioner employed the beneficiary, but no other workers. The petitioner paid the beneficiary \$2,916, \$6,500, and \$7,000 during those quarters, respectively.

The petitioner's owner's monthly budget shows that the petitioner requires \$5,589.07 per average month to support himself and his family. That amount equals \$67,068.84 per year.

The petitioner's owner's June 30, 2005 personal financial statement asserts that the petitioner's owner also owns various other real and personal properties and alleges values for each. Similarly, the financial statement lists the amounts of the petitioner's owner's various liabilities. The financial statement is not accompanied by an accountant's report or any other indication that it was audited. A signature at the bottom of that financial statement indicates that it was prepared by an accountant, but not that the accountant expresses any degree of confidence that the financial statement accurately reflects the value of the petitioner's owner's assets and the amount of his liabilities.

The director denied the petition on February 10, 2006. On appeal, counsel asserted that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel asserted that the decision of denial erred "by focusing on the adjusted gross income of Petitioner rather than on the actual income of Petitioner before taxes."

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. Unaudited financial statements are not backed by any assurance from the person, in this case an accountant, who prepared them. Unsupported representations of net worth or other aspects of finances are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statement will not be considered.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered 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 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 established that it and paid the beneficiary \$16,416 during 2005.<sup>3</sup>

Although counsel indicated, in the letter of August 31, 1998, that the petitioner had employed the beneficiary since August 1997, the record contains no evidence that the petitioner paid any other wages to the beneficiary. 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. No amount that the petitioner may have paid to the beneficiary during the salient years, other than the \$16,416 it paid him during 2005, will be considered.

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).

Counsel's assertion that CIS should consider the "actual income of Petitioner before taxes" rather than the petitioner's owner's adjusted gross income is puzzling. First, adjusted gross income is, in fact, the petitioner's net income, minus all deductions, but before payment of taxes. This office assumes that counsel meant to refer to gross income, rather than "actual income . . . before taxes."

Further, counsel appears to have used "Petitioner" as a synonym for "the petitioner's owner" in his brief. As such, whether counsel meant to refer to the petitioner's Schedule C Line 1 Gross Receipts or the petitioner's owner's Form 1040 Line 22 Total Income is unclear, even assuming that this office correctly gathered his meaning otherwise. In either event, this office notes that 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 income tax returns, rather than the petitioner's gross income, and this office will consider the petitioner's finances in accordance with settled precedent. 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, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the

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<sup>3</sup> The wage reports submitted show that the petitioner paid the beneficiary \$2,916, 6,500, and \$7,000 during the first three quarters of 2005.

petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he must show that he could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

The proffered wage is \$25,916.80 per year. The priority date is November 14, 1997.

During 1997 the petitioner's owner declared adjusted gross income of \$8,934. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 1997 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1997.

During 1998 the petitioner's owner declared adjusted gross income of \$19,223. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 1998 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner's owner declared adjusted gross income of \$31,651. That amount is greater than the annual amount of the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income, he and his wife would have been left with only \$5,734.20 with which to support themselves and their four dependents during that year. The budget submitted, however, indicates that the petitioner's owner requires \$67,068.84 per year to support his household. The petitioner submitted no reliable evidence of any other funds available to the petitioner's owner during 1999 with which he could have paid the proffered wage and supported his family. The petitioner has not, therefore, demonstrated that it was able to pay the proffered wage during 1999.

During 2000 the petitioner's owner declared adjusted gross income of \$38,525. That amount is greater than the annual amount of the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income during that year, he and his wife would have been left with only \$12,608.20 with which to support themselves and their four dependents. The budget submitted, however, indicates that the petitioner's owner requires \$67,068.84 per year to support his household. The petitioner submitted no reliable evidence of any other funds available to the petitioner's owner during 2000 with which he could have paid the proffered wage and supported his family. The petitioner has not, therefore, demonstrated that it was able to pay the proffered wage during 2000.

During 2001 the petitioner's owner declared adjusted gross income of \$39,782. That amount is greater than the annual amount of the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income, he and his wife would have been left with only \$13,865.20 with which to support themselves and their three dependents during that year. The budget submitted, however, indicates that the petitioner's owner requires \$67,068.84 per year to support his household. The petitioner submitted no reliable evidence of any other funds available to the petitioner's owner during 2001 with which he could have paid the proffered wage and supported his family. The petitioner has not, therefore, demonstrated that it was able to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared adjusted gross income of \$30,652. That amount is greater than the annual amount of the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income during that year, he and his wife would have been left with only \$4,735.20 with which to support themselves and their three dependents. The budget submitted, however, indicates that the petitioner's owner requires \$67,068.84 per year to support his household. The petitioner submitted no reliable evidence of any other funds available to the petitioner's owner during 2002 with which he could have paid the proffered wage and supported his family. The petitioner has not, therefore, demonstrated that it was able to pay the proffered wage during 2002.

During 2003 the petitioner's owner declared adjusted gross income of \$31,149. That amount is greater than the annual amount of the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income, he and his wife would have been left with only \$5,232.20 with which to support themselves and their three dependents during that year. The budget submitted, however, indicates that the petitioner's owner requires \$67,068.84 per year to support his household. The petitioner submitted no reliable evidence of any other funds available to the petitioner's owner during 2003 with which he could have paid the proffered wage and supported his family. The petitioner has not, therefore, demonstrated that it was able to pay the proffered wage during 2003.

During 2004 the petitioner's owner declared adjusted gross income of \$33,589. That amount is greater than the annual amount of the proffered wage. If the petitioner's owner had been obliged to pay the proffered wage out of his adjusted gross income during that year, he and his wife would have been left with only \$7,672.20 with which to support themselves and their three dependents. The budget submitted, however, indicates that the petitioner's owner requires \$67,068.84 per year to support his household. The petitioner submitted no reliable evidence of any other funds available to the petitioner's owner during 2004 with which he could have paid the proffered wage and supported his family. The petitioner has not, therefore, demonstrated that it was able to pay the proffered wage during 2004.

During 2005 the petitioner paid the beneficiary \$16,416. Ordinarily the petitioner would be obliged to demonstrate the ability to pay the \$9,500.80 remaining balance of the proffered wage. The petition in this matter, however, was submitted on June 30, 2005. On that date the petitioner's 2005 tax return was unavailable. On October 20, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, 2000, 2001, 2002, 2003, or 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.