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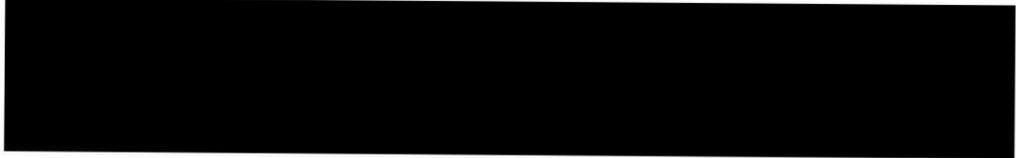
Office: VERMONT SERVICE CENTER

Date: JUL 23 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:



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 bagel store. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, 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 2001 priority date of the visa petition based on the petitioner's incomplete financial forms and failure to submit requested documents in response to the director's request for further evidence. The director also noted that it appeared that the beneficiary was self-petitioning as both the name of the beneficiary and the petitioner's represented signatory was Ahmed. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by 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 January 11, 2005 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary¹ 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 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 C.F.R. § 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

¹ The AAO notes that the current beneficiary is described as a substituted beneficiary by counsel on the cover letter submitted with the initial petition. Counsel further stated that the petitioner wished to withdraw the approved I-140 petition for [REDACTED] and to refile the petition with the current beneficiary. The AAO notes that the immigrant visa approval was revoked on August 30, 2004.

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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$19.55 an hour or \$40,664 per year. The Form ETA 750 states that the position requires two years of work experience in the job offered.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². On appeal, counsel submits a letter with no additional documentation. In response to the director's request for further evidence, counsel submitted copies of the petitioner's IRS Form W-3 for the years 2001, 2002 and 2003 that indicated aggregate wages, tips and other compensation of \$143,178 in tax year 2001, \$147,926 in tax year 2002, and \$159,243 in tax year 2003. Counsel stated that the petitioner had five employees in 2001, and six employees in tax years 2002 and 2003.³ With the initial petition, the petitioner submitted its Form 1120 for tax year 2000. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in April 12, 1993, to have a gross annual income of \$449,167 and did not indicate the number of current workers. On the Form ETA 750B, signed by the current beneficiary on March 22, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the beneficiary did not sign the I-140 petition, and that the petitioner's representative, whose name is also [REDACTED] signed the form. Counsel further asserts that the petitioner is not required to submit certified tax returns as evidence of its ability to pay the proffered wage. Counsel cites 8 C.F.R. § 204.5(g), for the premise that the petitioner is only required to submit evidence that the prospective United States employer has the ability to pay the proffered wage. Counsel then states that the petitioner's employees in 2001 were [REDACTED] and [REDACTED]. Counsel also noted that the same employees worked for the petitioner in 2002 and that in 2003, the same employees worked for the petitioner, with one additional employee, [REDACTED].

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). 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,

² 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).

³ Neither counsel nor the petitioner provided any further documentation to further substantiate counsel's assertion.

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).

The AAO notes that in his request for further evidence dated August 25, 2004, the director stated that the petitioner submitted its Form 1120 for tax year 2000, the tax year prior to when the 2001 priority date was established. The director then requested the petitioner's tax returns certified by IRS for tax years 2001 through 2003 with all schedules and attachments. While counsel is correct that CIS regulations do not require IRS certified federal tax returns as evidence of a petitioner's ability to pay the proffered wage, in the instant petition, the petitioner submitted a tax return that was prior to the 2001 priority date and no other tax returns. The regulation 8 C.F.R. § 204.5(g)(2) states, in pertinent part, that evidence of the petitioner's ability to pay the proffered wage shall be in the form of copies of annual reports, federal tax returns, or audited financial statements and that the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date. The petitioner, in the instant petition, only submitted its federal tax year for 2000, a year in which the petitioner's financial resources are not necessarily dispositive of the petitioner's ability to pay the proffered wage beginning on the priority date in 2001 and onwards. .

The regulation at 8 C.F.R. § 204.5(g)(2) also states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns, certified or non-certified, for the priority year and two subsequent tax years. The petitioner also provided no explanation for why such documents were not available or submitted. The 2001 through 2003 tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. As the director correctly noted, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In addition, the AAO notes that the director also requested that the petitioner submit its W-3 Forms with the names and salaries of all employees. In response to the director's request, counsel noted the amount of salaries paid by the petitioner but did not submit any corroborative evidence. On appeal, counsel identifies the petitioner's employees by name, but provides no further corroborative evidence as to their employment and salaries. 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)).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 petitioner's response to the director's request for further evidence, counsel noted that the beneficiary was currently working for the petitioner as of August 2004; however, the petitioner submitted no further evidence to further substantiate counsel's assertion. Again, 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).

Therefore in the instant case, the petitioner has not established that it employed and paid the beneficiary during the relevant period of time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2003.

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 the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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.

As previously stated, the petitioner did not submit any relevant federal tax returns or other regulatory-prescribed evidence of its ability to pay the proffered wage to the record. Therefore the AAO cannot examine whether the petitioner's net income in tax years 2001 to 2003 is sufficient to pay the proffered wage of \$40,664. Therefore, for the years 2001 to 2003, the petitioner did not have sufficient net income to pay the proffered wage.

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. Again, the petitioner did not submit its federal tax returns to the record for the priority year 2001 or any other subsequent year. Therefore the AAO cannot examine whether the petitioner had sufficient net current assets to pay the proffered wage. Therefore the petitioner has not demonstrated that it has the ability to pay the proffered based on the petitioner's net income, net current assets, or the beneficiary's wages. Therefore the director's decision will be affirmed and the petition will be denied.

The AAO also notes the director's comments with regard to the name [REDACTED] being used as signatures on both the I-140 petition and the Labor Certification Form ETA 750. However, the AAO does not find these signatures to be evidence that the beneficiary is petitioning for himself. The AAO notes that the beneficiary's middle name is [REDACTED] and his surname is [REDACTED]. The AAO does note that the Form ETA 750 and the I140 petition appear to be signed by an individual only identified by one name with accompanying handwritten signature block. On the ETA 750, the petitioner is identified as [REDACTED] with the signature block, and in the block below the signature line in which the petitioner has to print his or her name, the employer's name appears to be [REDACTED] identified as '[REDACTED]' on the form. Counsel on appeal brings up the name of [REDACTED] as a new employee in 2003. While dismissing the director's comments with regard to the beneficiary's petitioning for himself, the AAO does note the record contains various unexplained anomalies that do raise questions with regard to the petitioner's owner's identification.

As stated previously, the petitioner has not established its ability to pay the proffered wage as of the 2001 priority date and to the date the beneficiary obtains lawful permanent residence. 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.

⁴According 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.