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U.S. Citizenship
and Immigration
Services

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FILE: EAC 04 157 51622 Office: VERMONT SERVICE CENTER Date: **JUL 26 2007**

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 acting director, Vermont Service Center, denied the preference visa petition. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted. The decision by the AAO will be affirmed with regard to the petitioner's ability to pay the wages of all beneficiaries. The petition will be denied.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican style cook. 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 priority date of the visa petition. The director denied the petition accordingly. The AAO then dismissed the petition because the record did not reflect any wages paid to the beneficiary during the period of time in question, nor did it reflect that the petitioner had the ability to pay all beneficiaries for whom it had filed I-140 petitions in 2001.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. The petitioner has submitted new documentation with regard to the wages paid to the beneficiary by the petitioner, as well as the petitioner's 2004 tax return. Counsel also makes assertions with regard to the utilization of the petitioner's combined net incomes to establish the petitioner's ability to pay the proffered wage. This new evidence is viewed as sufficient to reopen the proceedings.

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 August 30, 2004 denial and the AAO dismissal of the petitioner's appeal dated January 18, 2006, the single 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 beneficiary obtains lawful permanent residence. The director in her denial examined the petitioner's net income and net current assets in tax year 2003 and stated that the petitioner had not established its ability to pay the proffered wage. In its dismissal of the petitioner's appeal, the AAO determined that the petitioner's submission of fourteen computer-generated payroll records could not be used to establish the beneficiary's wages for the 2001 priority year and subsequent years, and questioned why the petitioner had not submitted the W-2 Forms for the beneficiary when the petitioner had submitted W-2 Forms in response to the director's request for further evidence with regard to wages for another I-140 petition filed during the same period of time. Further the AAO stated that the petitioner had not established that it had the ability to pay both the beneficiary's proffered wages and the proffered wages of the second beneficiary during the period of time in question.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$39,291.20 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO considers all pertinent evidence in the record, including new evidence properly submitted on motion. On motion, counsel submits the beneficiary's W-2 Forms for tax years 2001, 2002, 2003, and 2004, as well as the petitioner's 2004 Form 1120S tax return. On appeal, counsel submitted fourteen pages of payroll records from what the AAO described as a "Quicken-style check writing computer application" that covered a period from December 29, 2003 to April 2, 2004. In her brief, counsel asserted that the petitioner in its cover letter dated March 22, 2004 that accompanied the petition had stated that it had net profits of \$21,460 after paying the beneficiary's salary of \$39,291.

On appeal, counsel also submitted another letter from the petitioner also dated March 22, 2004 that stated the beneficiary had been employed by the petitioner since May 2001 and that the beneficiary earned \$39,291 per year. The petitioner also submitted on appeal the petitioner's Form 1120S tax returns for tax years 2001 and 2002, and a copy of Form I-797 for another petition submitted by the petitioner to the Vermont Service Center. On this form, the director identifies a second beneficiary, [REDACTED], for whom the petitioner also filed a I-140 petition. Based on the RFE submitted to the record, the second beneficiary's proffered wage was \$39,291.20 and the I-140 petition had a priority date of April 27, 2001. Other relevant evidence in the record submitted with the initial petition is the original Form ETA 750, and the petitioner's 2003 Form 1120S for tax year 2003. 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 an S corporation. On the petition, the petitioner claimed to have been established in April 13, 1995, to have a gross annual income of \$1,800,509, net annual income of \$21,460, and to currently have 33 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary did not claim to have worked for the petitioner.

On motion, counsel states that the petitioner's combined net income for the time period of 2001 through 2003 was \$416,192, and that sum is sufficient to establish the petitioner's ability to pay the proffered wage of \$39,291 per year beginning on the priority date of April 27, 2001 and continuing through tax year 2011. Counsel cites an unpublished AAO decision dated August 16, 2004 in which the petitioner's net assets were used to establish that the petitioner could pay the difference between the beneficiary's actual wages and the proffered wage. Counsel states that the same use of the petitioner's assets could be done in the instant petition, namely, the previous combined net income of \$328,995 for the tax years 2001 and 2002.

Counsel also cites another unpublished AAO decision in which the petitioner submitted tax records from 2000 while the priority date was 11/08/2002. Counsel states that in this example the California Service Center issued a request for further evidence requesting additional evidence to demonstrate the petitioner's ability to pay the proffered wage as of the priority date. Counsel states that the instant petitioner was denied due process as the Vermont Service Center did not issue a request for further evidence for missing initial evidence and the petitioner was not given the opportunity to submit missing initial evidence. Counsel states that in a similar petition that the petitioner filed with the Vermont Service Center, a request for further evidence was sent to the petitioner. The petitioner responded to the request and the other I-140 petition was approved.

Counsel also states that the AAO in its dismissal rejected pertinent paychecks prepared by the petitioner's accountant as evidence that the beneficiary was actually paid, and that the AAO stated the following: ". . . the record of proceeding has a request for review submitted requesting a W-2 . . . for another beneficiary of business . . . the AAO can discern no reason for why such evidence was not also submitted to support the instant petition."

Counsel asserts that the request for further evidence sent to the petitioner with regard to the second beneficiary was issued on September 21, 2004 and received by counsel on September 24, 2004 following the denial of the instant petition on August 30, 2004. Counsel states that both the denial and appeal of the instant petition were effected prior to the issuance of the RFE sent to the petitioner with regard to the second beneficiary's petition. Counsel states that the petitioner on motion is submitting the beneficiary's W-2 forms from tax years 2001 to 2004, and that the beneficiary's W-2 form for 2005 is not yet available.

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, 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 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 director did not raise the issue of beneficiary's wages in his decision and thus no determination was made as to whether the petitioner could establish its ability to pay the proffered wage based on the beneficiary's wages. On appeal, the petitioner submitted the fourteen printouts of payroll records that

the AAO rejected as sufficient evidence to establish the beneficiary's wages in the period of time in question. As correctly noted by the AAO, the computer generated pay reports would not establish that the petitioner paid the beneficiary the proffered wage as of the April 27, 2001 priority date and in subsequent years, as these reports only examined a period of time from December 29, 2003 to April 2, 2004. As previously stated, the AAO also questioned why the petitioner had not submitted the beneficiary's W-2 forms since the petitioner had received a request for further evidence for a second I-140 petition that requested the beneficiary's W-2 form for tax year 2001.²

With regard to the AAO's questioning why the beneficiary's W-2 forms were not submitted to support the subject petition, counsel's explanation on motion of the timeline of both I-140 petitions submitted in 2001, provides some rationale for why the W-2 documents were not submitted on appeal in the instant petition. It is further noted that if the petitioner had followed the guidance provided in the RFE submitted to the record with regard to the second beneficiary's wages, it would have only submitted the second beneficiary's W-2 form for the 2001 priority year. Such evidence would have been insufficient to examine whether the petitioner paid the beneficiary the proffered wage or any wages as of the 2001 priority year and until the beneficiary in the instant petition obtained lawful permanent residence.³ Thus, since the petitioner has received no earlier request from the director with regard to the beneficiary's wages in the instant petition, the AAO will accept the W-2 forms submitted on motion.

Based on the beneficiary's W-2 forms, the petitioner paid the beneficiary \$26,446 in 2001, the priority year, and paid the beneficiary \$39,291.20 in tax years 2002, 2003, and 2004.

Therefore while the petitioner has established its ability to pay the proffered wage based on the beneficiary's wages in tax years 2002, 2003 and 2004, it has not established that it paid the beneficiary a salary equal to or greater than the proffered wage as of the 2001 priority date year. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages in 2001 and the proffered wage, namely, \$12,845.20. In addition, as correctly noted by the AAO, the petitioner has to establish its ability to pay the proffered wages for both beneficiaries for whom I-140 petitions were filed in priority year 2001. While counsel submitted a copy of the director's request for further evidence that stated the second beneficiary's proffered wage was also \$39,291.20, counsel on motion provides no further evidence as to the second beneficiary's actual wages and whether the petitioner had to pay the difference between the second beneficiary's actual wages in 2001 or any other pertinent year and the proffered wage. Thus, the record, based solely on the beneficiary's wage documents is not sufficient to establish that the petitioner had the ability to pay the proffered wage of all beneficiaries for whom I-140 petitions were filed during the 2001 priority date year, and during any subsequent years.

² In its dismissal of the appeal, the AAO identified the second petition as EAC 04 157 51622, Simon Oren; while the RFE submitted to the record by counsel identified the second petition as EAC 04 145 52459. CIS records indicate that the I-140 petition for the second beneficiary was approved on November 1, 2004.

³ Counsel's letter in response to the director's request for further evidence in EAC 04 1455 2459 states that the petitioner submitted the beneficiary's W-2 forms for all three years in the period of time in question, namely, 2001, 2002 and 2003. Such evidentiary documentation could have established the beneficiary's wages during the three years in question, and could have established whether the wages alone or the actual wages combined with either the petitioner's net income or net current assets were sufficient to establish the petitioner's ability to pay the proffered wage stipulated in the Form I-797, namely, \$39,291.20.

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 receipts and 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.

In examining the petitioner's net income, we reject counsel's idea that the petitioner's combined net income for the period 2001 through 2003 should have been considered in the determination of the petitioner's ability to pay the proffered wage. Counsel provides no further commentary on why such an analysis should be considered, nor cites to any precedent decisions or regulatory authority that suggests such an analysis. 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, unpublished 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). In addition, there is no indication that the petitioner in the unpublished AAO decision combined its net income for multiple years and used this aggregate figure to establish its ability to pay the proffered wage. Furthermore, although counsel on motion refers to the decisions⁴ cited by the AAO in its dismissal of the instant petition, none of these decisions' findings state that the petitioner's combined net income can be utilized to establish the petitioner's ability to pay the proffered wage.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$39,321 per year from the priority date:

⁴ *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).

- In 2001, the Form 1120S stated net income of \$87,839.
In 2002, the Form 1120S stated net income of \$306,893.
In 2003, the Form 1120S stated net income of \$20,960.
- In 2004, the Form 1120S stated net income of \$150,097.

Therefore, for the year 2001, the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage, namely \$12,845.20. The petitioner also had sufficient net income to pay the entire proffered wage for the second beneficiary noted by counsel, and the difference between the second beneficiary's actual wages and the proffered wage. In tax years 2002 and 2004, the petitioner had sufficient net income to pay the entire proffered wages for both the instant beneficiary and the second beneficiary; although the record indicates that the instant beneficiary was paid the proffered wage in both years. However, based on the lack of information in the record about the actual wages for the second beneficiary, the record is not clear that the petitioner in tax year 2003 had sufficient net income to pay the proffered wage, or the difference between the second beneficiary's actual wages and the proffered wage.

Thus, although the petitioner has established its ability to pay the entire proffered wages of both beneficiaries if they had not received any wages during the tax years 2001, 2002, and 2004, it has not established that it has sufficient net income to pay any difference between the second beneficiary's actual wages and the proffered wage in tax 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, including real property that counsel asserts should be considered. 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.⁵ 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. Since the petitioner has established its ability to pay both beneficiaries' wages during tax years 2001, 2002 and 2004 based on its net income, the AAO will only examine the petitioner's net current assets for the year 2003.

- The petitioner's net current assets during 2003 were -\$34,552.

⁵According 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, for the year 2003, although the record indicates that the instant beneficiary received the proffered wage, the record does not clearly establish that the petitioner has net current assets to pay the proffered wages of all beneficiaries.

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's proffered wage and the wages for a second beneficiary for whom a second I-140 petition was filed during the priority year during 2003, based on an examination of wages paid to the beneficiaries, or its net income or net current assets.

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 motion is granted. The prior decision of the AAO is affirmed.