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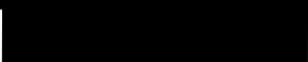
U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

JUL 27 2007
Date:

EAC 04 005 51905

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 that 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 cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 acting 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 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 Application for Alien Employment Certification 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 April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour, which equals \$24,689.60 per year.

The Form I-140 petition in this matter was submitted on October 3, 2003. On the petition, the petitioner did not state the date it was established, the number of workers it employs, or its gross and net incomes in the spaces provided. Subsequently, in a letter dated September 13, 2004, counsel stated that the petitioner was established on June 1, 1995, that it employs three workers, and that its gross and net annual incomes are \$248,962 and \$52,752, respectively.

On the Form ETA 750, Part B, signed by the beneficiary on August 29, 2003, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Riverdale, Maryland.

The AAO reviews *de novo* issues raised 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.¹

In the instant case the record contains, (1) copies of the petitioner's 2001, 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) a copy of a 2004 Form W-2 Wage and Tax Statement, (3) copies of 2005 pay stubs, (4) a letter dated November 24, 2005 from the petitioner's president, (5) an affidavit dated November 25, 2005 from the petitioner's president, and (6) copies of monthly statements pertinent to the petitioner's bank account. 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 petitioner's tax returns show that it is a corporation, that it incorporated on June 1, 1995, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2001 the petitioner declared taxable income before net operating loss deductions and special deductions of \$50,341. At the end of that year the petitioner declared current assets of \$1,861 and no current liabilities, which yields net current assets of \$1,861. The petitioner paid \$25,000 in Line 12, Compensation of Officers during that year.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$52,752. At the end of that year the petitioner declared current assets of \$9,691 and current liabilities of \$6,875, which yields net current assets of \$2,816. The petitioner paid \$0 in Line 12, Compensation of Officers during that year.

During 2003 the petitioner declared a loss of \$3,684 as its taxable income before net operating loss deductions and special deductions. On the corresponding Schedule L the petitioner declared neither end-of-year current assets nor end-of-year current liabilities, which yields net current assets of \$0. The petitioner paid \$0 in Line 12, Compensation of Officers during that year.

During 2004 the petitioner declared a loss of \$1,208 as its taxable income before net operating loss deductions and special deductions. On the corresponding Schedule L the petitioner declared neither end-of-year current assets nor end-of-year current liabilities, which yields net current assets of \$0. The petitioner paid \$0 in Line 12, Compensation of Officers during that year.

The 2004 W-2 shows that the petitioner paid the beneficiary gross wages of \$1,899.20 during that year. The pay stubs submitted show that the petitioner paid the beneficiary gross pay of \$474.80 on September 23,

¹ 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).

2005, September 30, 2005, and November 25, 2005. The more recent stub shows that the petitioner had paid the beneficiary year-to-date wages of \$22,315.60 by November 25, 2005.

The petitioner's president's November 24, 2005 letter states that the beneficiary has worked for the petitioner since December 2004 as a full-time cook at a salary of \$24,689.60. The petitioner's president's November 25, 2005 affidavit adds that the petitioner's officers agreed to forego compensation as necessary to pay the proffered wage.

The acting director denied the petition on October 25, 2005 based on the petitioner's failure to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.² That decision noted that the petitioner has filed at least four petitions³ and that the petitioner is obliged to show the ability to pay the wages proffered to all of its beneficiaries.

The acting director dismissed a subsequent motion, then forwarded it to AAO with the record to be treated as an appeal. In the brief, counsel asserted that the petitioner's profit, compensation of officers, and salary and wage expense, in sum, constitute "discretionary funds" available to pay additional wages.

Counsel's reliance on the bank statements in this case is misplaced.⁴ First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show

² On September 13, 2005 the service center issued a Notice of Intent to Deny in this matter. That notice requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, but concentrated largely on the conviction of the attorney who filed the petition in this case of multiple counts of immigration fraud for filing fraudulent alien worker petitions. The petitioner's present counsel protested, correctly, that the conviction of the petitioner's attorney for fraud in other cases is insufficient to demonstrate that the instant petition is fraudulent. This office will draw no conclusion from the fact that the petitioner's attorney was convicted of immigration fraud.

This office notes that [REDACTED], another attorney who has been convicted of multiple counts of immigration fraud for filing fraudulent alien worker petitions, represented a previous petitioner who filed for the instant beneficiary. Although a permissible inference may exist, this office will draw no conclusion from the fact that both of the attorney's who represented petitioners seeking to hire the beneficiary were convicted of multiple counts of immigration fraud.

³ In a letter dated September 13, 2004 the petitioner's previous counsel stated that the petitioner employs only three workers. Absent a substantial increase in the size of its premises and the volume of its business, that the petitioner needs four additional workers seems unlikely. Because this issue was not raised below and the petitioner has not been accorded an opportunity to respond, however, this office will not rely on that issue in today's decision, even in part. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

⁴ Actually, the petitioner's previous counsel in this case provided the bank statements. The petitioner's present counsel made no reference in argument to those bank statements.

the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁵ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel urges that the petitioner's Form 1120, Line 7, Compensation of Officers need not have been paid to its officers, but could have been retained by the petitioner to pay the proffered wage. In support of the proposition that the petitioner's officers were willing and able to forego compensation counsel cited the petitioner's president's November 25, 2005 affidavit.

Given that the petitioner's president has stated that the petitioner's officers have agreed to forego compensation as necessary to pay the proffered wage, and given that the petitioner paid its officers no compensation during 2002, 2003, and 2004, this office finds that the petitioner has demonstrated that its officer compensation was a discretionary fund available to pay wages as necessary. The petitioner's 2001 tax return shows that it paid officer compensation of \$25,000 during that year. That amount will be included in the calculations pertinent to the petitioner's ability to pay additional wages during 2001.

Counsel further asserts, however, that the petitioner's salary and wage expense during each of the salient years was a discretionary fund available to pay the wages proffered to the instant beneficiary. Whether the petitioner was able to pay those wages to the beneficiary depends upon whether they were paid for performance of the proffered position and whether the petitioner was free to discharge the employees to whom they were paid in favor of the beneficiary.

The petitioner submitted no evidence pertinent to the amount of its wage and salary expense that it paid to cooks, as opposed to delivery personnel, wait staff, counter staff, management, and other kitchen staff. Whatever amount was paid to employees other than cooks could not feasibly be diverted to pay an additional cook.

Further, the underlying purpose of the visa category pursuant to which the petition in this case was filed is to provide foreign workers for positions that U.S. employers are unable to fill with U.S. workers. If the position is currently filled and the petitioner is seeking to replace the incumbent or incumbents with the beneficiary out of preference, rather than necessity, that would be inconsistent with the purpose of the instant visa category. The petitioner has not demonstrated that it could have diverted any portion of its past or present salary and wage expense to pay the wage proffered in the instant case.

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

⁵ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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.

Evidence in the record shows that the petitioner paid the beneficiary \$1,899.20 during 2004. The most recent pay stub submitted shows that the petitioner had paid the beneficiary year-to-date year-to-date wages of \$22,315.60 by November 25, 2005, apparently at the rate of \$474.80 per week. This office notes that payment of \$474.80 per week is consistent with paying the wage proffered in this case.⁶

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).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 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's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed

⁶ \$474.80 x 52 = \$24,689.80.

or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁷ shown on lines 16(d) through 18(d). 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.

The priority date is April 12, 2001. The wage proffered in the instant case is \$24,689.60 per year. The record contains no evidence pertinent to the wages proffered to the other three beneficiaries for whom the petitioner has petitioned. If they were to be remunerated at the same wage proffered in this case then the total wages proffered were \$98,758.40.⁸ This office will use that figure in its calculations pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.⁹

The petitioner paid \$25,000 as officer compensation during 2001 and has demonstrated that it was available to pay that amount as wages to the aliens it proposes to employ. It has not demonstrated that it paid any wages to the instant beneficiary of the beneficiaries of the other alien worker petitions it has filed. The petitioner is obliged to show the ability to pay the remaining \$73,758.40¹⁰ of the aggregated wages proffered to its alien beneficiaries.

During 2001 the petitioner declared taxable income before net operating loss deductions and special deductions of \$50,341. That amount is insufficient to pay the remaining balance of the aggregated proffered wage. At the end of that year the petitioner had net current assets of \$1,861. That amount is also insufficient to pay the remaining balance of the aggregated proffered wage. The petitioner has submitted no reliable evidence of any other funds at its disposal with which it could have paid additional wages during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that it paid any officer compensation or that it paid any wages to the beneficiary of the instant petition or to its other beneficiaries during 2002 and must show the ability to pay the entire amount of the aggregated proffered wage.

⁷ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁸ \$24,869.60 x 4

⁹ If the wages proffered to the other beneficiary's were substantially less than the wage proffered in this case, and use of that sum prejudices the petition, the petitioner may address that issue on motion.

¹⁰ \$98,758.40 - \$25,000

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$52,752. That amount is insufficient to pay the aggregated proffered wage. At the end of that year the petitioner declared net current assets of \$2,816. That amount is also insufficient to pay the aggregated proffered wage. The petitioner submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the aggregated proffered wage during 2002.

The petitioner has not demonstrated that it paid any officer compensation or that it paid any wages to the beneficiary of the instant petition or to its other beneficiaries during 2003 and must show the ability to pay the entire amount of the aggregated proffered wage.

During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner declared net current assets of \$0. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the aggregated proffered wage during 2003.

The petitioner has not demonstrated that it paid any officer compensation during 2004. It demonstrated that it paid the beneficiary \$1,889.20 during 2004. It has not demonstrated that it paid any wages to its other beneficiaries during 2004. The petitioner is obliged to show the ability to pay the remaining \$96,869.20¹¹ balance of the proffered wage during that year.

During 2004 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner declared net current assets of \$0. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence of any other funds available to it during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the aggregated proffered wage during 2004.

The petitioner demonstrated that it had paid the beneficiary year-to-date wages of \$22,315.60 through November 25, 2005. That amount is consistent with payment of \$474.80 per week for 47 weeks. The proffered wage of \$24,689.60 per year equals \$474.80 per week.¹² Each of the pay stubs submitted shows that the petitioner paid the beneficiary \$474.80 per week. All of the evidence submitted supports that the petitioner paid the beneficiary weekly amounts consistent with the annual amount of the proffered wage through November 25, 2005. This office finds that the petitioner was able to pay the proffered wage during 2005.

The petition in this matter was submitted on October 3, 2003. On that date the petitioner's 2006 tax return was unavailable. On September 13, 2005 the service center issued a request for evidence in this matter,

¹¹ \$98,758.40 - \$1,889.20

¹² \$24,689.60 / 52

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 2006 tax return was still unavailable. The petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, and 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.