

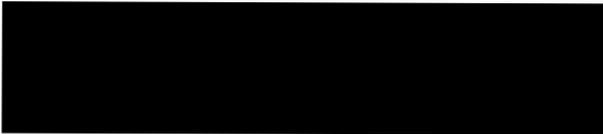
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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship and Immigration Services

PUBLIC COPY



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FILE: WAC 05 207 52002 Office: CALIFORNIA SERVICE CENTER Date: JUN 05 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 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 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 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 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 May 13, 2002. The proffered wage as stated on the Form ETA 750 is \$16.68 per hour, which equals \$34,694.40 per year.

The Form I-140 petition in this matter was submitted on July 20, 2005. On the petition, the petitioner stated that it was established during 1991 and that it employs four workers. The petitioner left blank the spaces on that form reserved for it to report its gross annual income and net annual income. On the Form ETA 750, Part B, signed by the beneficiary on April 30, 2002, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in San Francisco, California.

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.¹

In the instant case the record contains (1) the petitioner's owner's 2002, 2003, and 2004 Form 1040 U.S. Individual Income Tax Returns, (2) copies of monthly statements pertinent to the petitioner's bank statements, (3) a statement of the petitioner's owner's recurring monthly expenses (budget), (4) copies of the beneficiary's 2001, 2002, 2003, and 2004 Form 1040 U.S. Individual Income Tax Returns, and (5) copies of San Francisco business licenses, tax certificates, and alcoholic beverage licenses pertinent to a San Francisco restaurant. 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.

Schedules C, Profit or Loss from Business, attached to the petitioner's owner's tax returns show that the petitioner is held as a sole proprietorship. The petitioner's owner and owner's spouse filed jointly and had two dependents during each of the salient years.

During 2002 the petitioner returned net profit of \$36,110. The petitioner's owner and owner's spouse declared adjusted gross income of \$33,576 during that year, including the petitioner's profit offset by deductions.

During 2003 the petitioner returned net profit of \$26,512. The petitioner's owner and owner's spouse declared adjusted gross income of \$24,638 during that year, including the petitioner's profit offset by deductions.

During 2004 the petitioner returned net profit of \$17,987. The petitioner's owner and owner's spouse declared adjusted gross income of \$16,715 during that year, including the petitioner's profit offset by deductions.

The petitioner's owner's budget shows that he and his family require \$1,415 monthly to pay their living expenses. That amount equals \$16,980, annualized.

Schedules C attached to the beneficiary's 2001, 2002, 2003, and 2004 tax returns show that the beneficiary and her husband owned and operated the Balboa Sushi House in San Francisco during each of those years. The business licenses, tax certificates, and alcoholic beverage licenses confirm that they operated the restaurant.

In a letter dated December 8, 2005 counsel stated that the beneficiary received no W-2 forms because she was the proprietor of the restaurant at which she worked.

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).

The director denied the petition on December 21, 2005. On appeal, counsel asserted that the evidence in the record demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel cites 8 C.F.R. § 204.5(g)(2) and a May 4, 2004 memorandum from William Yates, CIS Associate Director of Operations, for the proposition that a petitioner may demonstrate its continuing ability to pay the proffered wage beginning on the priority date with its bank balances. Counsel states that the bank balances represent financial reserves available to pay additional wages as necessary, and should therefore be considered pursuant to the holding in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).²

Counsel's reliance on the bank statements in this case is misplaced. 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 the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.³ 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. Bank statements are not necessarily, therefore, a financial reserve available to pay additional wages if earnings are insufficient.

This office is aware that the memorandum counsel referenced urged that a petitioner might provide bank statements as evidence of its ability to pay the proffered wage. That memorandum, however, by its own terms, was not intended to create a substantive right or to amend 8 C.F.R. § 204.5(g)(2), but to provide guidance in adjudications.

The regulation at 8 C.F.R. § 204.5(g)(2) allows the introduction of bank statements, but does not indicate that a mere showing that a petitioner's monthly balance in excess of the monthly amount of the proffered wage shows that the petitioner was able to pay the proffered wage during that month. Further, it does not state that merely showing that a petitioner's average monthly balance exceeded the monthly amount of the proffered wage shows the ability to pay the proffered wage during a given period.

For the bank statements to demonstrate ability to pay the proffered wage, the petitioner would be obliged to demonstrate that the bank balances represent funds not included on the petitioner's tax returns. Otherwise

² Counsel misrepresents that *Sonogawa* is a decision of this office.

³ 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.

they do not show that any additional funds were available. Counsel has offered no such evidence 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 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 did not establish that it employed and paid the beneficiary.

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 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, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the 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 she 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 (7th Cir. 1983).

The proffered wage is \$34,694.40 per year. The priority date is May 13, 2002.

During 2002 the petitioner's owner and owner's spouse declared adjusted gross income of \$33,576. Even without reserving any amount for the petitioner's owner and owner's spouse to use to support their family, that amount is insufficient to pay the proffered wage. The petitioner provided 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 proffered wage during 2002.

During 2003 the petitioner's owner and owner's spouse declared adjusted gross income of \$24,638. Even without reserving any amount for the petitioner's owner and owner's spouse to use to support their family, that amount is insufficient to pay the proffered wage. The petitioner provided 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 proffered wage during 2003.

During 2004 the petitioner's owner and owner's spouse declared adjusted gross income of \$16,715. Even without reserving any amount for the petitioner's owner and owner's spouse to use to support their family, that amount is insufficient to pay the proffered wage. The petitioner provided 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 proffered wage during 2004.

The petition in this matter was submitted on July 20, 2005. On that date the petitioner's owner'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 owner's 2005 tax return was still unavailable. 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 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.