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U.S. Citizenship
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JUN 08 2007

FILE: [REDACTED]
SRC-05-256-52396

Office: TEXAS SERVICE CENTER

Date:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a motel manager (night shift manager). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established its 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 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 December 6, 2005 denial, 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.

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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.50 per hour (\$36,400 per year). The Form ETA 750 states that the position requires two years of college studies, an associate degree or equivalent and two years of experience in the job offered or in the related occupation of operations manager.

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 appeal¹. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2001 through 2004, the petitioner's quarterly federal tax returns for all quarters of 2001 and 2002, letters from the petitioner regarding the beneficiary's replacement of [REDACTED] (Mr. [REDACTED]) and Mr. [REDACTED] W-2 forms for 2001 and 2002. 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. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$790,859, to have a net annual income of \$28,557, and to currently employ 7 workers. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel claims that the beneficiary will replace Mr. [REDACTED] and the amount paid to Mr. [REDACTED] plus the petitioner's net current assets in 2001 and 2002 would be sufficient to pay the beneficiary the proffered wage in these two years, and therefore, the petitioner establishes its continuing ability to pay the proffered wage from the priority date to the present.

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 petitioner did not submit any evidence showing that it hired and paid the beneficiary.

The petitioner advised that the beneficiary will replace Mr. [REDACTED]. The record contains the petitioner's Form 941, Employer's Quarterly Federal Reports for all quarters of 2001 and 2002, Mr. [REDACTED]'s W-2 forms issued by the petitioner in 2001 and 2002 and two letters from Bhupendra Tripathi, Vice President and COO of the petitioner as documentation of the replacement. The letters from the petitioner verify that Mr. [REDACTED] worked for the petitioner on a full time basis, and the 941 forms and W-2 forms show that the petitioner paid Mr. [REDACTED] \$39,999.96 in 2001 and \$30,769.20 in 2002. However, there is no evidence that the position of Mr. [REDACTED] involves the same duties as those set forth in the Form ETA 750. In the instant case, the proffered position is a motel manager (night shift manager). If Mr. [REDACTED] performed other kinds of work, then the beneficiary could not have replaced him. The petitioner submitted two letters regarding Mr. [REDACTED]'s replacement. In response to the director's notice of intent to

¹ 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).

deny (NOID), the petitioner submitted a letter dated October 28, 2005 (the petitioner's October 28, 2005 letter). This letter states in pertinent parts that:

This is to inform that Mr. [REDACTED] who holds 80% shares of [REDACTED] [sic] is retiring (he is 68 yrs old). Mr. [REDACTED] has been working full-time since sunset lodge was purchased in June[sic] 2000. Because of his age and failing health, he has been slowing down on his work.

We need a full-time employee to take over Mr. [REDACTED] position, [the beneficiary], who is qualified for the position would be replacing Mr. [REDACTED] a.

The petitioner's October 28, 2005 letter verifies Mr. [REDACTED] full-time employment with the petitioner since June 2000, however it does not indicate in what position Mr. [REDACTED] worked on a full time basis. Instead, the letter states that Mr. [REDACTED] holds 80% shares of the petitioner, therefore, it verifies that Mr. [REDACTED] is the majority owner, shareholder or main executive officer of the petitioner.

On appeal the petitioner submits another letter from [REDACTED] dated March 1, 2006 (the petitioner's March 1, 2006 letter). The second letter states that: "[t]his is to certify that Mr. [REDACTED] was working as an assistant manager in the years of 2001 and 2002 for [REDACTED]." The letter does not describe the duties Mr. [REDACTED] performed as an assistant manager during 2001 and 2002. Therefore, the AAO cannot determine whether Mr. [REDACTED]'s assistant manager position involved the same duties as those set forth on the Form ETA 750 in the instant case, and thus whether or not the beneficiary could replace him. The petitioner does not submit any documentary evidence to support its assertion. However, the record of proceeding contains evidence which provides inconsistent information with the petitioner's March 1, 2006 letter. The schedule E of the petitioner's tax returns for 2001 and 2002 show that in 2001 and 2002 Mr. [REDACTED] held 25% of shares of the petitioner and was paid as compensation of officers in the amount of \$40,000 and \$30,769 in 2001 and 2002 respectively. The amounts were exactly the same the petitioner claimed to pay Mr. [REDACTED] as a full-time employee and reflected on his W-2 forms. The evidence in the record indicates that Mr. [REDACTED] worked and was paid as an officer of the petitioner.² The evidence does not support the petitioner's assertion that Mr. [REDACTED] worked as an assistant manager in 2001 and 2002. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 582, 591-92. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Therefore, the petitioner failed to establish its ability to pay the proffered wage in 2001 and 2002 through the examination of wages paid the replaced employee in the same position.

² This office notes that the petitioner was last registered on March 23, 2007, that Mr. [REDACTED] is its CFO, and that Mr. [REDACTED] also operates another business from the same address as a CFO in the State of Georgia. See <http://www.ganet.org/cgi-bin/pub/corp/corpsearch?corpId=K949423> and =0105846 (accessed on April 17, 2007).

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 total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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.

The petitioner's tax returns for 2001 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$36,400 per year from the priority date:

- In 2001, the Form 1120 stated a net income³ of \$(217,919).
- In 2002, the Form 1120 stated a net income of \$(103,953).
- In 2003, the Form 1120 stated a net income of \$20,989.
- In 2004, the Form 1120 stated a net income of \$28,557.

Therefore, for the years 2001 through 2004, 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

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

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.

- The petitioner's net current assets during 2001 were \$22,541.
- The petitioner's net current assets during 2001 were \$24,018.
- The petitioner's net current assets during 2001 were \$66,063.
- The petitioner's net current assets during 2001 were \$75,105.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage while it established that it had sufficient net current assets to pay the proffered wage in 2003 and 2004.

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 the proffered wage as of the priority date through an examination of wages paid to the beneficiary and its net income or net current assets for 2001 and 2002.

Counsel asserts in the brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.