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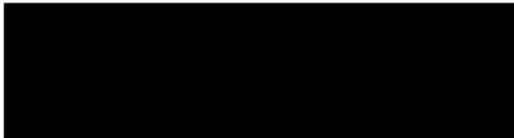
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IN RE: Petitioner:
Beneficiary:



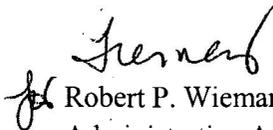
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 instant preference visa petition. The Director, Vermont Service Center reopened the matter pursuant to motion and denied the visa petition again. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty 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 director reopened the matter and affirmed that decision.

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 and the director's decision on the motion the sole issue in this case was 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$9.50 per hour, which equals \$19,760 per year.

The Form I-140 petition in this matter was submitted on September 18, 2003. On the petition, the petitioner stated that it was established during 1991 and that it employs four workers. The petition states that the petitioner's gross annual income is \$264,404 and that its net annual income is a loss of \$19,484. On the Form

ETA 750, Part B, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked for the petitioner since September 1999. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Richmond, Virginia.

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) 2001, 2002, and 2003 Form 1120, U.S. Corporation Income Tax Returns, (2) a copy of a Payroll Transaction Listing showing that the petitioner paid the beneficiary gross pay of \$6,480 between August 9, 2004 and November 30, 2004, (3) an accountant's compilation report initially issued with a 2003 balance sheet,² (4) pages three through seven of the petitioner's end-of-year 2003 general ledger, (5) eight pages of the petitioner's 2003 journal report, (6) the petitioner's compiled balance sheet as of April 30, 2004 and the associated accountant's compilation report, (7) the petitioner's income statement for the first four months of 2004 with no accompanying accountant's report, (8) monthly statements pertinent to the petitioner's bank accounts, and (9) a letter dated June 2, 2004 from the petitioner's president/owner. 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 January 1, 1993, and that it reports taxes pursuant to cash convention and the calendar year.

During 2001 the petitioner declared a loss of \$19,184 as its taxable income before net operating loss deductions and special deductions. At the end of that year the petitioner had current assets of \$38,384 and current liabilities of \$3,355, which yields net current assets of \$35,479. During that year the petitioner paid \$4,430 in officer compensation and \$8,913 in salaries and wages. The petitioner paid no Schedule A, Line 3, Cost of labor.

During 2002 the petitioner declared a loss of \$16,125 as its taxable income before net operating loss deductions and special deductions. At the end of that year the petitioner had current assets of \$21,086 and current liabilities of \$2,209, which yields net current assets of \$18,877. During that year the petitioner paid \$15,305 in officer compensation and \$8,930 in salaries and wages. The petitioner paid no Schedule A, Line 3, Cost of labor.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of \$15,943. At the end of that year the petitioner had current assets of \$41,923 and current liabilities of \$3,476, which yields net current assets of \$38,447. During that year the petitioner paid \$13,355

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).

² The balance sheet is not in the file:

in officer compensation and \$10,550 in salaries and wages. The petitioner paid no Schedule A, Line 3, Cost of labor.

In his June 2, 2004 letter the petitioner's owner stated that his restaurant then employed three full-time cooks. He also stated that the petitioner would not be filling a newly created position, but replacing part-time and temporary cooks.

The acting director denied the petition on December 2, 2004. Pursuant to petitioner's motion the director³ reopened the matter and denied the petition again. On appeal, counsel asserted that the petitioner's bank balances and other liquid assets should be considered in weighing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel also asserted, citing *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), that poor performance during a single year does not preclude approval of the petition.

In a previous letter dated April 16, 2004 counsel argued that the petitioner's depreciation deduction should be added to its net profit for each given year to determine the total amount available to pay additional wages. Counsel also asserted that the annual amount of the proffered wage the petitioner must show the ability to pay during 2001 should be prorated to reflect that only 35 weeks of that year remained after the priority date.

In his brief, counsel stated that the acting director had erred in finding that the petitioner was unable to pay the proffered wage. In so stating, counsel is inverting the burden of proof. The acting director did not find that the petitioner is unable, but that the petitioner had not sustained its burden of proving the petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

Counsel also misrepresented the financial documents submitted as audited financial statements. "Financial statements" denotes a company's balance sheets and income statements. Audited financial statements are balance sheets and income statements produced pursuant to an audit, rather than compilation or review. The single balance sheet in the record, that for April 30, 2004, is accompanied by an accountant's report that flatly states that it was produced pursuant to a compilation. The single income statement provided is not accompanied by an accountant's report, and the record contains no evidence to support counsel's assertion that it was audited.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

³ Between issuance of the initial decision of denial and the decision on the motion a permanent director was appointed at the Vermont Service Center.

Further, the remaining financial documents are not financial statements at all. This office is unable to draw any conclusion pertinent to the petitioner's profitability from its general ledger entries and journal reports.

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.⁴ 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.

The assertion of counsel and the accountant that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁵ Counsel appears to be asserting that the real cost of long-term

⁴ 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.

⁵ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel requests that CIS prorate the proffered wage during 2001 for the portion of the year that remained after the priority date. We will not, however, consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the 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), the petitioner has not submitted such evidence.

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, supra*.

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 established that it paid the beneficiary \$6,480 during 2004. The petitioner must show the ability to pay the balance of the proffered wage during that year. Although the beneficiary claims to have worked for the petitioner since 1999, no evidence was submitted of the wages it paid to him during any other year.

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.

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.

Contrary to the counsel's assertion, however, the petitioner's total assets 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 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 typically⁶ 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 proffered wage is \$19,760 per year. The priority date is April 30, 2001.

During 2001 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, however, the petitioner had net current assets of \$35,479. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 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 had net current assets of \$18,877. That amount is slightly less than the annual amount of the proffered wage. The petitioner has submitted no reliable evidence to demonstrate the existence of any funds with which it could have paid the balance of the proffered wage during that year. The petitioner's tax returns are insufficient to show that it was able to pay the proffered wage during 2002.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of \$15,943. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$38,447. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

⁶ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

During 2004 the petitioner paid the beneficiary \$6,480 in wages. Ordinarily the petitioner would be obliged to demonstrate the ability to pay the \$13,280 balance of the proffered wage. The petition in this matter, however, was submitted on September 18, 2003. On that date the petitioner's 2003 tax return was unavailable. The request for additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date was issued on May 26, 2004. On that date the petitioner's 2004 return was still unavailable. The petitioner is excused from showing its ability to pay the proffered wage during 2004 and subsequent years.⁷

Notwithstanding that the petitioner's 2002 tax return was insufficient, in itself, to show the petitioner's ability to pay the proffered wage during that year counsel asserts that pursuant to the decision in *Matter of Sonogawa, supra*, the petition should be approved.

The petitioner's tax returns showed the ability to pay the proffered wage during 2001 and 2003 and narrowly missed demonstrating that ability during 2002. Further, the petitioner has been in business since 1991 and in its current corporate form since 1993. Although its bank balances are not, in themselves, evidence of profitability sufficient to pay additional wages they appear to indicate that the petitioner has not been cash-strapped during the pendency of this petition. Although the petitioner only claimed, on the visa petition, to have four employees, it has had gross receipts between \$250,000 and \$300,000 during each of the salient years. Although the petitioner has not demonstrated the existence of any exigent circumstances that depressed its finances during 2002, if no other irregularities existed in the instant case, this office would be inclined to find, on the balance, that the petitioner had demonstrated its continuing ability to pay the proffered wage beginning on the priority date.⁸

The record suggests additional issues, however, that were not addressed in the decision of denial.

On the Form I-140 petition, submitted September 18, 2003, the petitioner stated that it then employed four workers. In his June 2, 2004 letter the petitioner's president stated that the petitioner then employed three full-time cooks and some number of part-time cooks and temporary cooks.

During 2003 the petitioner paid \$10,550 in salaries and wages. That amount is insufficient to compensate the four employees the petitioner claimed to employ during that year. That annual amount would be insufficient to compensate the three full-time cooks the petitioner claimed to employ during the following year. Even if that amount is combined with the petitioner's \$13,355 in officer compensation during that year the total, \$23,905, is insufficient to compensate four employees, or even three full-time cooks.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such

⁷ The petitioner is only excused from demonstrating its ability to pay the proffered wage during 2004 and subsequent years for the purpose of the instant appeal. The director is free on remand, if he wishes, to request evidence pertinent to 2004 and subsequent years.

⁸ On remand the director is free, as was noted above, to reconsider the petitioner's ability to pay the proffered wage based on evidence pertinent to later years.

inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Further, the beneficiary's name is [REDACTED]. An addendum to the 2001 Schedule K shows that [REDACTED] then owned the petitioner. Schedules E of the 2002 and 2003 returns show that Ismael Quiroz then owned the petitioner. That the petitioner's owner and the beneficiary share the same last name implies that they may be related.

Pursuant to 20 C.F.R. §656.20(c) (8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship." *See Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000)

Because the decision of denial did not discuss these additional issues and the petitioner has not been accorded the opportunity to address them, this office will not dismiss the appeal on these bases. Instead, the matter will be remanded for further consideration and action

On remand the director may consider the issues noted above or any other issues material to the approvability of the petition. The director may also request evidence salient to any other relevant issues, including the petitioner's ability to pay the proffered wage during 2004 and subsequent years. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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 director's decision is withdrawn. The matter is remanded for further consideration and action and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.