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U.S. Citizenship
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Services

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FILE: EAC 03 200 50999 Office: VERMONT SERVICE CENTER Date: MAR 01 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
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The 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 wholesale and retail meat cutter. It seeks to employ the beneficiary permanently in the United States as a halal butcher. 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 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 December 20, 2002. The proffered wage as stated on the Form ETA 750 is \$14.34 per hour, which equals \$29,827.20 per year.

The Form I-140 petition in this matter was submitted on June 25, 2003. On the petition, the petitioner stated that it was established during 1994 and that it employs four workers. The petition states that the petitioner's gross annual income is \$264,653 but the petitioner did not state its net annual income in the space provided.

The beneficiary signed but did not date the Form ETA 750, Part B. That form's inclusion with the Form ETA 750, however, indicates that it was signed before the priority date. On that form 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 Rutland, Vermont.

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) copies of the petitioner's 2001, 2002 and 2003 Form 1120, U.S. Corporation Income Tax Returns, (2) an undated letter from the petitioner's current owner and president, (3) 2002 and 2003 Form W-2 Wage and Tax Statements, (4) the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2001 and 2002, and the first, second, and fourth quarters of 2003, (5) Vermont Quarterly Wage Statements for the first, second, and fourth quarters of 2003, (6) photocopies of 2004 check stubs, (7) a narrative appraisal report pertinent to the petitioner's real property in Rutland, Vermont, (8) a settlement sheet for that property, (9) a copy of a first mortgage loan agreement, (10) one page of a second mortgage deed, (11) an unaudited **profit and loss** statement for the first five and one half months of 2004, (12) a letter of resignation from [REDACTED] (13) an undated letter from the petitioner's accountant, (14) monthly statements pertinent to the petitioner's bank accounts, and (15) a printout of the petitioner's payroll account transactions from April 2, 2004 to June 11, 2004. 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 the petitioner is a corporation, that it incorporated on July 5, 1994, and that it reports taxes pursuant to cash convention accounting and the calendar year.

The petitioner's 2001 tax return² shows that it declared taxable income before net operating loss deductions and special deductions of \$390 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 tax return shows that it declared a loss of \$14,665 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2003 tax return shows that it declared taxable income before net operating loss deductions and special deductions of \$7,927 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

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 This office notes that, because the priority date of the instant visa petition is December 20, 2002, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2002 and 2003 W-2 forms show that the petitioner paid its previous halal butcher, J [REDACTED] \$26,000 during both of those years.

The petitioner's quarterly returns show that it paid total wages of between \$14,860 and \$27,813 during each of the quarters they cover. The returns generally show a gradual increase in total wages from one quarter to the next.

The Vermont quarterly statements show that the petitioner paid its previous halal butcher \$6,500 during each of the first two quarters of 2003 and that the position was salaried rather than hourly. The third quarter statement was not provided. The amount paid to the petitioner's previous [REDACTED] shown on the fourth quarter statement was occluded when the statement was photocopied. This office notes that the figures on the quarterly statements are consistent with payment of an annual salary of \$26,000.

The 2004 check stubs show that the petitioner paid the beneficiary \$560 per week from February 6, 2004 to March 4, 2004 and \$600 per week from March 12, 2004 to July 29, 2004.³ The July 29 check stub shows a year-to-date total of \$15,400.

The appraisal report, dated July 5, 2003, estimated that the value of the petitioner's property is \$200,000. The settlement sheet, dated June 4, 2004, shows that [REDACTED] the petitioner's previous [REDACTED] purchased the same property for \$250,000 on that date. That sheet also indicates that the property was then encumbered by loans of \$230,000. The first mortgage loan documents confirm that a mortgage loan was placed on the property on that date.

The first page of a second mortgage deed submitted indicates that it is the first of three pages. The other pages were not provided. The single page provided does not contain the date that second mortgage was placed, but indicates that the second mortgage loan amount is \$30,000 and that it is subordinate to a previous loan with the original principal amount of \$220,000.

The petitioner's president's undated letter states that [REDACTED] was the company's full-time halal butcher until January 2004. The letter further states that Mr. [REDACTED] left the company in February 2004 and the beneficiary replaced him.

The resignation letter states, in its entirety, "I, [REDACTED], hereby resign any and all positions I hold with [the petitioner] as an officer and director of the corporation effective January 1, 2004."

The petitioner's payroll printout shows that between April 2, 2004 and June 11, 2004 the petitioner regularly drew a weekly check to the beneficiary for \$554.10. That printout also shows that, during that same period, the petitioner regularly drew a weekly check to [REDACTED] the petitioner's previous [REDACTED], for

³ Those pay stubs were submitted on August 13, 2004, in response to the request for evidence issued in this case.

⁴ The name of the petitioner's previous president and [REDACTED] is spelled both [REDACTED] and [REDACTED] in various places in the record. This office believes that the two discrepant names refer to the same person, but which spelling is correct is unknown to this office.

\$419.22, except that it did not draw such a check on June 11, 2004. This tends to contradict the assertion that the petitioner no longer employed its previous halal butcher after January of 2004.

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 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).

The petitioner's accountant's undated letter notes the amount of the petitioner's depreciation deduction on its 2001, 2002, and 2003 returns and that depreciation is a non-cash deduction. The accountant also states that the value of the petitioner's real property is carried at its historical cost basis, and that its actual value is significantly higher. Finally, that letter indicates that [REDACTED] interest in the petitioner.

The director denied the petition on June 1, 2005. On appeal, counsel asserted that the amount of the proffered wage that the petitioner was obliged to show the ability to pay during 2002 should be prorated to reflect that only eleven days of that year remained on the priority date. Counsel also urged that, based on the reasoning of the accountant's undated letter, the petitioner's depreciation deduction should be added back to the petitioner's net profit to show the total available to the petitioner during that year with which it could have paid additional wages. Further still, counsel urged that the value of the petitioner's real property should be considered, as should the fact that it is currently paying wages to the beneficiary.

In a previous letter, dated July 30, 2004, counsel cited a May 4, 2004 memorandum issued by the Associate Director for Operations of Citizenship and Immigration Services (CIS) for the proposition that the petition should be approved because the petitioner is currently paying the beneficiary the proffered wage.

The Associate Director's memorandum relied upon by counsel provides guidance to adjudicators to make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the associate director's memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the associate director's memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is December 20, 2002. Thus, the petitioner must show its ability to pay the proffered wage not only during 2002, but during subsequent years. Demonstrating that the petitioner paid the proffered wage during a specific year suffices to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay the proffered wage during the remaining salient years.

This office does not concur with counsel's reasoning that CIS should prorate the proffered wage during 2002 for the portion of the year remaining after the priority date. We will not 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 argument 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 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'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.⁶

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.

⁶ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's

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 evidence of record indicates that the petitioner owns, and apparently operates upon, real property worth roughly \$250,000. The record does not, however, indicate that the value of that property is available to the petitioner to pay additional wages. First, the property has been encumbered by mortgage loans in the past and the amount by which it may be encumbered at present is unknown to this office. Further, the property appears to be used in the petitioner's business. The petitioner could not readily continue in business if it alienated that property to pay the proffered wage.

Counsel's reliance on the unaudited financial statement submitted in this case 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.

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. (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 established that it paid the beneficiary \$15,400 during 2004.

The evidence demonstrates that the petitioner it employed ██████████ as its halal butcher during 2002 and 2003 and paid him \$26,000 per year. The petitioner indicated that Mr. ██████████ ceased to perform that function in January of 2004, and was replaced by the beneficiary. Ordinarily, this might suffice to show that, had the petitioner been able to employ the beneficiary during 2002 and 2003 he would have replaced Mr. ██████████'s wages would have been available to pay the wage proffered in the instant case.

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.

Other evidence in the record, however, indicates that [REDACTED] continued to draw a paycheck from the petitioner after January of 2004. This casts doubt on the assertion that the beneficiary replaced Mr. [REDACTED]. The wages paid to Mr. [REDACTED] during 2002 and 2003 will not be considered in the determination of the petitioner's ability to pay the proffered wage during those years.

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.

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 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 proffered wage is \$29,827.20 per year. The priority date is December 20, 2002.

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

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 negative net current assets. 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 has 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 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 \$7,927. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. 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 has 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 that it was able to pay the proffered wage during 2003.

During 2004 the petitioner paid the beneficiary \$15,400. Ordinarily the petitioner would be obliged to show the ability to pay the remaining \$14,427.20. However, the petition in this matter was filed on June 26, 2003. On that date the petitioner's 2004 tax return was unavailable. On May 25, 2004 CIS issued a request that the petitioner submit additional evidence to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2004 return was still unavailable. The petitioner is excused from its obligation to show its ability to pay the proffered wage during 2004 and subsequent years.

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