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U.S. Citizenship
and Immigration
Services

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FILE: LIN 05 132 50346 Office: NEBRASKA SERVICE CENTER Date: MAY 01 2007

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:



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 Acting Center Director (director), Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican food specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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.

On appeal, counsel asserts that the director erred in his analysis of the evidence submitted and maintains that the petitioner has the financial ability to pay the proffered wage.

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 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 Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$11.00 per hour, which amounts to \$22,880 per annum.

On Part B of the ETA 750, signed by the beneficiary on January 9, 1998, the beneficiary claims that he has worked for the petitioner, "[REDACTED]" at [REDACTED]s, Utah since December 1997. This is the same name and address of the employer [REDACTED] that is listed in item 4 and item 6 on the ETA 750A. It is noted that the ETA 750A was signed on January 9, 1998, by "[REDACTED]" as president. It states that his location is in Del Mar, California. It is further noted that the ETA 750A has been altered to state the name of the employer as "[REDACTED]." This alteration has not been stamped as an approved correction by the DOL.

On the ETA 750B, the beneficiary also states that he worked at "[REDACTED]" Utah from November 1996 until December 1997. This is the same address as that given for the petitioner on the Immigrant Petition for Alien Worker (I-140).

On Part 5 of the preference petition, filed on March 28, 2005, the petitioner claims that it was established in 1975.

In support of the petitioner's ability to pay the proffered salary of \$22,880, the petitioner provided an incomplete copy of a Form 1040, U.S. Individual Income Tax Return for 2003. The filers are "[REDACTED]" and his spouse "[REDACTED]" signed the I-140 on behalf of the employer, [REDACTED], and by letter, dated November 29, 2004, he signs as the owner of [REDACTED] Mexican Foods located at [REDACTED] in Murray Utah. The tax return shows that [REDACTED] filed jointly with his spouse and declared four dependents. His tax return contains the following:

Wages, salaries, tips, etc.	\$12,500
Business income or (loss)	\$30,255
One-half of self-employment tax	\$ 2,138
Adjusted Gross Income	\$40,617

The petitioner also provided incomplete copies of the corporate tax returns of [REDACTED] for 2002 and 2003. The employer tax identification number is different from that listed for the petitioner named on the I-140. No explanation is given for the submission. Other documents submitted in support of the petitioner's ability to pay the proffered wage are as follows:

- 1.) a copy of a municipal business license issued in April 2003 to [REDACTED] at [REDACTED].
- 2.) Internet copies of directions and listings of multiple restaurants called "[REDACTED]" throughout California with eight listings in Utah. None of the locations match either the address for the petitioner on the I-140 or the ETA 750A, although one location is at [REDACTED] in Murray, Utah.
- 3.) Multiple copies of state quarterly sales and use tax returns filed by [REDACTED] for 1998 to 2003.

On May 25, 2005, the director requested additional evidence pertinent to the petitioner's ability to pay the beneficiary's proposed wage offer. The director requested that the petitioner provide copies of the beneficiary's 1998-2004 wage earning statements, as well as his most recent pay voucher identifying the employer and beneficiary, wages paid both currently and year-to-date, and the length of the pay period. The director additionally requested copies of the petitioner's federal tax returns, copies of annual reports, or audited financial statements as of the priority date and continuing until the present to show that it has had the ability to pay the proffered wage. The director further instructed the petitioner to provide copies of its most recent federal quarterly federal tax return as well as similar reports for the first quarter of 2003. He also specifically requested copies of the petitioner's 1998 through 2004 federal income tax returns, copies of the beneficiary's 1998-2004 federal income tax returns, as well as any additional evidence showing that the petitioner had the ability to pay the proffered wage.

In response, the petitioner submitted a copy of a municipal business license sought by "new owner," [REDACTED] on June 2, 2005, in order to commence a business called "[REDACTED]", Utah. The petitioner also provided a copy of a letter, dated August 5, 2005, from [REDACTED] of Wells Fargo Bank stating that Mr. [REDACTED] has a business checking account at the bank with an available balance of \$17,686.63, and a business savings account with an available balance of \$33,031.34. A copy of an internally generated printout showing the checking account balance accompanies the letter.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 11, 2005, denied the petition. The director noted that the petitioner had not substantively responded to the request for evidence by providing evidence of the continuing financial ability to pay the proposed wage offer since the priority date of January 14, 1998.

On the notice of appeal, counsel merely states that the director erred where the "restaurant owner has opened one new restaurant and is in the process of opening others and therefore has the ability to pay the offered salary." Counsel's assertions are not persuasive and do not constitute evidence of the ability to pay. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

It is noted that record shows that Mr. [REDACTED] has applied to open a restaurant in St. George, Utah in 2005. The petitioner, however, is a different restaurant and for that reason, the petitioner must establish its continuing financial ability through its audited financial statements, federal tax returns, or annual reports beginning at the priority date of January 14, 1998 and continuing until the beneficiary obtains lawful permanent resident status

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have 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. If the petitioner paid compensation less than the proffered wage, those amounts will be considered. If any deficit between the beneficiary's actual wages and the proffered wage may be met by the petitioner's net current assets or net income in a given period, the petitioner may be deemed to have the ability to pay the proffered wage for that period. In the instant case, the petitioner provided no evidence of payment of wages to the beneficiary.

In determining the petitioner's ability to pay the proffered wage, CIS will generally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In this case, the petitioner provided a partial tax return filed by Mr. [REDACTED] in 2003. Although he may be the petitioner's current owner, the tax return, as well as other documents supplied to the record, do not corroborate when this ownership occurred or document how the petitioner is structured. This tax return was incomplete and will not be considered as evidence of the petitioner's ability to pay the proffered wage.

Similarly, the submission of the partial corporate tax returns of [REDACTED] c. do not correspond to the petitioner's ownership or employer's tax identification number and will not be considered as probative, without further explanation and documentation, of the petitioner's ability to pay the proffered wage for the years submitted. The record does not establish whether the petitioner may be considered a successor-in-interest to the Luna company. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner may be doing business

at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. Additionally, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Reliance upon the petitioner's bank letter and accompanying bank printout is also misplaced. They are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise would provide an inaccurate financial portrait of the petitioner. A petitioner's bank statements may constitute additional evidence to be submitted in appropriate cases, but a selected bank statement or letter referring to balances maintained over an undetermined period of time show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage.

The petitioner has not established its continuing ability to pay the proffered wage of \$22,880 in any of the relevant years. Based on the evidence contained in the record we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date of the petition.

Beyond the decision of the director, it is noted that the beneficiary and the petitioner's brother or brother-in-law, declared as a dependent on the 2003 tax return, share the same last name. While this may not be uncommon, it is noted that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, 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 it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Although not part of the consideration in this case, in future proceedings, this issue may also merit further investigation, including consultation with the DOL.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.