

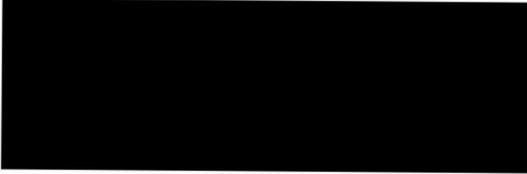
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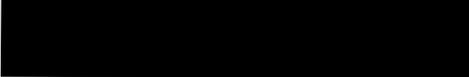
U.S. Citizenship  
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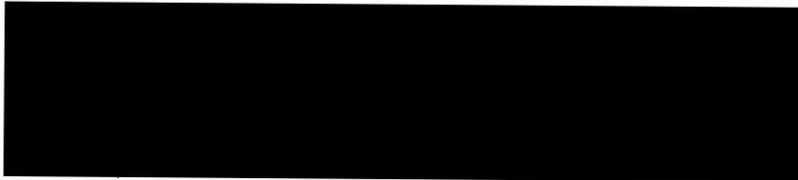
*Be*

FILE: WAC 05 153 52717 Office: CALIFORNIA SERVICE CENTER Date: **MAY 22 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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$15 per hour, which equals \$31,200 per year.

The Form I-140 petition in this matter was submitted on May 9, 2005. On the petition, the petitioner stated that it was established during September 1987 and that it employs six workers. The petitioner did not state its gross annual income and net annual income in the spaces provided on the Form I-140. On the Form ETA 750, Part B, signed by the beneficiary on date April 12, 2001, the beneficiary claimed to have worked for the petitioner since July 2000. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Lynwood, 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.<sup>1</sup>

In the instant case the record contains (1) the 2001, 2002, 2003, and 2004 joint Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and owner's spouse, (2) copies of monthly statements pertinent to bank accounts of the petitioner's owner's spouse, (3) the petitioner's owner's 2002 mortgage interest statement, (4) California Form DE-6 Quarterly Wage Reports, and (5) a statement of the recurring monthly expenses (budget) of the petitioner's owner and owner's spouse. 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.

Corresponding Schedules C provided with the individual income tax returns show that the petitioner's owner holds the petitioner as a sole proprietorship. During 2001 the petitioner's owner and owner's spouse had two dependents. During each of the other salient years they had one dependent.

During 2001 the petitioner returned net profit of \$22,677. During that year the petitioner's owner and owner's spouse declared adjusted gross income of \$45,156, including the petitioner's profit offset by deductions.

During 2002 the petitioner returned net profit of \$9,107. During that year the petitioner's owner and owner's spouse declared adjusted gross income of \$47,945, including the petitioner's profit offset by deductions.

During 2003 the petitioner returned net profit of \$16,220. During that year the petitioner's owner and owner's spouse declared adjusted gross income of \$55,034, including the petitioner's profit offset by deductions.

During 2004 the petitioner returned net profit of \$32,308. During that year the petitioner's owner and owner's spouse declared adjusted gross income of \$70,263, including the petitioner's profit offset by deductions.

The mortgage interest statement shows that at the beginning of 2002 the petitioner's owner owed a principal balance of \$172,888.98 on a mortgage secured by a property at 4276 Lavinia Avenue in Lynwood, California, and that at the end of that year he owed \$166,800.19.

The California Wage Reports cover the last quarter of 2004 and the first three quarters of 2005. Those reports show that during those quarters the petitioner employed from 15 to 17 workers, and paid wages of \$38,291.58, \$41,924.74, \$47,628.27, and \$37,799.06 during those four quarters, respectively. Finally, those reports show that the petitioner paid the beneficiary wages of \$1,080, \$2,970, and \$2,970 during the first,

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<sup>1</sup> 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).

second, and third quarters of 2005, respectively, for a total of \$7,020 during those three quarters. Although the beneficiary claims to have worked for the petitioner since June of 2000, the report for the last quarter of 2004 does not indicate that the beneficiary paid him any wages during that quarter.

The petitioner's owner's and owner's spouse's budget shows that they require \$3,619.96 per month for their personal household expenses. That amount equals \$43,439.52 annually.

The director denied the petition on December 29, 2005. On appeal, counsel asserted that the amounts in the petitioner's monthly bank statements demonstrates its continuing ability to pay the proffered wage beginning on the priority date. Counsel also asserts that the petitioner's owner's ownership of real estate is an index of his ability to pay the proffered wage.

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. 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 reflected on its tax returns.

Counsel asserts that this office should consider the petitioner's owner's ownership of real estate in assessing the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel provides principal balance information pertinent to the property for 2002, but for no other year. Further, counsel provided no evidence pertinent to the market value of the property<sup>2</sup> or any other encumbrances.<sup>3</sup>

Further, even if that information were provided and demonstrably correct, it would be insufficient to render the petition approvable. The value of the petitioner's owner's equity in real estate is not the sort of liquid assets expected to be readily available to pay wages. For all of the reasons listed, the petitioner's owner's alleged equity in real estate 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,

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<sup>2</sup> A property's market value would typically be estimated by a professional appraisal report.

<sup>3</sup> The existence or absence of other encumbrances would typically be demonstrated by a professional title search.

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 established that it paid the beneficiary \$7,020 during the first three quarters of 2005. Although the beneficiary stated, on the Form ETA 750B, to have worked for the petitioner since July 2000, the record contains no evidence that the petitioner paid the beneficiary wages during any other time.

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 he 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 (7<sup>th</sup> Cir. 1983).

The proffered wage is \$31,200 per year. The priority date is April 24, 2001.

During 2001 the petitioner's owner declared adjusted gross income of \$45,156. If the petitioner's owner had been obliged to pay the beneficiary's wages out of that amount he would have been left with \$13,956 to support his household during that year. That amount would have been insufficient as their household expenses total \$43,439.52 per year. The petitioner submitted no reliable evidence to demonstrate that any other funds were available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared adjusted gross income of \$47,945. If the petitioner's owner had been obliged to pay the beneficiary's wages out of that amount he would have been left with \$16,745 to support his household during that year. That amount would have been insufficient as their household expenses total \$43,439.52 per year. The petitioner submitted no reliable evidence to demonstrate that any other funds were 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 declared adjusted gross income of \$55,034. If the petitioner's owner had been obliged to pay the beneficiary's wages out of that amount he would have been left with \$23,834 to support his household during that year. That amount would have been insufficient as their household expenses total \$43,439.52 per year. The petitioner submitted no reliable evidence to demonstrate that any other funds were 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 declared adjusted gross income of \$70,263. If the petitioner's owner had been obliged to pay the beneficiary's wages out of that amount he would have been left with \$39,063 to support his household during that year. That amount would have been insufficient as their household expenses total \$43,439.52 per year. The petitioner submitted no reliable evidence to demonstrate that any other funds were 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 petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 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.