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U.S. Citizenship
and Immigration
Services

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FILE:

LIN-04-244-50004

Office: NEBRASKA SERVICE CENTER

Date: MAY 24 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 preference visa petition was denied by the Acting 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 cook. 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 noted that the petitioner's actual identity could not be determined with inconsistent information submitted by the petitioner, and thus she could not conclude that the petitioner is a qualifying entity and that the evidence submitted demonstrated the petitioner's ability to pay the proffered wage. 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 August 26, 2005 denial, the issues in this case are whether or not the petitioner submitted sufficient evidence to establish its status as a qualifying entity and 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 at 8 C.F.R. § 204.5(c) states in pertinent part:

Any United States employer desiring and intending to employ an alien may file a petition for classification of the Alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act.

The regulation at 8 C.F.R. § 204.5 also states in pertinent part:

(1) *Skilled workers, professionals, and other workers.* (1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker.

... ..

(3) *Initial evidence—(i) Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor,

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, 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).

The instant petition is for a substituted beneficiary.¹ The original Form ETA 750 was accepted on September 9, 2002. The proffered wage as stated on the Form ETA 750 is \$11.47 per hour (\$23,857.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. The I-140 petition was submitted on August 26, 2004. The record shows that the petitioner claimed to have been established in 1998, to have a gross annual income of \$219,915, and to currently employ 4 workers. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on July 21, 2004, the beneficiary did not claim to have worked for the petitioner.

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 appeal². On appeal counsel submits a corporation certificate from the Secretary of State of Ohio, articles of incorporation of the petitioner, a letter from [REDACTED], Certified Public Accountants, regarding ownership of the petitioner and a shareholder consent for the petition dated September 30, 2005. Other relevant evidence in the record includes report of use of fictitious name filed by the petitioner, evidence of the petitioner's business operation, the petitioner's corporate federal tax returns for 2001 through 2004, letters from banks regarding the petitioner's account balances, the petitioner's wage report, payroll records, and the beneficiary's W-2 form for 2004. The record does not contain any other evidence relevant to the petitioner's status and ability to pay the proffered wage.

On appeal, counsel admits that some incorrect information and documents were submitted in error, and asserts that the submitted new evidence establishes that the petitioner, [REDACTED], is the qualifying entity in the instant case.

¹ An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

² 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).

It is noted that an employer under name of [REDACTED] filed a labor certification application on September 9, 2002 and the DOL approved the labor certification application on September 18, 2003. On August 26, 2004 the instant petition was filed by an entity named [REDACTED] with Form 1040 U.S. Individual Income Tax Return for 2002 filed by [REDACTED] and [REDACTED] claiming [REDACTED] as the [REDACTED]'s IRS Tax number and other inconsistent information. On April 19, 2005 the director issued a request for evidence (RFE) requesting the petitioner resolving the inconsistencies in the evidence. In response to the director's RFE, counsel admitted that there were some mistakes in the initial filing and submitted documents as evidence. The director determined that the submitted response did not resolve the several disparities pointed out in the director's RFE and denied the petition accordingly. On appeal counsel submits additional evidence to support her assertion that the petitioner is [REDACTED], and it is a qualifying entity in the instant case.

The certificate issued by Secretary of State of Ohio, and the articles of incorporation of [REDACTED] in the record show that [REDACTED] incorporated this company on January 12, 1998. The record contains a copy of a report of use of fictitious name which shows that on November 23, 1998 the petitioner registered [REDACTED] as the fictitious name for [REDACTED], located at [REDACTED]. Counsel, the accountant and representative of the petitioner claim that they provided incorrect documents and information about the tax return, the petitioner's IRS tax number and ownership. The petitioner is [REDACTED] who runs a restaurant under its fictitious name of [REDACTED]. However, the labor certification application was filed by and certified for [REDACTED]. The record does not contain any evidence to establish that [REDACTED] and [REDACTED] are the same business entity, that [REDACTED] Inc. is the successor-in-interest to [REDACTED] or [REDACTED]. [REDACTED] is the fictitious name of [REDACTED]. Instead, this office also notes that the fictitious name of [REDACTED] was cancelled on November 24, 2003.⁴ Therefore, this portion of the director's decision is affirmed.

The AAO will also review all the documents in the record under the name of [REDACTED] to determine whether or not the petitioner would demonstrate its continuing ability to pay the proffered wage as of the priority date if [REDACTED]'s petitioning status were established.

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

³ This office notes that the petitioner, [REDACTED] was incorporated on January 22, 1998 and the corporate status has been active in the State of Ohio; that the petitioner runs a seafood restaurant/carryout business under a fictitious name of [REDACTED] at [REDACTED]. *See* http://www1.sos.state.oh.us/pls/portal/PORTAL_BS.BS_QRY_BUS_INFORMATION1.show (accessed on April 19, 2007).

⁴ *See* http://www1.sos.state.oh.us/pls/portal/PORTAL_BS.BS_QRY_BUS-FILING_DET.SHOW (accessed on May 11, 2007).

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 of compensation the beneficiary received from the petitioner in 2002 and 2003. However, the petitioner submitted the beneficiary's W-2 form for 2004, the petitioner's wage reports for the first quarter of 2005, and the beneficiary's payroll records for the first five months of 2005. The beneficiary's W-2 form shows that the petitioner paid the beneficiary \$1,988.00 in 2004; the petitioner's wage report shows that the petitioner paid the beneficiary \$5,964.00 in the first quarter of 2005; and the payroll record for 2005 shows that the petitioner paid the beneficiary \$9,940.00 in the first five months of 2005. The evidence demonstrates that the petitioner employed the beneficiary in December 2004 and since then has been paying the beneficiary \$1,988.00 per month at the level of the proffered wage rate.

In response to the director's RFE, counsel asserts that the fact that the beneficiary has been working for the petitioner and has been paid at the proffered wage rate establishes the petitioner's ability to pay the proffered wage. However, counsel's assertion does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2). The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is September 9, 2002. Thus, the petitioner must show its ability to pay the proffered wage not only in December 2004, when counsel claims the petitioner actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2002 through 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Therefore, the petitioner did not establish that it paid the beneficiary the full proffered wage in 2002, 2003 and 2004 although it demonstrated its ability to pay the proffered wage through wages paid in 2005. The petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage in 2002 and 2003, and pay the difference of \$21,869.60 in 2004 between wages actually paid to the beneficiary and the proffered wage with its net income or net current assets.

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 record contains the petitioner's tax returns for 2001 through 2004. 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. The priority date in the instant case is September 9, 2002, therefore, the petitioner's 2001 tax return is not necessarily dispositive. The petitioner's tax returns for 2002 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$23,857.60 per year in 2002 and 2003 and to pay the difference of \$21,869.60 in 2004:

- In 2002, the Form 1120 stated a net income⁵ of \$2,200.
 - In 2003, the Form 1120 stated a net income of \$(1,683).
- In 2004, the Form 1120 stated a net income of \$6,111.

Therefore, for the years 2002 through 2004, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid to the beneficiary and 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 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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

⁵ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

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 2002 were \$7,203.
- The petitioner's net current assets during 2003 were \$8,413.
- The petitioner's net current assets during 2004 were \$9,436.

Therefore, for the years 2002 through 2004, the petitioner did not have sufficient net current assets to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage.

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 from 2002, the year of the priority date to 2004 through an examination of wages paid to the beneficiary, its net income or net current assets.

With the initial filing the petitioner submitted a letter from [REDACTED] of KeyBank dated August 18, 2004 confirming that the balance of the petitioner's account was \$39,994.92. In response to the director's RFE, counsel submitted a letter from [REDACTED], Certified Personal Banking Advisor at FirstMerit dated June 24, 2005 confirming that the petitioner's current account balance was \$35,196.75. Neither of writers provides bank statements or any other documentary evidence to support the contents of the letters. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, letters from banks 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 paints an inaccurate financial picture of the petitioner. Second, the bank letters provided by the petitioner 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 in the petitioner's bank accounts somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel'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 to 2004.

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

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.

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).

Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The AAO notes that the job offer in the instant case does not appear to be *bona fide*, as the petitioner’s owner and the beneficiary share the same last name and appear to be related.

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.