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U.S. Citizenship
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Services

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SEP 05 2007

FILE:

EAC 05 079 52439

Office: VERMONT SERVICE CENTER

Date:

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 Director, Vermont 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 U.S. Department of Labor (DOL). 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. Therefore, the director denied the petition.

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.

According to the director's August 30, 2005 denial, the issue in this case is whether 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(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 is accepted for processing by any office within the employment system of the DOL. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the petition. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the Form ETA 750 for processing on January 30, 2001. The proffered wage as stated on the Form ETA 750 is \$755.60 per week, 52 weeks per year, or \$39,291.20 annually. The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 on appeal.¹

¹ 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 this case

The petitioner submitted the following evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage:

- the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001, 2002 and 2003, together with certain attachments filed with these forms;
- copies of the petitioner's monthly business checking statements for January 2003 through December 2004;
- a letter dated June 22, 2005 from the petitioner's professional accounting and income tax services which lists the petitioner's gross income, net income; total assets and its number of employees in 2001, 2002, 2003 and 2004;
- a letter dated October 24, 2005 from counsel which indicates that the petitioner has shown an ability to pay the proffered wage by demonstrating that its total assets are more than the proffered wage and that, if necessary, the assets may be liquidated to pay the wage; and by demonstrating that its gross revenues were twice to four times the amount of the proffered wage during the relevant period of analysis;
- a letter dated July 1, 2005 from counsel which indicates that the beneficiary worked for the petitioner from April 2000 through an unspecified month in 2005, but that the petitioner did not document this employment as the beneficiary was not authorized at that time to work in the United States, and as such the petitioner is not able to provide evidence regarding the wages paid to the beneficiary during this period; and which indicates that the petitioner has shown an ability to pay the proffered wage in that it has paid its bills in the past and in that it has assets which may be liquidated to cover expenses, such as the proffered wage;

The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as an S corporation. On the petition, the petitioner listed June 2000 as the date it was established. It stated that it had eight employees and a gross annual income of \$100,000. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on January 24, 2001, the beneficiary claimed to have worked for the petitioner from April 2000 through the date that form was signed.

In the appeal and in various other submissions, counsel indicates that the petitioner has demonstrated the ability to pay the proffered wage in that it has met all its expenses since opening in 2000, in that its total assets have always exceeded the proffered wage and in that its gross revenues have always far exceeded the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition subsequently based on that Form 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

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).

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 Sonegawa*, 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 this case, the beneficiary did indicate on the Form ETA 750 that he had worked for the petitioner. However, there is no documentation in the record to support the assertion that the petitioner employed the beneficiary at any time during the relevant period of analysis. 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)). Similarly, evidence in the record fails to support counsel's assertions that the petitioner employed the beneficiary during early 2000 through early 2005, but did not document this employment and the wages that it paid the beneficiary because the beneficiary was not yet authorized to work during this period. Without documentary evidence to support the claim that the petitioner paid wages to the beneficiary during the relevant period, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient, contrary to counsel's assertions. It is also insufficient for the petitioner to show that it paid wages in excess of the proffered wage.

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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* stated:

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* 719 F. Supp. at 537.

The petitioner's tax returns demonstrate the following financial information concerning its ability to pay the proffered annual wage of \$39,291.20 from the priority date of January 30, 2001 onwards:

- Petitioner's 2001 Form 1120 states a net income or loss² of 2,289.
- Petitioner's 2002 Form 1120 states a net income or loss of \$139.
- Petitioner's 2003 Form 1120 states a net income or loss of \$4,355.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay 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, contrary to assertions of counsel. 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, contrary to counsel's assertions that CIS should consider the petitioner's total assets as funds available to pay the 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, 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 2001 were \$4,956.
- The petitioner's net current assets during 2002 were \$4,060.
- The petitioner's net current assets during 2003 were \$4,725.

Thus, for the years 2001 through 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

In sum, the petitioner has not demonstrated an ability to pay the wage during any year in the relevant period of analysis. It has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards through an examination of wages paid to the beneficiary, its net income or its net current assets.

²For purposes of this analysis, net income is equal to ordinary income (loss) from trade or business activities as reported on Line 21 of the Form 1120S.

³According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Under certain circumstances, CIS will consider the petitioner's expectations for future growth and various other evidence beyond net income and net current assets in keeping with the holding of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), when determining the petitioner's ability to pay the proffered wage. However, in this matter, any reliance on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. That case relates to a petition filed during uncharacteristically unprofitable years within a framework of profitable years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. Also, the petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. The instant petitioner has not shown that unusual circumstances, parallel to those in *Sonegawa*, exist in this case, nor has the petitioner established that 2001 through 2003 were uncharacteristically low profit years for its restaurant.

Counsel does assert on appeal that the petitioner is an expanding business and as such should not be obliged to show net current assets to cover the entire proffered wage. However, there is no evidence in the record to support counsel's claim that the petitioner's business is expanding in any significant way. The assertions of counsel do not constitute evidence in these proceedings. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, speaking against any projection of future earnings, the Acting Regional Commissioner states in *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977):

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Finally, the petitioner's business checking account statements submitted into the record do not help demonstrate that the petitioner has had the ability to pay the proffered wage from the priority date onwards. Bank statements are not among the three types of evidence enumerated in 8 C.F.R. § 204.5(g)(2) as the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional evidence to be considered "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 in this matter. Also, the various bank statements submitted show the amount in the petitioner's checking account on a given date. Such statements standing alone cannot show an ability to pay the proffered wage from the priority date onwards. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's monthly checking statements somehow reflect additional available funds that were not listed on its tax returns.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.