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**SEP 05 2007**

FILE:   
EAC-05-166-53447

Office: VERMONT SERVICE CENTER

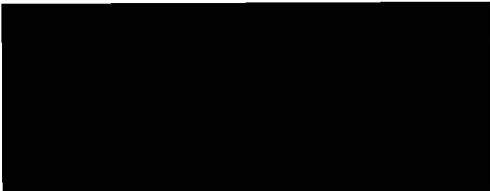
Date:

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 Acting Director (Director), Vermont Service Center. After granting a motion to reopen, the director affirmed the decision and denied the petition. The matter 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 head waiter/waitress [REDACTED]. 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 determined that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed timely<sup>1</sup> 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 December 8, 2005 denial, the single issue in this case is 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.

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<sup>1</sup> The petition was denied on December 19, 2005. Counsel filed a Form I-290B initially on January 20, 2006, however, it was returned without issuing the receipt date because the check for the required filing fee was not signed. The Form I-290B was properly filed on January 31, 2006. In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). Since the appeal was untimely filed (43 days after the decision was issued), it would have been rejected if the director had forwarded it to the AAO. The director decided to treat the late appeal as a motion to reopen under the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2). On March 14, 2006, the director affirmed her December 19, 2005 decision and denied the petition after reviewing the motion and the complete record of proceedings. The instant appeal was filed from the director's March 14, 2006 decision. Counsel requested a waiver of the filing fee since the director affirmed her unfavorable decision. Counsel misunderstands the regulations and procedures. The same Form I-290B cannot be treated as a motion to reopen and then also as a subsequent appeal from the decision on the motion to reopen. The petitioner must file a new separate appeal with a proper filing fee. Since that was done, the AAO considers the instant appeal properly filed, and thus counsel's request for waiver of the filing fee for the instant appeal is denied.

The regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The record indicates that the director issued the decision on March 14, 2005 and the instant appeal was received by Citizenship and Immigration Services (CIS) on April 14, 2005, 31 days after the decision was issued. Accordingly, the appeal was timely filed despite that in her decision, the director improperly gave notice to the petitioner that it had 18 days to file the appeal.

The regulation 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.<sup>2</sup> The original Form ETA 750 was accepted on April 4, 2001. The proffered wage as stated on the Form ETA 750 is \$8.45 per hour (\$15,818.40 per year<sup>3</sup>). The Form ETA 750 states that the position requires two years of experience in the job offered or in the related occupation of waiter or waitress. The I-140 petition was submitted on May 18, 2005. The petitioner did not provide information regarding its date of establishment, gross annual income, net annual income or its current number of employees on the petition. 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 April 22, 2005, 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 appeal<sup>4</sup>. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2001, 2002 and 2004, and bank statements for the petitioner's account covering February 2001 to September 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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<sup>2</sup> An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from [REDACTED] Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, [REDACTED] fm96\_28-96a.pdf (March 7, 1996).

<sup>3</sup> Based on working 36 hours per week set forth on the original certified Form ETA 750A. It is noted that the director mistakenly calculated the annual salary as \$12,168.00 in both the December 19, 2005 and March 14, 2006 decisions.

<sup>4</sup> 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). Although on the Form I-290B, counsel indicated that a brief and/or evidence would be sent to the AAO within 30 days, in response to the AAO's August 2, 2007 fax counsel confirmed that she did not file a brief or evidence in support of this appeal as indicated on Form I-290B.

On appeal, counsel asserts that the petitioner's current liabilities for 2001 erroneously included deposits of \$113,339, and loan repayment of \$100,000 which does not need to be repaid; that the business has been in existence since 1972 for 23 years in a business with high turnover; and that the average cash balance in the bank statement for every single month from 2001 to 2005 exceeds the annual salary.

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 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 showing that it hired and paid the beneficiary, and therefore, has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

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). Counsel suggested CIS note the petitioner's gross income of \$3,013,156 in its fiscal year 2001, \$3,126,382 in 2002 and \$3,091,679 in 2003, and also total paid wages of \$1,246,059 in 2001, \$1,240,438 in 2002 and \$1,186,871 in 2003 respectively in determining the petitioner's ability to pay the proffered wage. Counsel's 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 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 runs from August 1 to July 31. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001, 2002 and 2004 which cover its three fiscal years of 2001 (August 1, 2001 - July 31, 2002), 2002 (August 1, 2002 - July 31, 2003) and 2003 (August 1, 2003 - July 31, 2004)<sup>5</sup>. The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$15,818.40 per year from the priority date:

- In the fiscal year 2001 (8/1/01-7/31/02), the Form 1120 stated a net income<sup>6</sup> of \$(104,625).
- In the fiscal year 2002 (8/1/02-7/31/03), the Form 1120 stated a net income of \$(52,642).
- In the fiscal year 2003 (8/1/03-7/31/04), the Form 1120 stated a net income of \$(27,274).

Therefore, for the fiscal 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. 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.<sup>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and

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<sup>5</sup> The petitioner filed its fiscal year 2001 (August 1, 2001-July 31, 2002) tax return on the IRS Form 1120 for 2001 and filed its fiscal year 2002 (August 1, 2002-July 31, 2003) tax return on the IRS Form 1120 for 2002, however, filed its fiscal year 2003 (August 1, 2003-July 31, 2004) on the IRS Form 1120 for 2004.

<sup>6</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

<sup>7</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 its fiscal year 2001 were \$(145,036).
- The petitioner's net current assets during its fiscal year 2002 were \$(232,156).
- The petitioner's net current assets during its fiscal year 2003 were \$(268,714).

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

The priority date in the instant case is April 4, 2001. The regulation 8 C.F.R. § 204.5(g)(2) requires the petitioner demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence with evidence in the form of copies of annual reports, federal tax returns, or audited financial statements. The petitioner's tax return for its fiscal year 2001 covers a period from August 1, 2001 to July 31, 2002, but does not cover the priority date of April 4, 2001. Therefore, the petitioner must establish its ability to pay the proffered wage in its fiscal year 2000 with its tax return, annual report or audited financial statements. However, the record does not contain any regulatory-prescribed evidence for the period from April 4, 2001 to July 31, 2001. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner failed to establish its ability to pay the proffered wage as of the priority date because it failed to submit these documents.

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 as of the priority date through an examination of wages paid to the beneficiary, its net income; or its net current assets.

Counsel asserts on appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel mentions that the petitioner's current liabilities for 2001 included deposits of \$113,339, which were liquid and should not be counted against assets; and that in 2001 the shareholders were repaid almost \$100,000, which they did not "need" to be repaid. However, counsel does not submit any evidence to support these assertions, such as amended tax returns, and corrected audited financial statements. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

The record contains bank statements for the petitioner's business analysis account from June 2002 to September 2005. Counsel argues that the balance on each and every bank statement is more than enough to pay the annual salary of several additional employees. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements 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, 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 return, 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.

On appeal counsel also suggests CIS consider the longevity of the petitioner's business. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the instant case, the petitioner was incorporated in 1972 and has been in business for 23 years, however, the tax returns submitted in the record indicate that the petitioner never had a profit during the most recent three years and the record does not contain any evidence showing that there are unusual circumstances in this case to parallel those in *Sonogawa*, nor has it been established that these three years were the only uncharacteristically unprofitable years for the petitioner. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and does not have the ability to pay the proffered wage.

In addition, CIS records show that the petitioner has ten approved Immigrant Petitions for Alien Worker (Form I-140) for which the petitioner must establish its ability to pay the proffered wage in all or any of years 2001 through 2005.<sup>8</sup> Therefore, the petitioner must show that it had sufficient income to pay each of the beneficiaries the proffered wage from his/her priority date to the time when each of the beneficiaries obtains his/her lawful permanent residence. The record does not contain such evidence in the instant case.

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<sup>8</sup> Those ten approved immigrant petitions are as follows:

1. EAC-01-227-51024 filed on May 14, 2001 with the priority date of February 21, 2001 and approved on November 9, 2001;
2. EAC-02-044-54222 filed on November 19, 2001 with the priority date of February 28, 2001 and approved on January 17, 2002;
3. EAC-02-055-52900 filed on December 3, 2001 with the priority date of April 4, 2001 and approved on January 23, 2002;
4. EAC-02-055-55180 filed on December 3, 2001 with the priority date of April 4, 2001 and approved on January 24, 2002;
5. EAC-02-131-50852 filed on March 4, 2002 with the priority date of April 5, 2001 and approved on April 29, 2002;
6. EAC-02-172-52760 filed on April 24, 2002 with the priority date of April 26, 2001 and approved on August 2, 2002;
7. EAC-02-269-51291 filed on August 22, 2002 with the priority date of April 13, 2001 and approved on April 29, 2003;
8. EAC-03-193-50699 filed on November 19, 2001 with the priority date of April 30, 2001 and approved on August 21, 2004;
9. EAC-02-269-51291 filed on August 22, 2002 with the priority date of April 13, 2001 and approved on April 29, 2003;
10. EAC-04-155-52233 filed on April 28, 2004 with the priority date of April 4, 2001 and approved on December 19, 2005.

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.

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.