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FILE:   
WAC 05 200 52579

Office: CALIFORNIA SERVICE CENTER

Date: **SEP 12 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 instant preference visa petition as abandoned. Subsequently the director granted a motion to reopen. After the petitioner submitted additional evidence for consideration the director again 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 cook. 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$480 per week, which equals \$24,960 per year.

The Form I-140 petition in this matter was submitted on June 30, 2005. On the petition, the petitioner stated that it was established on February 9, 1996 and that it employs ten workers. On the Form ETA 750, Part B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Rolling Hills, 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, and 2003 Form 1040 U.S. Individual Income Tax Returns of [REDACTED] and his wife, (2) the petitioner's 2004 Schedule C, Profit or Loss from Business form, but without the balance of that year's tax return, (3) the 2004 Schedule C of another restaurant owned by the petitioner's owner, (4) the petitioner's 2001, 2002, 2003 and 2004 Form W-3 transmittal, (5) the petitioner's 2003 and 2004 Form 940-EZ employer's annual returns, (5) the petitioner's California Form DE-6 Quarterly Wage and Withholding Reports for the all four quarters of 2005, (6) money market statements pertinent to an account of the petitioner's owner and owner's spouse, (7) a statement of wire activity, (8) a real property grant deed, and (9) a statement of monthly expenses (budget) of the petitioner's owner. 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.

[REDACTED] tax returns show that during the salient years he held the petitioner as a sole proprietorship and that he and his wife had two dependents.

A Schedule C, Profit and Loss from Business form attached to the 2001 return shows that during that year the petitioner returned a profit of \$8,312. The petitioner's owner declared adjusted gross income of \$10,525 during that year, including the petitioner's profit.

A Schedule C, Profit and Loss from Business form attached to the 2002 return shows that during that year the petitioner returned a profit of \$15,777. The petitioner's owner declared adjusted gross income of \$20,709 during that year, including the petitioner's profit.

A Schedule C, Profit and Loss from Business form attached to the 2003 return shows that during that year the petitioner returned a profit of \$27,704. The petitioner's owner declared adjusted gross income of \$21,883 during that year, including the petitioner's profit.

The petitioner's 2004 Schedule C shows that it returned a profit of \$41,075 during that year. The other 2004 Schedule C shows that the petitioner's owner's other restaurant suffered a loss of \$29,419 during that same year. Because the balance of the petitioner's owner's 2004 tax return was not provided this office is unable to determine the petitioner's owner's adjusted gross income during that year.

The 2001 and 2002 Forms W-3 show that during those years the petitioner paid total wages of \$10,418.51 and \$16,593.08. The 2003 Forms W-3 and 940-EZ show that during that year the petitioner paid total wages of \$20,731.61. The 2004 Forms W-3 and 940-EZ show that the petitioner paid total wages of \$75,408.11 during that year.

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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).

The 2005 quarterly reports show that the petitioner paid wages of \$15,416.84, \$14,155.28, \$12,407.61, and \$19,002.65, during the four quarters of that year, respectively, for a total annual wage expense of \$60,982.38. Those reports show that the petitioner paid [REDACTED] apparently the beneficiary, \$1,180.08 during the first quarter of 2005, but not that it paid him wages during any other quarter of that year.

The wire activity statement shows that \$150,326.24 was wired to the petitioner's owner on August 2, 2005. The grant deed shows that a property in San Bernardino County, California, was transferred to the petitioner's owner on August 30, 2005.

The petitioner's owner's budget shows that his recurring monthly living expenses total \$1,483 per month, or \$17,796 per year.

The director denied the petition on May 5, 2006.<sup>2</sup> On appeal, counsel cited a May 4, 2004 memorandum from William R. Yates, the Associate Director for Operations of Citizenship and Immigration Services (CIS) and a statement that Mr. Yates made to a meeting of an immigration attorney's organization for the proposition that the petitioner, based on its longevity, either has shown or need not show its continuing ability to pay the proffered wage beginning on the priority date.

Counsel noted that because the petitioner is a sole proprietorship the personal income and assets of its owner should be considered in assessing its ability to pay additional wages, and urged that the owner's income and assets were not correctly considered in the instant case.

Counsel asserted that the petitioner has employed the beneficiary for many years, but admitted that no evidence in support of that proposition is available. Finally, counsel cited an unpublished non-precedent decision of this office for the proposition that the normal accounting practices of a business must be considered in assessing its ability to pay the proffered wage.

Counsel's citation of unpublished, non-precedent decisions is without effect. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

With regard to the Yates' memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but is merely offered as guidance. That said, the AAO's decision in this case is consistent with the guidelines set forth in that memorandum.

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<sup>2</sup> In fact, the petition was originally denied on January 23, 2006. The record contains a letter from counsel dated January 27, 2006. In that letter counsel asserted that neither he nor the petitioner had received a request for evidence or a notice of intent to deny in this matter. The California Service Center subsequently issued a request for evidence on February 2, 2006, to which counsel responded on April 27, 2006. The acting director denied the petition again on May 5, 2006.

Counsel's reliance on the bank statements and investment account 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.<sup>3</sup> For both reasons the bank accounts submitted are not especially good evidence of the petitioner's, or petitioner's owner's, ability to pay the proffered wage.

Further, the statement of wire activity shows that an escrow company wired the petitioner's owner \$150,340.24 on August 2, 2005. The provenance and disposition of those funds are both unclear, although the petitioner's owner's acquisition of real estate shortly thereafter suggests that the two transactions may have been related. In any event, whether those funds belonged to the petitioner's owner clear of all obligations, has not been demonstrated, and the evidence suggests that they may have been obligated when received.

The account statements submitted are all dated after the receipt of that wire transfer. This does not demonstrate that they were taken from the proceeds of the wire transfer, but it suggests that source. On August 24, 2005 the petitioner's owner's investment account contained \$73,116.92. Although the disposition of the remaining \$77,223.32 is unknown, but the acquisition of real estate on August 30, 2005 may have consumed some or all of that difference.

As that may be, the amount in the petitioner's owner's investment account diminished from \$73,116.92 in August of 2005 to \$63,264.11, \$54,388.56, \$45,448.61, \$23,054.38 during September, October, November, December of 2005. On January 26, 2006 the balance had risen to \$28,199.72. The steady decrease in the account from \$73,116.92 to \$28,199.72 in five months, however, a decrease of almost \$9,000 per month, indicates that the money that remained after settlement of the newly acquired real estate may also have been required for some other purpose and not available to pay additional wages. In short, the petitioner did not submit evidence sufficient to demonstrate that those funds could have been used to pay the proffered wage.

The real property grant deed does not demonstrate that the petitioner's owner has any funds available to pay additional wages. The record does not contain an appraisal of the property's value. Whether the petitioner continues to own that property and the amount by which the property may be encumbered has not been demonstrated by a real estate title search or any other reliable means. Even if the value of the property and the amount by which it is encumbered were sufficiently demonstrated, that would be insufficient to show that the difference, the amount of the petitioner's owner's equity, was available to pay wages. The petitioner's

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<sup>3</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

owner will not necessarily realize the value of that property in cash in the near future and that value has not, therefore, been shown to be available to pay wages.

The petitioner's owner could secure a home equity loan with whatever equity he has in his home. An indication of available credit, however, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner's owner is not part of the calculation of the funds available to pay the proffered wage.

For all of these reasons, the value of the petitioner's owner's equity in real property owned will not be considered in evaluating the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner submitted W-3 transmittals, Form 940-EZ returns, and quarterly wage reports to show the amount it has been paying in wages. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>4</sup> or otherwise increased its net income,<sup>5</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 CIS should have considered income before expenses were paid rather than net income.

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, 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 examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by

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<sup>4</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>5</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

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 employed and paid the beneficiary \$1,180.08 during the first quarter of 2005, but not that it paid him wages during any other quarter of that year.

Counsel asserted that the petitioner has employed the beneficiary for many years, but admitted that he had no evidence to support that assertion. The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

The beneficiary was required, on the Form 750B, which he signed on April 23, 2001, to list all employment related to the proffered position.<sup>6</sup> The beneficiary did not then claim to have worked for the petitioner. The petitioner and the beneficiary have not demonstrated any such employment or wages other than during the first quarter of 2005. The wages that the petitioner has demonstrated that it paid to the beneficiary will be considered. The additional employment and wages to which counsel alluded will not be considered.

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). 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 \$24,960 per year. The priority date is April 27, 2001.

During 2001 the petitioner's owner declared adjusted gross income of \$10,525. That amount is insufficient to pay the proffered wage.<sup>7</sup> The petitioner has submitted no reliable evidence of any other funds available to it

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<sup>6</sup> See the instructions to part 15 of that form.

<sup>7</sup> This office notes that, pursuant to *Ubeda v. Palmer, Id.*, the petitioner is obliged to show not only that the petitioner's owner's adjusted gross income exceeded the annual amount of the proffered wage during each of the salient years, but also that the petitioner's owner could have paid the proffered wage and still supported his family, either on the balance of his adjusted gross income or with other assets.

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 \$15,777. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds 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 \$21,883. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds 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.

Counsel submitted a copy of the 2004 Schedule C showing the petitioner's performance during that year and another 2004 Schedule C showing the performance of another restaurant owned by the petitioner's owner. The balance of the petitioner's owner's 2004 tax return was not provided. That portion of the petitioner's owner's tax return does not demonstrate that the petitioner's owner could have paid the proffered wage out of his adjusted gross income and continued to support himself and his family.

The petition in this matter was submitted on June 30, 2005. On that date the petitioner's owner's 2004 tax return was available, but was not then submitted. On February 2, 2006 the service center issued a request for evidence in this matter. Consistent with 8 C.F.R. § 204.5(g)(2) the service center requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date and stipulated that the evidence should be in the form of copies of annual reports, federal tax returns, or audited financial statements. As to tax returns the service center requested that the petitioner, "Provide all schedules and tables that accompany the submitted tax return." The petitioner did not submit copies of annual reports or audited financial statements, and the tax returns it submitted were incomplete and insufficient to show its ability to pay the proffered wage during 2004. The evidence submitted does not show that the petitioner was able to pay the proffered wage during 2004.

The petitioner has demonstrated that it paid the beneficiary \$1,180.08 during 2005 and would ordinarily be obliged to show that it was able to pay the \$23,779.92 balance of the proffered wage during that year. As was noted above, however, the instant visa petition was submitted on June 30, 2005, when the petitioner's 2005 tax return was unavailable, and a request for evidence was issued on February 2, 2006, when that return would still have been unavailable. For the purpose of today's decision, the petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2005 and later years.

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.



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**ORDER:** The appeal is dismissed.