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U.S. Citizenship
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FILE: EAC 06 079 52331 Office: NEBRASKA SERVICE CENTER Date: APR 15 2008

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The acting director, Nebraska Service Center, denied the preference visa petition. The matter is presently 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 an administrative assistant. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Application Certification, approved by the Department of Labor. 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. 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 8, 2006 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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. The petitioner filed the instant petition as a skilled worker.

The AAO notes that the director requested further evidence as to the beneficiary's qualifications for the proffered position, and that the petitioner submitted sufficient evidence to establish that the beneficiary, with a baccalaureate degree in business administration from the Philippines, has the equivalent of a U.S. baccalaureate degree from an accredited U.S. institution. The minimum qualifications as outlined on the Form ETA 9089 were an associate's degree in business administration. Thus, the AAO will not address the issue of the beneficiary's qualifications further in these proceedings.

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 9089 Application for Permanent 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 9089 Application for Permanent 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).

Here, the Form ETA 9089 was accepted on November 6, 2005. The proffered wage as stated on the Form ETA 9089 is \$17.35 an hour, or \$36,088 per year. The Form ETA 9089 states that the position requires an associate's degree in business administration, and two years of relevant work experience.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.¹ Relevant evidence submitted on appeal includes counsel's brief, and an original letter dated September 5, 2006 written by [REDACTED], the petitioner's accountant.²

In his letter, [REDACTED] stated that he has been the petitioner's accountant for more than ten years. He further states that the petitioner is very popular with diners in Montgomery County and surrounding areas in Maryland and that if all non cash items such as depreciation were removed from the petitioner's profit and loss statements for the years 2004, 2005 and for the seven months ended July 31, 2006, the petitioner would show considerable growth. [REDACTED] further states that although there are other payroll and salary concepts on the profit and loss statements, purchases represent, in addition to food items, labor force additions in the same manner as a manufacturing activity includes individuals in preparing a final product. [REDACTED] concludes by stating that the petitioner is very capable of acquiring an additional employee in the \$30,000 to \$36,500 salary range and would treat such an individual in the "purchases" section of the petitioner's tax return.³ The record also contains the petitioner's IRS Forms 1120S, for tax years 2003,⁴ 2004, and 2005; and a one-page document identified as an income statement for the seven months ending on July 31, 2006.

On appeal, counsel states that the accountant's letter establishes that the petitioner could have afforded to hire an additional employee in 2005 and could afford to continue that employment in its present financial status, without jeopardizing the petitioner's financial position. Counsel on the Form I-290B states that [REDACTED] is

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 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).

² A copy of [REDACTED]'s letter was submitted earlier to the record.

³ Although [REDACTED] refers to profit and loss statements none are found in the record. The AAO notes that even if such documents were submitted, they would not be dispositive in these proceedings. As stated previously, the petitioner is required to submit its tax returns, audited financial statements or annual reports in establishing its ability to pay the proffered wage.

⁴ The petitioner submitted the first two pages of its Forms 1120S for tax years 2003 and 2004. The record also contains a more complete copy of the petitioner's 2004 tax return.

providing an audited financial statement for the first two quarters of tax year 2006, as well as an explanation of where to find the funds to pay the proffered wage in the petitioner's 2005 tax return.⁵

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$475,684, net annual income of \$239,670, and to currently have three employees. On the Form ETA 9089, signed by the beneficiary on November 6, 2005, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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).

On appeal, the petitioner's accountant states that if the petitioner's depreciation expenses were considered, the petitioner has exhibited considerable growth in the period of time under consideration. However, the AAO does not consider the petitioner's depreciation expenses when it examines the petitioner's net income, as will be discussed further in these proceedings.

The petitioner's accountant also infers in his letter that the petitioner can pay the proffered wage of an additional employee based on other employees' salaries represented under the "purchases" section of the petitioner's Schedules A submitted to the record. However, the AAO does not find the petitioner's accountant's statement to be persuasive. The petitioner provides no further evidence such as W-2 Forms or IRS Forms 1099-MISC in support of its assertion with regard to workers' salaries being included in the purchases reported on Schedule A. Furthermore, even if this assertion is correct, neither the petitioner nor the petitioner's accountant provides any further comment as to why the petitioner's current payment of wages would support the addition of another employee.

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, based on the record as presently constituted, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe. Thus the petitioner has to establish its ability to pay the entire proffered wage as of the 2005 priority date.⁶

⁵ The AAO does not find any audited financial statement for the first six months of tax year 2006 in the record.

⁶ The AAO notes that the record closed on July 5, 2006 with the receipt of the petitioner's response to the director's request for further evidence, dated June 7, 2006. thus, the petitioner's tax return for 2005 is the most recent tax return available.

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, contrary to the petitioner's accountant's assertion, 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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. 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* 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 Chang* at 537.

The petitioner submitted its tax returns for tax years 2003, 2004 and 2005. Since tax years 2003 and 2004 are prior to the 2005 priority date, the petitioner's 2003 and 2004 tax returns are not dispositive in these proceedings. Thus, the AAO will only examine the petitioner's 2005 net income. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$36,088 per year from the priority date:

- In 2005, the Form 1120S stated a net income⁷ of -\$9,264

⁷Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions or other adjustments shown on its Schedule K for tax year 2005, the petitioner's net income is found on line 21 of page one of its tax return..

Therefore, for the year 2005, 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.⁸ 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 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 in tax year 2005 are -\$18,364.

Therefore, from the date the Form 9089 was filed with the Department of Labor, the petitioner identified on the instant I-140 petition 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, or its net income or net current assets.

Counsel's assertions on appeal with regard to the petitioner's accountant's statement 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 9089 was accepted for processing by the Department of Labor.

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁸According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.