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U.S. Citizenship
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Services

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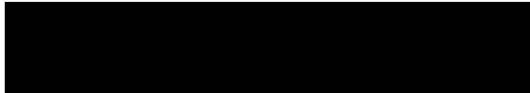
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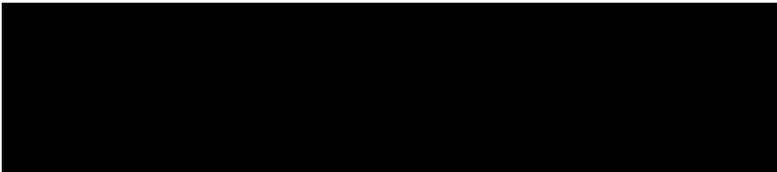
Petitioner:

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, Texas 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 head cook or chef (Korean/Japanese specialty 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 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 July 27, 2006 denial, the only 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.

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).

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$2,300 per month (\$27,600 per year). The Form ETA 750 states that the position requires three years of experience in the job offered.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal, counsel submits a brief. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2001 through 2005, Form 941 Employer's Quarterly Federal Tax Returns and Form DE-6 Quarterly Wage and Withholding Reports for 2001 through 2005 and the first two quarters of 2006, and W-3 and W-2 forms for 2001 through 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$564,583, and to currently employ 10 workers. On the Form ETA 750B signed on April 10, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director improperly denied the petition because the director erred in not considering wages already paid to workers in the proffered position in the relevant years and not considering compensation paid to the owners of the petitioner.

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).

On appeal counsel refers to a decision issued by the AAO concerning the wages paid to the beneficiary as *prima facie* proof of the petitioner's ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Counsel does not provide its published citation, however, it is the AAO's policy to first examine whether the petitioner employed and paid the beneficiary during a given period in determining the petitioner's ability to pay the proffered wage 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 submitted the petitioner's Form 941 Employer's Quarterly Federal Tax Returns and Form DE-6 Quarterly Wage and Withholding Reports for 2001 through 2005 and the first two quarters of 2006, and W-3 and W-2 forms issued by the petitioner for all its employees for 2001 through 2005. These documents show that the petitioner employed the beneficiary for some period of 2003. The beneficiary's W-2 form for 2003 shows that the petitioner paid the beneficiary \$5,460 in 2003.

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) and 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).

Counsel's reliance on wages paid to other employees to establish the petitioner's ability to pay the proffered wage is misplaced. Counsel's interpretation of the language in that policy is overly broad. Only the documentary evidence establishing that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. (Emphasis added). In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Therefore, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 2001 onwards. The petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage of \$27,600 per year in 2001, 2002, 2004 and 2005, and the difference of \$22,140 between wages actually paid to the beneficiary and the proffered wage in 2003 with its net income or its 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 its gross income and gross profit is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, counsel's 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 Chang* at 537

The petitioner submitted its Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2005 as evidence of the petitioner's ability to pay the proffered wage. According to the tax returns in the record, the petitioner is structured as an S corporation and its fiscal year is based on a calendar year. The tax returns for 2001 through 2005 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage from the priority date to the present:

- In 2001, the Form 1120S stated a net income² of \$27,190.
- In 2002, the Form 1120S stated a net income of \$(7,563).
- In 2003, the Form 1120S stated a net income of \$(34,959).
- In 2004, the Form 1120S stated a net income of \$(21,628).
- In 2005, the Form 1120S stated a net income of \$(18,268).

For the year 2001, the petitioner had sufficient net income to pay the proffered wage that year, and thus the petitioner established its ability to pay the proffered wage that year with its net income. However, the petitioner had insufficient net income in 2002 through 2005 to pay the beneficiary the proffered wage for 2002, 2004 and 2005 or the difference between wages actually paid to the beneficiary and the proffered wage in 2003. Therefore, the petitioner failed to establish its ability to pay the proffered wage with its net income for 2002 through 2005.

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.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 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 \$(61,369).

² Where 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 Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's **rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K.** See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

³ According 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.

- The petitioner's net current assets during 2003 were \$(110,571).
- The petitioner's net current assets during 2004 were \$(134,372).
- The petitioner's net current assets during 2005 were \$(277,346).

For the years 2002 through 2005 the petitioner did not have sufficient net current assets to pay the beneficiary the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage, and thus, the petitioner failed to establish its ability to pay the proffered wage with its net current assets for 2002 through 2005.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL except for 2001, the petitioner had not established that it had continuing ability to pay the beneficiary the proffered wage 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 advises in his brief accompanying the appeal that the wages paid to cooks during the relevant years established the petitioner's ability to pay the proffered wage from the priority date to the present. Counsel also lists names of cooks and wages paid to them and submits their W-2 forms. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present unless the beneficiary will replace other workers in the proffered position. In the instant case counsel does not state that the beneficiary will replace all or any of these cooks. Even if counsel had made this assertion, 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). The record does not contain evidence that the petitioner has replaced or will replace any or all of the cooks with the beneficiary⁴. 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)).

Counsel also mentions that the petitioner paid its owners as officer's compensation implicitly suggesting consideration of officer's compensation in determining the petitioner's ability to pay the proffered wage. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. However, in the instant case, the petitioner did not document that the majority shareholders are willing to forgo a significant percentage of their officer compensation to pay the beneficiary the proffered wage from 2002 to 2005. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, at 533.

The documentation presented here indicates that each of [REDACTED] and [REDACTED], husband and wife, holds 50 percent of the company's stock. According to the petitioner's 2002 through 2005 Form 1120

⁴ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal because the petitioner did not submit any evidence that it has replaced or will replace currently working U.S. employees with the beneficiary.

line 7 Compensation of Officers and W-2 forms for the shareholders, the petitioner elected to pay each of the shareholders \$16,500 in 2002, \$18,000 in 2003, and \$18,000 in 2004 respectively, and paid \$9,000 and \$12,000 respectively in 2005. The petitioner did not submit the shareholders' individual tax returns for 2002 through 2005, therefore, the AAO cannot determine the shareholders' total adjusted gross income. If the compensation of officers from the petitioner was the total income for Mr. and Mrs. the shareholders would not be able to forgo a significant percentage of their compensation of officers to pay the beneficiary the proffered wage in 2002 through 2005 even if they asserted that they were willing to do so. This office notes that in 2005, the total compensation of officers for both shareholders was \$21,000, an amount that is insufficient to pay the beneficiary the proffered wage.

After a complete review of the record and the petitioner's amount of compensation paid out to the majority shareholders, the AAO finds that the petitioner did not submit evidence that the majority shareholders are willing to and able to forgo a significant percentage of their compensation of officers to pay the beneficiary the proffered wage from 2002 to 2005.

Counsel's argument concerning the totality of circumstances cannot be overlooked. 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). The petitioner was incorporated in 1998 and employs approximately 10 workers. Counsel claims that the petitioner paid four cooking employees about \$50,000 during the four years from 2002 to 2005. However, the tax returns for 2002 through 2005 in the record show that the petitioner's gross receipts were approximately \$500,000 each year (\$551,555 in 2002, \$520,638 in 2003, \$564,583 in 2004 and \$540,170 in 2005). However, during the four relevant years, the petitioner's net income was negative. The average annual salary paid to a cook in the relevant years was less than \$12,000, which was less than a half of the proffered wage for a cook position with the petitioner. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that the relevant four years 2002 through 2005 were uncharacteristically unprofitable years for the petitioner in its framework of profitable or successful years. 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 continuing ability to pay the proffered wage.

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 2002 to the present.

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.