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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
LIN 07 035 52696

Office: NEBRASKA SERVICE CENTER

Date: JUN 27 2008

IN RE:

Petitioner:

Beneficiary: [REDACTED]

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:

[REDACTED]
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, Nebraska Service Center, denied the employment-based immigrant visa petition, which 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 specialty cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A)(i). Section 203(b)(3)(A)(i) of the Act 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. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the beneficiary had entered into a marriage to evade immigration laws, precluding approval of the petition pursuant to section 204(c) of the Act, and that 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.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, while we withdraw the director's conclusions regarding section 204(c) of the Act because the director did not reach an independent conclusion on this issue, we uphold the director's findings regarding the petitioner's ability to pay the proffered wage.

Section 204(c) of the Act

Section 204(c) of the Act states, in pertinent part:

[N]o petition shall be approved if –

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative . . . status as the spouse of a citizen of the United States . . . by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or
- (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The regulation corresponding to section 204(c) of the Act, at 8 C.F.R. § 204.2(a)(1)(ii), states:

Fraudulent marriage prohibition. Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the

attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

A decision that section 204(c) of the Act applies must be made in the course of adjudicating a subsequent visa petition. *Matter of Rahmati*, 16 I&N Dec. 538, 539 (BIA 1978). Citizenship and Immigration Services (CIS) may rely on any relevant evidence in the record, including evidence from prior CIS proceedings involving the beneficiary. *Id.* However, the adjudicator must come to his or her own, independent conclusion and should not ordinarily give conclusive effect to determinations made in prior collateral proceedings. *Id.*; *Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990). In this matter, the director noted that the Form I-130 petition filed in behalf of the beneficiary by his wife had been denied and that the wife did not appeal that decision. While the denial of that petition raises several inconsistencies between the beneficiary's statements and those given by his wife, the director did not reach an independent conclusion on this issue. Rather, the director gave conclusive effect to the prior collateral proceeding. Thus, while the record contains evidence of concern as to the bona fides of the beneficiary's marriage, we must withdraw the director's conclusion that section 204(c) of the Act precludes the approval of this petition.

Ability to Pay

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 either 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 Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$13.43 per hour, which amounts to \$27,934.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of October 2000.

On the petition, the petitioner claimed to have an establishment date in 2000, a gross annual income of \$500,000, an unlisted net income and nine employees. In support of the petition, the petitioner submitted Internal Revenue Service (IRS) Form 1120S U.S. Income Tax Returns for an S Corporation for the petitioner for the years 2001 through 2005, a letter from an accountant, payroll records that do not list the names of employees and quarterly reports from the fourth quarter of 2001 and the first three quarters of 2002 that do not list the beneficiary as an employee.

The tax returns reflect the following information for the following years:

	2001	2002	2003	2004	2005
Net income	\$4,398	(\$879)	\$64,792	(\$2,117)	\$12,176
Compensation of Officers	\$22,000	25,000	\$0	\$0	\$0
Salaries and Wages	\$0	\$0	\$67,400	\$0	\$0
Cost of Labor	\$48,700	\$50,220	\$0	\$57,780	\$38,510
Current Assets	\$20,574	\$23,481	\$51,116	\$62,098	\$87,556
Current Liabilities	\$5,822	\$20,347	\$13,211	\$35,301	\$55,870
Net current assets	\$14,752	\$3,134	\$37,905	\$26,797	\$31,686

As the petitioner had submitted the required initial documentation, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on February 14, 2008, denied the petition.

On appeal, counsel asserts that the director should have first issued a request for additional evidence. The regulation at 8 C.F.R. § 103.2(b)(8)(iii) provides that if the petitioner has submitted the required initial evidence but the evidence does not establish eligibility, the director may deny the petition. In this matter, the petitioner had submitted the required initial evidence required pursuant to 8 C.F.R. § 204.5(g)(2), which the director determined did not demonstrate the petitioner's ability to pay the proffered wage. Thus, the director did not err procedurally in denying the petition. We will, however, consider all new evidence on appeal.

On appeal, the petitioner submits reviews of the petitioning restaurant and unaudited financial statements. The petitioner also resubmits previously submitted documents. Counsel asserts that because the petitioner is a subchapter S corporation, the director should have considered the compensation paid to the petitioner's officer and year-end cash.

The unaudited financial statements that counsel submitted with the appeal are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), CIS will first examine whether the petitioner employed and paid the beneficiary during the relevant 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, while the beneficiary claimed to have worked for the petitioner since October 2000, the petitioner's own quarterly reports do not confirm that employment. The record contains no Forms W-2 Wage and Tax Statements or other evidence demonstrating any wages paid to the beneficiary. Thus, the

petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any year. Moreover, the petitioner has not explained this inconsistency in the record.¹

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. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. 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.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current

¹ It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

² 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.

assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner shows sufficient net income to cover the proffered wage of \$27,934 in 2003 and sufficient net current assets to cover the proffered wage in 2005. The petitioner does not show sufficient net income or net current assets to cover the proffered wage in 2001, 2002 or 2004.

The accountant's letter urges us to consider the petitioner's cash, stockholder loans, "total cash flow," stockholder salary, deducted interest on the loan to the stockholder and depreciation. The accountant is not persuasive. Cash is a current asset and has been taken into account above in calculating the petitioner's current assets from Schedule L of the petitioner's tax returns. As stated above, we will not consider current assets without balancing them against the petitioner's current liabilities. Moreover, any cash expended to pay the proffered wage in 2001 would not be available to pay the proffered wage in later years. The petitioner has not demonstrated that its cash has increased each year in an amount sufficient to pay the proffered wage in each year.

The petitioner has not demonstrated that the funds loaned to the petitioner by its stockholder and its "total cash flow" are funds available in addition to the cash that we have already considered. Wages and interest paid to the petitioner's shareholder are real expenses that are no longer available to pay the proffered wage. Moreover, the officer compensation reflected on the tax returns in 2001, 2002 and 2004 is less than the proffered wage in each year.

Finally, as stated above, CIS examines the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054. *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 536; *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1083; *Ubeda v. Palmer*, 539 F. Supp. at 650. Thus, the accountant's request that we consider the petitioner's depreciation is not persuasive.

In light of the above, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001, 2002 or 2004.

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.