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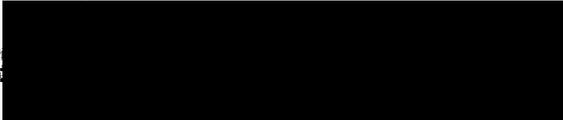
Date: AUG 21 2006

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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 Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant specializing in Indian cuisine. It seeks to employ the beneficiary permanently in the United States as a 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. On March 30, 2003, the director denied the petition, finding that the petitioner had abandoned its petition for failing to pay a fingerprint fee within the allotted time. Counsel successfully moved to reopen, which the director granted on March 12, 2005, and at that time 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.

On appeal, counsel submits no brief and no additional evidence.

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 CFR § 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$397.20 per week (\$20,654.40 per year).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax returns in the record, the petitioner's fiscal year lasts from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on January 14, 1998, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- Counsel's G-28; and,
- A certified ETA 750.

On September 26, 2003, the director requested additional evidence pertinent to that ability to pay the proffered wage. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested bank account records, "the last two years of U.S. tax returns," W-2 (Wage and Tax Statement), quarterly federal unemployment report forms, monthly balance sheets and a statement of the petitioner's monthly expenses.

On March 30, 2004, the director denied the petition, finding that the petitioner had abandoned its petition for failing to pay a fingerprint fee within the allotted time.

In response, on April 26, 2004, the petitioner submitted:

- The petitioner's incomplete Form 1120S for the years 1998–2001;
- The petitioner state quarterly unemployment reports for 2002 and 2003; and,
- A statement indicating the beneficiary would be replacing an existing worker.

On April 30, 2004, counsel moved the director to reopen the decision denying the petition as abandoned.

On March 12, 2005, the director reopened its decision but then denied the petition, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the director failed to consider the totality of the petitioner's circumstances, such as the length of time the petitioner has been open (i.e., since 1996) and the size of the petitioner's payroll (\$250,000–\$350,000). Counsel further asserts that the beneficiary "is replacing an existing employee who is leaving the petitioner's employment when his position will be filled."

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through the present.

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 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 other workers' 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* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$20,654.40 per year from the priority date.

In 2001, the Form 1120S stated net income¹ of \$(70,467).
In 2000, the Form 1120S stated net income of \$(128,775).
In 1999, the Form 1120S stated net income of \$(260,641).
In 1998, the Form 1120S stated net income of \$(457,013).

Therefore, for the years 1998 through 2001, 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. 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 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. We are unable to determine the petitioner's net current assets during the years in question, however, because counsel did not attach any Schedule L's to any of the submitted Form 1120S.

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

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

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

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

Counsel asserts in her brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that the beneficiary will replace an existing employee. Counsel has not submitted any evidence in support of that assertion, such as the existing employee's job description in comparison with the proffered position. 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).

Counsel asserts that under the totality of circumstances, the petitioner's business has the ability to pay the proffered wage. *See, Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel is correct that, if the losses during some years and very low profits during others are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses might be overlooked in determining ability to pay the proffered wage. Here, the petitioner is a relatively new business, and from the record of proceedings, it is not apparent that the petitioner has ever posted a profit. Further, to assume that the petitioner's business will flourish, with or without hiring the beneficiary, is to speculate.

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 any office within the employment system of 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.