U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

B6

[redacted]

FILE: WAC 02 241 51141 Office: CALIFORNIA SERVICE CENTER Date: JUN 07 2006

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, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a fast food restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a cook. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits a brief and additional evidence. Counsel also urges that the evidence previously provided was sufficient to warrant approval of the visa petition.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

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 or seasonal nature, for which qualified workers are unavailable in the United States.

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. Here, the Form ETA 750 was accepted on January 20, 1998. The proffered wage as stated on the Form ETA 750 is $11.55 per hour, which equals $24,024 per year.

On the petition, the petitioner stated that it was established during 1991. The petitioner did not state the number of workers it employs in the space reserved for that purpose. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since 1991. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Santa Monica, California.

With the petition, counsel submitted no evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, the California Service Center, on October 11, 2001, requested evidence pertinent to that ability. Pursuant to 8 C.F.R. § 204.5(g)(2), the Service Center noted that the evidence should include copies of annual reports, federal tax returns, or audited financial statements, and that the evidence must show the ability to pay the proffered wage beginning on the priority date.

The Service Center also specifically requested the petitioner's 1998, 1999, 2000, and 2001 tax returns and copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters. The Service Center stipulated that the returns submitted should be certified and include all schedules, attachments, and tables.

In addition, the Service Center requested that the petitioner provide copies of the 1998, 1999, 2000, and 2001 Form W-2 Wage and Tax Statements showing the wages the petitioner paid the beneficiary during those years.

In response, counsel submitted uncertified copies of the petitioner's owner's 1998, 1999, 2000, and 2001 Form 1040 U.S. Individual Income Tax Returns including the associated Schedules C, Profit or Loss from Business (Sole Proprietorship). Counsel stated that the petitioner issued no W-2 forms to the beneficiary because the beneficiary has no social security number.

The 1998 Schedule C shows that the petitioner made a net profit of $15,040 during that year. The Form 1040 shows that the petitioner's owner declared an adjusted gross income of $13,394 during that year, including the petitioner's entire profit offset by deductions. Line 12 of the Form 1040 shows that the petitioner's owner had a business income of $14,527 during that year, rather than $15,040 as stated on the petitioner's Schedule C. This appears to indicate that another Schedule C or a Schedule C-EZ was submitted with that tax return, declaring a loss of $513. If that is so, then the petitioner's owner did not submit a complete tax return to CIS, with all of the associated schedules, tables, and attachments, as the Service Center requested on October 11, 2001.

The 1999 Schedule C shows that the petitioner made a net profit of $5,022 during that year. The 1999 Form 1040 shows that the petitioner's owner declared an adjusted gross income of $13,850 during that year, including the petitioner's profits. A second Schedule C attached to that return indicates that the petitioner's

owner also owned a gift shop during that year. The Schedule C for that business may have been the Schedule C missing from the petitioner's 1998 return.

The 2000 Schedule C shows that the petitioner suffered a loss of $1,224 during that year. The 2000 Form 1040 shows that the petitioner's owner declared an adjusted gross income of $19,567 during that year, including the petitioner's profits.

The 2001 Schedule C shows that the petitioner suffered a loss of $1,296 during that year. The Form 1040 shows that the petitioner's owner declared an adjusted gross income of $13,604 during that year, including the petitioner's profits.

Counsel submitted copies of the petitioner's California Form DE-6 Quarterly Wage Reports for all four quarters of 2001 and the first three quarters of 2002. Those wage reports do not indicate that the petitioner employed the beneficiary during those quarters.

Finally, counsel submitted earnings summaries for three employees for the first quarter of 2002. Those summaries do not indicate that the petitioner employed the beneficiary during that quarter.

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 January 16, 2003, denied the petition. The director cited the petitioner's adjusted gross income, which is less than the proffered wage for each relevant year, and lack of W-2s or other proof of actually paying the beneficiary any wages.

On appeal, counsel submitted a copy of the petitioner's owner's 2002 Form 1040 income tax return including the corresponding Schedule C. The Schedule C shows that the petitioner made a profit of $16,521 during that year. The Form 1040 shows that the petitioner's owner declared an adjusted gross income of $30,496, including the petitioner's profits, during that year.

Counsel also submitted a copy of a monthly loan statement in the petitioner's owner's name. That statement indicates that the petitioner's owner pays $806.69 per month to amortize a principal balance of $96,406.70 secured by a property in Culver City, California. Further still, counsel submitted a California Certificate of Title for a 1995 Acura.

Counsel asserted that the petitioner's owner's property in Culver City is a condominium worth $227,000. Counsel further asserted that the petitioner's Acura is valued at $14,000. Counsel did not then state how he had arrived at those values or provide any evidence in support of them. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *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 contained no evidence to support counsel's assertion of the value of the petitioner's property. Further, equity in real estate or a business owner's personal automobile is not the sort of liquid asset readily convertible to cash in order to pay wages and not the sort of asset expected to be converted to cash during the coming year in the ordinary course of business. Their asserted value was not included in the determination of the petitioner's ability to pay the proffered wage.

Counsel cited a transcript of a teleconference between the Vermont Service Center and an immigration lawyers' association for the proposition that "(The Service Center) will generally assume that the petitioner can handle the additional salary if, according to its tax return, it has a favorable enough ratio of total current assets to total current liabilities. Although this office is not bound by the policies of the Vermont Service Center, it may consider whether the reasoning behind those policies is sound. *See Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*. 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Net current assets are a business's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d).[1] Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's net current 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the salient statistic, rather than the ratio.

Further, the petitioner is a sole proprietorship, rather than a corporation or some other type of business entity. It does not file a Schedule L and does not declare end-of-year current assets and end-of-year current liabilities. Values for current assets and current liabilities are not shown on the Schedule C, Profit or Loss from Business of a sole proprietorship or on its owner's Form 1040 U.S. Individual Income Tax Return.

On March 5, 2004 the AAO dismissed the petitioner's appeal, finding that the evidence submitted does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

With the motion counsel submits (1) evidence of the petitioner's owner's contributions to charities, (2) a document pertinent to conversion of a traditional IRA to a Roth IRA, (3) a 2001 Form 1099-B Proceeds from Broker and Barter Exchange Transactions statement showing the amount the petitioner's owner realized from trades with an investment broker during that year, (4) a letter pertinent to incentives and commissions the California Lottery paid to the petitioner during 2001, (5) Form 1098 Mortgage Interest Statements, (6) the cover letter of an appraisal of the property at 4900 Overland Avenue, Culver City, California, (7) 1999 and 2001 Form 1099-DIV Dividends and Distributions statements showing mutual fund dividends paid to the petitioner's owner by investment firms, (8) a 2001 Form SSA-1099-SM showing social security payments to the petitioner's owner, and (9) a brief.

In the brief counsel states that the petitioner's owner has $95,000 in mutual funds, noting that her Schedule B shows dividends from those investments. Counsel also cites a speech given to an immigration lawyers' association by an associate director of CIS for the proposition that, in order to establish its ability to pay the proffered wage, the petitioner need merely demonstrate that it is a *bona fide* company, rather than merely existing "on paper.

---

[1] The location of the current assets and current liabilities varies somewhat from one version of the Schedule L to another.

The associate director's speech to the immigration lawyers' association is less authoritative than the regulations governing the instant visa category. To the extent that they conflict this office will rely on the regulations. The regulation at 8 C.F.R. § 204.5(g)(2) does not state that a petitioner must merely demonstrate that it is a *bona fide* company, but that it must show that it has had the continuing ability to pay the proffered wage beginning on the priority date.

The proposition that the evidence pertinent to the petitioner's charitable contributions and the petitioner's owner's IRA was intended to support is unclear, as is the proposition counsel intended to support with the petitioner's owner's 2001 Form 1099-B and the letter pertinent to commissions and incentives paid to the petitioner by the lottery commission. Further, counsel submitted no argument pertinent to those documents. Those documents will not be considered in the determination of the petitioner's ability to pay the proffered wage.

The petitioner's owner's Schedules B show dividend income during 1998, 1999, 2000, 2001, and 2002. During some of those years, the amount of those dividends that was derived from mutual fund ownership is unclear. The petitioner's returns also show capital gains and losses, apparently indicating that the petitioner's owner sold at least some of her interest in mutual funds.

The 2001 Form SSA-1099-SM shows that during that year the social security administration paid the petitioner's owner $9,633. This office notes that, although this is income to the petitioner's owner, the amount is not entered on the petitioner's owner's tax return. That amount, therefore, will be added to the petitioner's adjusted gross income in determining the funds available to pay additional wages.

The Form 1098 Mortgage Interest Statement provided demonstrates that the petitioner's owner owns condominium unit [redacted]

The appraisal cover letter submitted states that, in the appraiser's opinion, a property [redacted] was worth $226,000 on January 24, 2003. The name and address of the recipient of that letter has been occluded. This office notes that the petitioner's owner allegedly owns the condominium unit [redacted] address. Whether this appraisal cover letter pertains to that particular condominium unit is unclear. If it does, then the reason for redacting the name of the appraisal recipient is unclear.

The cover sheet further states that the analysis and supporting data for the value estimate, the appraiser's certifications, and the statement of limiting conditions are included with the appraisal report. Neither the appraisal report, the appraiser's credentials, nor the statement of limiting conditions was provided. Absent evidence that the cover letter pertains to the petitioner's owner's condominium units, absent evidence of the appraiser's competence, and absent the actual appraisal report and statement of limiting conditions this office finds the cover letter to be unpersuasive.

Further, even if the value estimate were supported by the appraisal report, and the petitioner submitted the appraiser's certifications showing that the appraiser is qualified to issue an expert opinion pertinent to the value of real estate, and submitted the statement of limiting conditions showing that the value estimate was not contingent upon any conditions, the estimate of value would still not indicate any amount of funds available to pay wages.

The appraisal would be unlikely to warrant that the subject property is unencumbered or, in the alternative, the amounts of its encumbrances.[2] Absent evidence pertinent to the property's encumbrances the petitioner's owner's equity in the property cannot be determined.[3]

Further, still, the petitioner's owner's equity in real estate is not a net current asset. The value of the petitioner's owner's equity in real estate is not expected to be realized in cash or cash equivalent within the coming year. Real estate is not the sort of liquid asset generally available to pay wages. For all of the reasons listed, the petitioner's owner's equity in real estate will not be considered.

The assertion of counsel that the petitioner's owner has $95,000 in mutual funds is not evidence and is not sufficient to sustain the burden of proof in this matter. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980). The information from the tax returns, although it does demonstrate that the petitioner's owner has owned some mutual funds during the pendency of this petition, does not demonstrate the value of those funds at any given time, let alone the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Similarly, the Forms 1099-DIV show the amount of the 1999 and 2001 dividend payment to the petitioner's owner, but not the value of the underlying mutual funds.

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 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 stated that it has employed the beneficiary since 1991, but submitted no evidence in support of that proposition. The petitioner did not, therefore, establish that it employed and paid the beneficiary.[4]

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, 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).

---

[2] The amount of any encumbrances would typically be determined by a professional title search.

[3] The Form 1098 submitted demonstrates that the property is encumbered by a mortgage, but not the remaining principal amount of that mortgage. Further, no evidence was submitted to show that the property is not otherwise encumbered.

[4] Counsel asserts that the petitioner was unable to issue a Form W-2 Wage and Tax Statement because the beneficiary has no social security number. Although this explains the inability to provide a W-2 form, it does not establish the petitioner's ability to pay the proffered wage.

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 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. 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 priority date is January 20, 1998. The proffered wage is $24,024 per year.

During 1998 the petitioner's owner declared adjusted gross income of $13,394. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during 1998 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner's owner declared adjusted gross income of $13,850. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during 1999 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner's owner declared adjusted gross income of $19,657. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner's owner declared adjusted gross income of $13,604 and received 9,633 in social security benefits, for a total of $23,237. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it 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 $30,496. If the petitioner's owner had been obliged to pay the proffered wage out of that amount she would have been left with $6,472 with which to support herself.[5] Although no evidence pertinent to the petitioner's owner's budget was requested or submitted, to believe that the petitioner's owner could support herself for a year on that amount is unreasonable. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 1998, 1999, 2000, 2001, and 2002. Therefore the petitioner has not established its continuing ability to pay the proffered wage beginning on the priority date and the objection of the AAO has not been overcome on the motion.

---

[5] The petitioner's owner's 2002 Form 1040 U.S. Individual Income Tax Return shows that she had no dependents during that year.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The motion is granted. The AAO's decision of March 5, 2004 is affirmed. The petition is denied.