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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 22 2006

EAC-03-157-51745

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 3, 2004 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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant

[1] The appeal seems to have been filed by the beneficiary because according to the Form I-290B, counsel is representing the beneficiary. Moreover, the brief submitted on appeal is the "alien's brief in support of an administrative appeal." Citizenship and Immigration Services' (CIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). However, since there is a Form G-28 submitted with the initial petition wherein counsel represents both the beneficiary and the petitioner, the AAO will adjudicate the appeal on its merits.

petition is April 12, 2001. The proffered wage as stated on the Form ETA 750 is $11.87 per hour, which amounts to $24,689.60 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] Relevant evidence submitted on appeal includes a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2004. Other relevant evidence in the record includes copies of the beneficiary's Form W-2 Wage and Tax Statements for 2001, 2002, and 2003, copies of the petitioner's income statements for period one ending January 22, 2002, copies of the petitioner's income statements for period two ending February 25, 2003, copies of the petitioner's income statements for period nine ending September 7, 2004, information regarding Chevys, and a letter from counsel dated October 1, 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

Counsel states on appeal that the petitioner's profit and loss statements can be considered and cites to Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) cases. Counsel also states that legislation allows for the beneficiary to change sponsors.

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, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on February 28, 2001, the beneficiary claimed to have worked for the petitioner beginning in December 1997 and continuing through the date of the ETA 750B.

The record contains copies of the beneficiary's Form W-2 Wage and Tax Statements. The beneficiary's Form W-2's show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage

[2] 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).

2001	$16,591.30	$24,689.60	$8,098.30
2002	$13,261.90	$24,689.60	$11,427.70
2003	$11,107.89	$24,689.60	$13,581.71
2004	$18,399.35	$24,689.60	$6,290.25

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, 2003, and 2004.

The record contains a letter from counsel dated October 1, 2004 submitted in response to the request for evidence (RFE). According to the letter, "the beneficiary worked with [the petitioner] only part time. However, since April 2004 [the beneficiary] has been working . . . full time." Regardless of whether the beneficiary worked part time or full time, the petitioner has to establish that it had the ability to pay the full proffered wage as of the priority date.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.,* 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The record contains none of the three forms of initial evidence required of the petitioner. Thus, CIS has no available information to calculate the petitioner's net income.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer'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. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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 current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

The record contains none of the three forms of initial evidence required of the petitioner. Thus, CIS has no available information to calculate the petitioner's net current assets.

Counsel states on appeal that "[the petitioner] provided internal financial statements and other supplemental evidence demonstrating that it had sufficient net revenue both corporately (outside of its Merrifield, Virginia restaurant and particularly at its Merrifield, Virginia restaurant) available to pay the proffered wage . . . [t]hey

were not however, audited." Evidence in support of this assertion includes copies of the petitioner's income statements for period one ending January 22, 2002, copies of the petitioner's income statements for period two ending February 25, 2003, and copies of the petitioner's income statements for period nine ending September 7, 2004.

The income statements, which show the petitioner's profits and losses, are unaudited financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Furthermore, counsel concedes that they are unaudited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel states that "[a]n employer's statements, although not audited, are not necessarily incredible," and cites to BALCA decisions. Counsel does not state how DOL precedent decisions are binding in these proceedings. 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, BALCA 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 states that "the law also permits use of other documents such as profit and loss statements . . . this is particularly true regarding a company of over 100 employees." As stated above, "[i]n appropriate cases, additional evidence, such as profit/loss statements . . . may be submitted." 8 C.F.R. § 204.5(g)(2). Thus, CIS may, in its discretion, consider profit and loss statements as additional evidence. However, in this case, the profit and loss statements are unsupported representations of management and therefore are not reliable evidence.

Counsel's statement seems to indicate that the petitioner has over 100 employees, and the record contains information regarding Chevys. 8 C.F.R. § 204.5(g)(2), as quoted above, states that where a petitioner employs 100 or more workers, "the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." No such statement appears in the record. Moreover, according to the I-140 petition, the petition currently has 40 employees.[3]

Counsel also states that "[l]egislation enacted in 2000 permits individual whose I-485 applications have been pending for 180 days to change jobs or employers without affecting the validity of the underlying I-140 or labor certification, provided the job is in the same classification . . . [and] [p]rovided that [the beneficiary's] I-140 is not denied (which would affect the underlying validity of her I-140) she could change sponsors to the new employer." Counsel then states that "[w]ere [the beneficiary] permitted to change sponsors . . . this problem would be solved. In this regard, [the beneficiary] suggests that she be permitted to do whatever administrative steps would be requested by [CIS] to change sponsors." In addition, counsel states that "[the beneficiary] is uncomfortable with leaving her current sponsor however when there is a chance her I-140 and I-485 will be approved" and "[s]he seeks to effect a change to a new [s]ponsor but only if the current [s]ponsor is un-approvable." Counsel appears to be requesting that the petitioner be changed if the current I-140 petition will not be approved.

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[3] Counsel states that the petitioner is "a national chain." However, according to information regarding Chevys in the record, Chevys consists of various franchisees, "all franchise applicants must have a liquid net worth of a least Ten Million Dollars," and "Chevys will not guarantee any loans on assets purchased or act as sub lessor on any asset which are leased."

The legislation counsel is referring to is the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) section 106(c). The language of AC21 states that the I-140 petition "shall remain valid" with respect to a new job offer for purposes of the beneficiary's I-485 petition despite the fact that he or she no longer intends to work for the petitioning entity provided that (1) the I-485 petition based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer from the new employer must be for a "same or similar" job. A plain reading of the legislation suggests that the I-140 petition must be valid *prior* to any consideration of whether or not the I-485 application was pending for more than 180 days and/or the new position is same or similar. In other words, as counsel states on appeal, it is not possible for an I-140 petition to remain valid if it is not valid currently. Thus, if the current I-140 petition, as in this case, is not approved, then the petitioner cannot be changed so that this current I-140 petition can then be approved.

The AAO notes that the director is the official with jurisdiction over the beneficiary's I-485 petition. Generally, the director may, in her discretion, review the beneficiary's I-485 petition and consider the new offer of employment and the entire record with respect to the beneficiary's eligibility under section 106(c) of AC21. However, aside from counsel's assertion, the record does not contain any evidence regarding the new offer of employment.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.