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U.S. Citizenship and Immigration Services

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FEB 01 2007

File: [redacted] Office: TEXAS SERVICE CENTER Date:

SRC-04-061-51184

In re: Petitioner: [redacted]
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:

[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 Acting Director, Texas Service Center ("director"), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant that seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's June 8, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it can pay the beneficiary the proffered wage.

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.[1]

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor ("DOL"). *See* 8 CFR § 204.5(d). Therefore, 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).

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.

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[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). 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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 24, 2001. The proffered wage as stated on Form ETA 750 is $9.50 per hour based on 40 hours per week, which is equivalent to $19,760 per year.[2] The labor certification was approved on September 3, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on December 29, 2003. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: May 1, 1982; gross annual income: not listed; net annual income: not listed; current number of employees: 8.

On March 1, 2005, the director issued a Request for Evidence ("RFE") requesting additional documentation regarding the petitioner's ability to pay for the years 2001, 2002, and 2003, as well as the beneficiary's W-2 forms for the years 2001, 2002, 2003, and 2004. Counsel responded, but the director determined that the response was insufficient, and denied the petition on June 8, 2005. Counsel appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. Regarding the petitioner's ability to pay, first, Citizenship & Immigration Services (CIS) will 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.

On Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary listed that she has been employed with the petitioner from March 2000 until the present (date of signature). The petitioner did not submit any evidence that it employed the beneficiary, and counsel indicated in its RFE response that the "beneficiary did not work during 2001-2004 on regular basis due to her unspecified status and then due to wreckage of petitioner's business by hurricanes. She is therefore unable to produce her W-2s."[3] Therefore, the petitioner cannot establish its ability to pay the proffered wage through prior wages paid to the beneficiary.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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). 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.

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[2] The petitioner initially listed the wage as $8.00 per hour. DOL required that the wage be changed to $9.50 per hour prior to certification.

[3] We note that the beneficiary's Form G-325 filed with her Adjustment of Status application lists that the beneficiary has been employed with the petitioner from July 2001 to September 2003 (signed December 18, 2003). Further, both the beneficiary's Form I-485 and Form G-325 list that the beneficiary resides at the same address, [redacted] as is listed as the address for the petitioner. Form ETA 750 and Form I-140 additionally list the beneficiary's address as [redacted] the same address as the petitioner's.

We note that the petitioner listed on the Form ETA 750 is [redacted] Restaurant with an address of [redacted]. The petitioner listed on the I-140 Petition is: [redacted] Restaurant with an address of [redacted] Beach, Alabama 36561. The petitioner has submitted tax returns for [redacted] with an address of: [redacted] Alabama 36547. While the tax returns do list the same tax identification number as listed on the I-140 for the petitioner, the petitioner has not forwarded information to demonstrate that [redacted] and [redacted] Restaurant operate on a "d/b/a" basis, or that the two businesses have a successor-in-interest relationship. A corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Alternatively, the petitioner would need to show that the new entity is a successor in interest to the original business, which filed the labor certification. The petitioner must show that it has assumed all the rights, duties, and obligations of that business. Present counsel has provided no evidence. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

We will examine the tax returns submitted with the caveat that the petitioner has not demonstrated the relationship between [redacted] and [redacted] Restaurant. The petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 of the tax returns demonstrates the following concerning the petitioner's ability to pay the proffered wage of $19,760 per year:

Tax year	Net income or (loss)
2003	-$14,427[4,5]
2002	-$30,925
2001	-$9,776

Based on the above, the petitioner's net income would not allow for payment of the beneficiary's proffered wage. Further, we note that the petitioner's tax returns reflected negative net income for all three years.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets

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[4] The petitioner did not submit its 2004 federal tax return, which would not have been available at the time of filing, but may have been available at the time that the petitioner responded to the RFE, or on appeal.

[5] We note that the petitioner's tax returns reflect on Schedule K that an individual from Thailand owns 100% of the petitioner's business. The beneficiary is from Thailand. While the record is unclear as to the owner's identity, we do find it curious that the beneficiary lives at the stated address of the petitioning restaurant. We note that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." If there is any relationship between the beneficiary and the petitioner, and the petitioner did not make the relationship clear to the DOL prior to certification of the ETA 750, then the bona fides of the job offer are unclear. *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

and current liabilities.[6] 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, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

Tax year	Net current assets
2003	-$31,225
2002	-$24,143
2001	-$2,182

The petitioner also lacked sufficient net current assets to pay the beneficiary the proffered wage in any year as well, and similarly demonstrated negative net current assets in each year.

The petitioner additionally submitted Profit and Loss Statements for [redacted] Restaurant for the years 2000, 2001, and 2002. The petitioner did not submit any documentation to verify these calculations and did not list what documents that were examined to reach these totals. 8 C.F.R. § 204.5(g)(2) provides that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As the profit and loss statements were unaudited, they are, solely 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. Further, if we were to examine these statements, the statements exhibit a net income of $5,164.26 in the year 2000; net income of -$6482.40 in 2001; and net income of -$7,868.15 in 2002. The statements do not provide evidence that the petitioner has the ability to pay the beneficiary the proffered wage from the priority date until the time that the beneficiary obtains permanent residence.

On appeal, counsel contends that the director failed to take into account that the petitioner has been in business for twenty-five years. We note that the tax returns submitted list that the business incorporated in September 1994.[7] The record does not contain any evidence that the petitioner has been in business for twenty-five years other than the date of establishment listed on the I-140.

Counsel further provides that the restaurant is "well reputed in the area for serving Thai foods." Other than the accountant's statement that the restaurant has a "good reputation," counsel has provided no other evidence regarding the petitioner's reputation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); ***Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting** documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.

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[6] 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.

[7] The petitioner may have been in business, and incorporated later as a C Corporation in 1994, however, the reason for the discrepancy in the date that the petitioner was established is unclear from the record.

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 has provided a letter from [redacted]k, which confirms that as of June 30, 2005 [redacted] savings account had a balance of $25,224.05. Counsel asserts that the bank balance shows the petitioner's ability to pay the proffered wage. The letter would establish only that the petitioner had $25,224.05 in savings as of June 30, 2005, but would not account for the funds that the petitioner had as of the priority date or any date thereafter up until June 30, 2005. The letter would not establish, therefore, that the petitioner had the continuing ability to pay from the priority date onward.

The petitioner additionally submitted a letter from the restaurant manager. The letter provided that the beneficiary had been training under an older cook who would retire at the end of the 2005 summer.[8] Further, the restaurant manager noted that the business, destroyed by a hurricane, planned to reopen in July 2005. The manager speculated that with the influx of workers to the area to rebuild following the hurricane, the petitioner will be open for lunch business (where they had not in the past), and the increase in workers to the area should increase the petitioner's business and revenues. The petitioner must demonstrate its ability to pay from the priority date, in this case, April 2001. The petitioner cannot rely on the potential of future revenues. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner additionally submitted a letter from an accountant that prepares the petitioner's tax returns, which indicates that the petitioner has "been in business for 25 years and in that time has always met their payroll, payroll tax liabilities, and sales tax liabilities." Despite the accountant's statement, the petitioner's tax returns do not evidence their ability to pay the proffered wage. The returns show low and declining gross receipts (2001: $170,186; 2002: $140,396; and 2003: $130,659) prior to the hurricane. No further documentation, such as payroll statements, Forms W-2, or quarterly employee wage payments were submitted to document the petitioner's ability to pay, or to verify the accountant's statement that the petitioner is able to meet its payroll obligations.

Counsel further asserts that it would be "gross injustice" to ignore that Hurricane Ivan "completely wiped out" the petitioner's business, and that the petitioner's business is being rebuilt. News sources report that Hurricane Ivan occurred in September 2004. We note that the petitioner's tax returns and profit and loss statements submitted reflect that the petitioner was unable to pay the proffered wage at the time of the priority date, or any year thereafter. The tax returns all predate the event of Hurricane Ivan, so that the hurricane would not have impacted the petitioner's ability to pay from 2001 through 2003.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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[8] The petitioner does not assert specifically that the beneficiary will replace the retiring cook. Further, even if the beneficiary were a replacement, the petitioner has not provided evidence of what wages were paid to the prior cook, and that those wages paid would now be available to pay the beneficiary.