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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 29 2007

EAC-03-264-53712

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, Vermont Service Center, 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 Chinese restaurant, and seeks to employ the beneficiary permanently in the United States as a cook, specialty, foreign food ("Cook, Chinese-Style Food"). 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 April 6, 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)(b).

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. *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 26, 2001. The proffered wage as stated on Form ETA 750 is $25,000 per year. The labor certification was approved on June 12, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on August 26, 2003. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: 1991; gross annual income: $127,000; net annual income: not listed; and current number of employees: 3.

On July 7, 2004, the director issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding the petitioner's ability to pay, and submission of the petitioner's federal tax returns for the years 2000, 2001, and 2002, as well as the petitioner's Forms 941 Quarterly Tax Returns. The RFE additionally requested that the petitioner provide copies of the beneficiary's Forms W-2 if the petitioner employed the beneficiary.

The petitioner responded to the RFE. Following review, the director denied the petition on April 6, 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 March 26, 2001, the beneficiary did not list that he has been employed with the petitioner. On Form G-325 submitted with the beneficiary's I-485 Adjustment of Status application, the beneficiary listed that he has been employed with the petitioner since 2003 (no month listed). The petitioner submitted the following W-2 Forms for the beneficiary on appeal:

Year	Amount Paid
2004	$20,000

As the petitioner has provided the beneficiary's W-2 Form only for the year 2004, the petitioner cannot establish its ability to pay the beneficiary from the priority date of 2001 until the beneficiary reaches permanent residence based on prior wage payments alone.

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.

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:

Tax year	Net income or (loss)
2002	$3,085[2]
2001	$3,591
2000	$5,514

Based on the above, the petitioner's net income would not allow for payment of the beneficiary's proffered wage in the years 2001 or 2002.

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 and current liabilities.[3] 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
2002	$2,863
2001	$292
2000	$10,472

The petitioner cannot establish its ability to pay the beneficiary the proffered wage based on its net current assets in 2001 or 2002 either.

On appeal, counsel contends that the beneficiary has been employed since March 2004, and that he has been the prevailing wage since that date. Therefore, counsel contends that this exhibits the petitioner's ability to pay the proffered wage.

Based on 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. The petitioner has failed to demonstrate its ability to pay in the years 2001, 2002, or 2003. Further, based on the wages paid to the beneficiary in 2004, the petitioner would be still be deficient in demonstrating its ability to pay by $5,000, the difference between the wages paid on the W-2 Form, and the proffered wage.

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[2] The petitioner did not submit its 2003 federal tax return, which should have been available at the time of response to the RFE (although not specifically requested in the RFE). Further, we note that the priority date is April 26, 2001, so that the petitioner's 2000 tax return would not be required. However, we will consider the petitioner's 2000 tax return generally.

[3] 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.

On appeal, the petitioner has additionally submitted Quarterly Federal Tax Returns Forms 941 for the quarters ending March 31, 2004, June 30, 2004, September 30, 2004, and December 31, 2004. While the Forms 941 exhibit that the petitioner has paid wages to some employees, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The Forms 941 alone would not demonstrate that the petitioner has the ability to pay the proffered wage.

The petitioner additionally submitted a letter from the petitioner's accountant, which provided that the petitioner's gross receipts for 2004 were $250,799, and $63,500 for the three months ending March 31, 2005. Based on *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the petitioner's net income figure is the relevant figure for consideration, rather than the petitioner's gross income. The accountant's letter did not provide the petitioner's net income for 2004. Further, the petitioner did not submit its 2004 tax return on appeal.[4]

The accountant's letter further provided that, "assets owned by the corporation include equipment and improvements, which have a book value of $80,070. Additionally, the land and building the business operates in is owned by the principals of the corporation which has a fair market value of $1,000,000." First, we note that improvements would not be a readily liquefiable asset to pay the proffered wage. The accountant did not specify or itemize the value of the petitioner's equipment in order to determine the value of each item, or total of the equipment. Further, no appraisals were provided to allow a determination of whether the equipment was accurately valued. Regarding the building owned by the petitioner's principals, a corporation is a separate and distinct legal entity from its owners and shareholders, therefore, 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). Additionally, it would not be realistic that the petitioner could sell its equipment to pay the proffered wage. If the petitioner sold the equipment, land or building, there would be no equipment left for the petitioner to conduct business or to provide the beneficiary with a position.

The petitioner did not submit any additional documentation on appeal, or provide any additional evidence to allow us to conclude that the petitioner can pay the beneficiary the proffered wage from priority date until the time of adjustment.

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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[4] Based on the date that the petitioner filed the appeal, the 2004 tax return may not have been available.