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U.S. Citizenship
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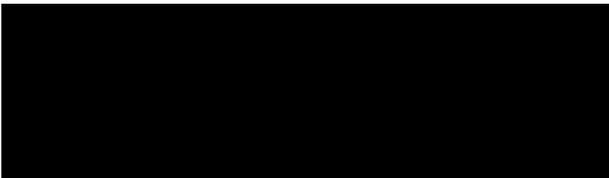
Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: [Redacted]
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:



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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a caterer. It seeks to employ the beneficiary permanently in the United States as a sous chef. 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.

On appeal, counsel submits a brief and additional evidence.

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 granting 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.

The regulation at 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 2, 1999. The proffered wage as stated on the Form ETA 750 is \$19.29 per hour, which equals \$40,123.20 per year.

On the petition, the petitioner stated that it was established on during 1993 and that it employs six workers. The petitioner stated that it has gross income of \$120,000 annually and net income of \$40,000.¹ On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since December of 1995. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in White Plains, New York.

In support of the petition, the petitioner submitted (1) 1999 and 2001 Form W-2 Wage and Tax Statements showing that the petitioner paid \$17,061 and \$21,335 to the beneficiary during those years, respectively, (2) 1999 and 2001 W-3 transmittals showing that the petitioner paid total wages of \$39,707 and \$80,542.15

¹ The assertion that the petitioner nets \$40,000 annually is not borne out by the tax returns subsequently submitted by counsel, as shall appear below.

during those years, respectively, (3) copies of the petitioner's Form 941TeleFile Tax Record for the second quarter of 2001 showing that the petitioner paid total wages of \$20,966.25 during that quarter, (4) Form 941 Employer's Quarterly Tax Returns for the first and third quarters of 2001 showing that the petitioner paid wages of \$6,619 and \$17,611.15 during those quarters, respectively, and (5) a copy of the beneficiary's 2001 Form 1040A.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on March 20, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted 1998 and 2000 W-2 forms issued to the beneficiary by the petitioner. Although the figures on the 1998 form are not entirely legible, this office observes that, because the priority date is August 2, 1999, the amount the petitioner paid to the beneficiary during 1998 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The 2000 W-2 form shows that the petitioner paid the beneficiary wages of \$19,710 during that year.

The petitioner submitted a copy of the petitioner's Form 941TeleFile Tax Record for the fourth quarter of 2001 showing that the petitioner paid total wages of \$35,345.75 during that quarter. Finally, the petitioner submitted a letter, dated March 29, 2003, from the petitioner's owner. That letter states that the petitioner provides the beneficiary with an apartment, the value of which it estimates at \$2,000 per month, or \$24,000 annually. The petitioner's owner provided no other evidence of the assertion that the petitioner provides the beneficiary with an apartment.

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 August 1, 2003, denied the petition.

On appeal, counsel submits copies of the joint 1998, 1999, 2000, and 2001 Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and owner's spouse. Those returns show that the petitioner was a sole proprietorship during those years and that the petitioner's owner and owner's spouse had one dependent.

The 1998 return shows that the petitioner earned a profit of \$18,533 during that year. The petitioner's owner declared adjusted gross income, including the petitioner's entire profit, of \$26,021 during that year.

The 1999 return shows that the petitioner earned a profit of \$18,197 during that year. The petitioner's owner declared adjusted gross income, including the petitioner's entire profit, of \$24,481 during that year.

The 2000 return shows that the petitioner earned a profit of \$32,664 during that year. The petitioner's owner declared adjusted gross income, including the petitioner's entire profit offset by deductions, of \$29,049 during that year.

The 2001 return shows that the petitioner earned a profit of \$24,353 during that year. The petitioner's owner declared adjusted gross income, including the petitioner's entire profit, of \$36,624 during that year.

Counsel argues that the petitioner's profit, the amount of its depreciation deduction, and the wages the petitioner paid to the beneficiary demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel also provided copies of all of the previously provided W-2 forms but did not provide the 2002 W-2 form showing wages the petitioner paid to the beneficiary, nor did counsel explain that omission. Further, although the petitioner's 2002 income tax return was due and should have been available counsel did not provide a copy of that form or explain its absence.

Initially, this office notes that counsel's reliance on the petitioner's depreciation deduction is misplaced. A depreciation deduction does not, in fact, represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. However, the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

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 established that it employed the beneficiary and paid him \$17,601, \$19,710, and \$21,335 during 1999, 2000, and 2001, respectively. The petitioner provided no reliable evidence of any other compensation of the beneficiary since the priority date. Having established that it paid the beneficiary those amounts during those years, the petitioner must demonstrate the ability to pay the balance of the proffered wage during those years, and the entire proffered wage during other salient years.

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).

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.

The petitioner, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses as well as pay the proffered wage. In addition, he must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The proffered wage is \$40,123.20 per year. The priority date is August 2, 1999.

Having established that it paid the beneficiary \$17,601 during 1999 the petitioner is obliged to demonstrate the ability to pay the \$22,522.20 balance of the proffered wage during that year. During 1999 the petitioner's owner declared adjusted gross income of \$24,481, including the petitioner's profit. If the petitioner's owner had been obliged to pay the balance of the proffered wage out of his adjusted gross income he would have been left with \$1,958.80. To expect that the petitioner's owner could have supported his family of three on that amount is unreasonable. The petitioner submitted no evidence, however, of any other funds that were available to it with which it could have paid the proffered wage during 1999. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

Having established that it paid the beneficiary \$19,710 during 2000 the petitioner is obliged to demonstrate the ability to pay the \$22,413.20 balance of the proffered wage during that year. During 2000 the petitioner's owner declared adjusted gross income of \$24,481, including the petitioner's profit. If the petitioner's owner had been obliged to pay the balance of the proffered wage out of his adjusted gross income he would have been left with \$2,067.80. To expect that the petitioner's owner could have supported his family of three on that amount is unreasonable. The petitioner submitted no evidence, however, of any other funds that were available to it with which it could have paid the proffered wage during 2000. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

Having established that it paid the beneficiary \$21,335 during 2001 the petitioner is obliged to demonstrate the ability to pay the \$18,788.20 balance of the proffered wage during that year. During 2001 the petitioner's owner declared adjusted gross income of \$24,481, including the petitioner's profit. If the petitioner's owner had been obliged to pay the balance of the proffered wage out of his adjusted gross income he would have been left with \$5,692.80. To expect that the petitioner's owner could have supported his family of three on that amount is unreasonable. The petitioner submitted no evidence, however, of any other funds that were available to it with which it could have paid the proffered wage during 2001. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner submitted no reliable evidence of wages it paid to the beneficiary during 2002 or of any funds it had available to pay the proffered wage during 2002. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999, 2000, 2001, and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.