



U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **AUG 29 2005**
EAC-04-009-52036

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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: SELF-REPRESENTED

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, Director
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. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, Italian style. 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.

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.

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 petition is January 29, 2001. The proffered wage as stated on the Form ETA 750 is \$661.15 per week, which amounts to \$34,379.80 annually. On the Form ETA 750B, signed by the beneficiary on November 11, 2000, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on October 7, 2003. On the petition, the petitioner claimed to have been established in June 1987, to currently have three employees, to have a gross annual income of \$305,000.00, and to have a net annual income of \$148,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated December 29, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on February 9, 2004.

In a decision dated March 31, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner submits a letter from the petitioner's owner and a copy of a Form W-2 Wage and Tax Statement of the owner's wife for 2003. The owner states on appeal that his wife draws a salary from the petitioner which she would be willing to forego if the beneficiary is hired, and that the wife wishes to retire.

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). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, none of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

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 first year of 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 Sonogawa*, 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 November 11, 2000, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

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 [REDACTED], 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 evidence indicates that the petitioner is a corporation. The record contains an incomplete copy of the Form 1120 U.S. Corporation Income Tax Return of the petitioner for 2002. The record before the director closed on February 9, 2004 with the receipt by the director of the petitioner’s submissions in response to the RFE. As of that date, the petitioner’s federal tax return for 2003 was not yet due. Therefore the petitioner’s tax return for 2002 was the most recent return available. No tax return of the petitioner was submitted for the year 2001, which is the year of the priority date.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner’s tax return for 2002 states the amount for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	not submitted	\$34,379.80*	no information
2002	\$1,591.00	\$34,379.80*	-\$32,788.80

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information fails to establish the petitioner's ability to pay the proffered wage either in 2001 or in 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 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.

In the instant case, however, the Form 1120 U.S. Corporation Income Tax Return of the petitioner for 2002 lacks a copy of Schedule L, therefore no calculations can be made of the petitioner’s net current assets for the beginning of 2002 or for the end of 2002. As noted above, the incomplete copy of the petitioner’s Form 1120 for 2002 is the only tax return submitted for the record.

The record contains two letters from the petitioner’s owner, one dated February 6, 2004, which was submitted in response to the RFE, and second dated April 3, 2004, which is submitted on appeal. In both letters the owner states that his wife is presently working for the petitioner, but that she wishes to retire from the business and thereby free her salary to pay the proffered wage to the beneficiary. In the February 6, 2004 letter, the owner states the amount of the wife’s salary to be approximately \$40,000.00. The partial copy in the record of the Form 1120 U.S. Corporation Income Tax Return of the petitioner for 2002, Schedule E, shows compensation to the petitioner’s wife that year in the amount of \$40,670.00. The Schedule E identifies the wife as a officer of the petitioner and states that she devotes 100% of her time to the business.

In his April 3, 2004 letter, the owner states the amount of the wife's salary to be \$50,960.00 per year. That letter is accompanied by a copy of the Form W-2 Wage and Tax Statement of the petitioner's wife for 2003, which shows employee compensation by the petitioner to the wife in the amount of \$50,960.00 in 2003.

Under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. The two letters from the petitioner's owner indicate that the petitioner intends to hire the beneficiary to replace the services of the wife of the owner. Although such an intention is a relevant factor to any analysis under *Matter of Sonogawa*, the record in the instant case lacks sufficient financial information about the petitioner to support an analysis of the totality of circumstances affecting the petitioner. No tax return was submitted for 2001, which is the year of the priority date. Moreover, the copy of the petitioner's tax return for 2002 submitted in evidence is an incomplete copy. Nor has the petitioner submitted any annual reports or audited financial statements, which are the two other alternative forms of required evidence under the regulation at 8 C.F.R. § 204.5(g)(2).

In addition, the tasks performed by the owner's wife are not the same as those of the offered job. In a letter dated February 6, 2004, the owner state that he and his wife work seven days a week at the business, and the Form 1120 U.S. Corporation Income Tax Return of the petitioner for 2002 shows that the wife is an officer of the petitioner. Concerning his wife's work, the owner states in a letter dated April 3, 2004, "She does it all i.e. cooking & preparation of food, serving, etc." (Letter from petitioner's owner, April 3, 2004, at 1). The foregoing facts indicate that duties of the wife of the owner are not identical to the duties of the offered job, as described on the ETA 750. If the wife were to retire and the petitioner were to hire the beneficiary, the petitioner apparently would still have to hire one or more other persons to serve tables and to perform other duties now done by the owner's wife.

For the foregoing reasons, the evidence concerning the petitioner's intention to hire the beneficiary as a replacement for the current services of the wife of the petitioner's owner is insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly found that the petitioner's net income as shown on its Form 1120 U.S. Corporation Income Tax Return for 2002 was insufficient to establish the petitioner's ability to pay the proffered wage that year and the director noted the absence of any evidence to establish the petitioner's ability to pay the proffered wage as of the priority date. The director's decision to deny the petition was correct, based on the evidence then in the record.

For the reasons discussed above, the assertions of the petitioner's owner on appeal and the evidence submitted on appeal are insufficient 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.