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U.S. Citizenship
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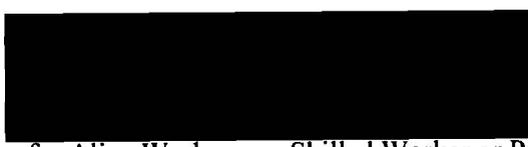
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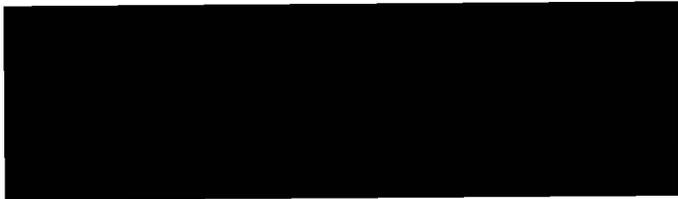
Petitioner:

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:



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. The appeal will be sustained. The petition will be approved.

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

As set forth in the director's July 5, 2005 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 nature, for which qualified workers are not available in the United States.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$12.57 per hour (\$26,145.60 per year). The Form ETA 750 states that the position requires two years of experience in a related occupation, although the related occupation is not specified on the Form ETA 750.

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 On appeal, counsel submitted a brief, a previously submitted letter from the petitioner's chief financial officer, the petitioner's previously submitted IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001, certain definitions of depreciation and a previously submitted excerpt of 8 C.F.R. § 204.5(g)(2). The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1999 and to currently employ 600 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 19, 2001, the beneficiary claimed to have worked for the petitioner.

On appeal, counsel asserts that the director erred in its decision, citing a letter from the petitioner's chief financial officer submitted with the petition affirming that the petitioner employs over 600 employees. Counsel also cites several non-precedent AAO decisions in support of his argument that the petitioner's depreciation expense should be added back into the petitioner's net income to establish the petitioner's ability to pay the proffered wage. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in support of his argument that the director failed to consider the totality of the circumstances in its determination of the petitioner's ability to pay the proffered wage. Counsel also asserts that the director erred in its analysis of the petitioner's Schedule L to its 2001 tax return by omitting Line 6 (other current assets) and Line 14 (other assets).

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, Citizenship and Immigration Services (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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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. In the instant case, although the beneficiary claimed to have worked for the petitioner from 1999 to the time he signed the ETA Form 750, the petitioner failed to submit evidence of any wages earned by the beneficiary. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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).

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses as counsel suggests. 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). The court in *Chi-Feng Chang* noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537

The record before the director closed on May 23, 2005 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2002, 2003 and 2004 federal income tax returns were due, although they were not provided by the petitioner. However, the director requested only the petitioner's 2001 federal income tax return in the RFE. While the petitioner could have provided the returns in response to the RFE or on appeal, the returns were not requested. Therefore, the AAO will not penalize the petitioner for not providing the returns. The petitioner's 2001 Form 1120S stated net income² of -\$580,673.00. Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the proffered wage of \$26,145.60 per year.

As an alternate 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 the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Therefore, as counsel correctly points out on appeal, the director erred in not considering Line 6 of Schedule L in its calculation of the petitioner's net current assets. Line 14 of Schedule L is not a current asset of the petitioner and, therefore, was correctly omitted from the director's calculation of the petitioner's net current assets. The petitioner's year-end current liabilities are shown on lines 16 through 18. If the total of a

² Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on line 23 of Schedule K. Because the petitioner had additional income shown on its Schedule K for 2001, the petitioner's net income is found on line 23 of Schedule K of its tax return.

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.

corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's 2001 Form 1120S stated net current assets of -\$13,306,335.00. Therefore, for the year 2001, the petitioner did not have sufficient net current assets to pay the proffered wage of \$26,145.60 per year.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

In his brief, counsel refers to several decisions issued by the AAO concerning the determination of a petitioner's ability to pay, but does not provide their published citations. 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, unpublished 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).

The petitioner's Form I-140 states in Part 5 that the petitioner has 600 employees. The regulation at 8 C.F.R. § 204.5(g)(2) states that "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." Pursuant to this regulation, the petitioner submitted a statement on the financial capacity of the petitioner dated October 28, 2002 signed by the petitioner's chief financial officer (CFO). The statement contains sufficient financial information indicating that the petitioner has the ability to pay the proffered wage to the beneficiary. Specifically, the statement states that the petitioner was incorporated in February 1999, that the petitioner currently operates ten restaurants in Massachusetts, that the petitioner employed over 600 employees in 2001, that the petitioner's payroll exceeded \$8,000,000.00 in 2001 and that the petitioner had sales of approximately \$29,000,000.00 in 2001. The petitioner's 2001 tax return supports the assertions of the petitioner's CFO. The statement also indicates that the petitioner has seen consistent growth in sales and profitability over the last several years, and that the petitioner has established its position as an industry leader. The record does not contain any derogatory information such as to persuade CIS to doubt the credibility of the information contained in the CFO's statement. We note that the letter in the record is an original with an original signature and references the beneficiary by name. Thus, the statement meets the regulatory requirements of 8 C.F.R. § 204.5(g)(2) and establishes the petitioner's ability to pay the proffered wage.

Further, counsel's argument concerning the totality of the circumstances of this case cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner in the instant case has been in business over seven years, operates ten restaurants and employs over 600 employees. In 2001, pursuant to its federal tax return, the petitioner's gross income was \$29,308,637.00 and it paid salaries and wages of \$8,653,435.00. Thus, assessing the totality of circumstances in this case, it is concluded that the petitioner has proven its financial strength and viability and has shown its ability to pay the proffered wage.

The evidence submitted establishes that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.