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U.S. Citizenship  
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Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **OCT 24 2006**

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IN RE:

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, Nebraska 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 foreign food specialty 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 March 29, 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 C.F.R. § 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.90 per hour (\$24,752.00 per year based on a 40 hour work week). The Form ETA 750 states that the position requires two years of experience in the job offered.

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.<sup>1</sup> On appeal, counsel submits a brief, the petitioner's IRS Form 941c, Supporting Statement to Correct Information, for tax years 2001, 2002, 2003 and 2004, the petitioner's IRS Forms 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Returns, for 2001, 2002, 2003 and 2004, the petitioner's Amended Tax & Wage Reports from the Washington State Employment Security Department for 2001, 2002, 2003 and 2004,<sup>2</sup> the petitioner's amended Employer's Quarterly Reports for Industrial Insurance, for 2001, 2002, 2003 and 2004, the petitioner's Employer's Quarterly Reports for Industrial Insurance, for 2001, 2002, 2003 and 2004, the beneficiary's IRS Forms W-2, Wage and Tax Statements, issued by the petitioner for 2001, 2002, 2003 and 2004, the beneficiary's IRS Form 1040 EZ, Income Tax Return for Single and Joint Filers with No Dependents, for 2004, the beneficiary's paystubs issued by the petitioner for January, February, March, April and May 2005, and a copy of a memorandum dated May 4, 2004 from William R. Yates, Associate Director of Operations, Citizenship and Immigration Services (CIS) ("Yates memorandum"). Relevant evidence in the record includes the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns, for 2001, 2002 and 2003.<sup>3</sup> 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 a C corporation. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$447,313.00, and to currently employ 12 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 April 26, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner has been paying the beneficiary the proffered wage since April 2001. Therefore, he asserts that according to the language in the Yates memorandum, the petitioner has demonstrated its continuing ability to pay the proffered wage.

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 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. On appeal, the petitioner submitted the beneficiary's IRS Forms W-2, Wage and Tax Statements, issued by the petitioner for 2001, 2002, 2003 and 2004. It appears that the petitioner created the IRS Forms W-2 in 2005 and amended its wage reporting on IRS Forms 941, IRS Forms 940-EZ and its state and insurance forms in

<sup>1</sup> 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).

<sup>2</sup> This office notes that the petitioner's IRS Form 941c and its state tax reports are original, hand written documents. CIS would require certified copies to corroborate the assertion that the amended reports were actually processed by the proper federal and state tax departments.

<sup>3</sup> This office notes that the petitioner did not submit amended IRS Forms 1120 for the petitioner for 2001, 2002 and 2003, despite the fact that it has amended the wages it paid in each of those years. The amended wage amounts would alter the petitioner's net income in each relevant year.

2005 to reflect the addition of wages allegedly paid to the beneficiary in 2001, 2002, 2003 and 2004.<sup>4</sup> The petitioner provided no explanation as to why it failed to file the beneficiary's 2001, 2002, 2003 and 2004 IRS Forms W-2 until May 2005.<sup>5</sup> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). This office will not accept the beneficiary's IRS Forms W-2 submitted on appeal as evidence of wages paid by the petitioner to the beneficiary in 2001, 2002, 2003 and 2004.<sup>6</sup>

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. 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).

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on March 22, 2005 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence.<sup>7</sup> The

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<sup>4</sup> A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

<sup>5</sup> It is not clear from the evidence whether the petitioner failed to file an IRS Form W-2 for the beneficiary for 2004 or whether it filed a Form W-2 for less than the amount it claims to have paid the beneficiary in 2004. The petitioner's 2004 Amended Tax & Wage Report from the Washington State Employment Security Department indicates that the petitioner reported wages for the beneficiary of \$6,000.00 and that the beneficiary was actually paid \$20,720.00 in 2004. The petitioner's IRS Form 941c and its state and insurance forms also appear to indicate that the petitioner is increasing the beneficiary's wages from \$6,000.00 to \$20,720.00 in 2004. However, the beneficiary's Form W-2 for 2004 shows that the petitioner paid the beneficiary \$9,000.00. In addition, the beneficiary's IRS Form 1040EZ shows that he received wages of \$9,000.00 in 2004. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

<sup>6</sup> The IRS Forms W-2 submitted on appeal state that the petitioner paid the beneficiary \$17,280.00 in 2001, \$23,040.00 in 2002, \$23,520.00 in 2003 and \$9,000.00 in 2004. The beneficiary's paystubs show that the petitioner paid the beneficiary \$10,000.00 in 2005. The proffered wage is \$24,752.00 per year. Therefore, even if this office accepts that the petitioner paid the beneficiary the wages stated on the IRS Forms W-2 and the beneficiary's paystubs, counsel's claim that the petitioner has paid the beneficiary at the proffered wage or higher since 2001 is without merit.

<sup>7</sup> This office notes that the record does not contain the petitioner's 2004 federal income tax return. Therefore, even if this office accepts that the petitioner paid the beneficiary wages of \$9,000.00 in 2004, the petitioner's net income and net current assets may not be analyzed against the difference between the wages

petitioner's income tax return for 2003 is the most recent return provided by the petitioner. The petitioner's tax returns demonstrate its net income for 2001, 2002 and 2003, as shown in the table below.

- In 2001, the Form 1120 stated net income of -\$165,786.00.
- In 2002, the Form 1120 stated net income of -\$116,552.00.
- In 2003, the Form 1120 stated net income of -\$18,544.00.

Therefore, for the years 2001, 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a 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 tax returns demonstrate its end-of-year net current assets for 2001, 2002 and 2003, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of -\$13,841.00
- In 2002, the Form 1120 stated net current assets of \$30,632.00.
- In 2003, the Form 1120 stated net current assets of \$9,875.00.

Therefore, for the years 2001 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage. In 2002, the petitioner had sufficient net current assets to pay the proffered wage.

Thus, 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 except for 2002.<sup>9</sup>

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since April 2001, according to the language in the Yates memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date. However, as detailed herein, counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the

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actually paid to the beneficiary and the proffered wage in 2004.

<sup>8</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>9</sup> This office notes that even if this office accepts that the petitioner paid the beneficiary wages of \$17,280.00 in 2001, the petitioner had not established that it had the continuing ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage through an examination of its net income or net current assets in 2001.

petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

The evidence submitted does not establish that the petitioner had 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 not met that burden.

**ORDER:** The appeal is dismissed.