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U.S. Citizenship
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Office: TEXAS SERVICE CENTER

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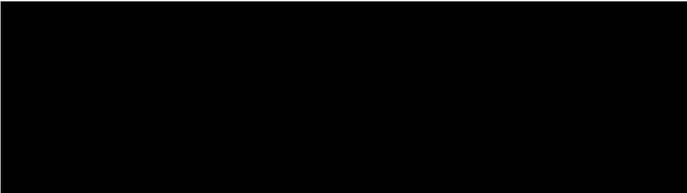
Petitioner:

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and 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 U.S. 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. Therefore, the director denied the petition.

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.

According to the director's April 10, 2007 denial, the issue in this case is whether 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 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, which is the date the Form ETA 750 is 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 as certified by the DOL and submitted with the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the Form ETA 750 for processing on April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour, 40 hours per week, or \$27,040 annually.¹ The Form ETA 750 states that the position requires two years of experience in the proffered position.

¹ Counsel indicated in a brief in the record which is not dated and which was submitted prior to filing the instant appeal that a thirty-five hour workweek may be considered a fulltime schedule, and that the proffered position should therefore be viewed as involving a thirty-five hour workweek, rather than a forty-hour workweek as stated on the Form ETA 750, as certified. Counsel then suggested that because the petitioner may offer the beneficiary two weeks of unpaid vacation each year that the petitioner need only show the

The AAO maintains plenary power to review this matter on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The federal courts have long recognized the AAO's *de novo* review authority. *See*, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.²

The petitioner submitted the following evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage:

- the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001, 2002, 2003, 2004, 2005 and 2006 together with certain attachments filed with these forms;
- copies of the beneficiary's Form W-2, Wage and Tax Statement, for 2001, 2002, 2003, 2004, 2005 and 2006 issued by the petitioner;
- copies of the petitioner's monthly business checking and savings statements for certain months during the relevant period of analysis;
- counsel's brief dated July 9, 2004;
- counsel's brief dated October 8, 2004;
- counsel's brief which is not dated and which was submitted as an attachment to counsel's June 14, 2006 request for expedited processing; and
- counsel's brief dated April 10, 2007.

The record does not contain other evidence directly relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as an S corporation. On the petition, the petitioner listed September 1996 as the date it was established. It stated that it had forty employees. Where the petitioner was to state its gross annual income and net annual income on the petition, it failed to provide any information, but instead wrote "See attached." *See* Form I-140, Part 5.

According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, which is signed by the beneficiary but not dated, the beneficiary claimed to have worked for the petitioner from September 1997 until the date that form was signed.

ability to pay the proffered hourly wage of \$13.00 multiplied by 35 (hours) multiplied by 50 (weeks) to yield an annual wage of \$22,750. Counsel's assertion is not persuasive. In this matter, the DOL certified a proffered wage of \$13.00 per hour, 40 hours per week. The petitioner did not indicate on the Form ETA 750 that its intent was that the cook in the proffered position would be left unpaid for a certain period of the year. CIS shall adhere to the terms of the Form ETA 750, as certified, when analyzing whether the petitioner has demonstrated an ability to pay the wage. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983)(stating that "DOL bears the authority for setting the *content* of the labor certification.")(Emphasis in the original.) *See also* § 8 CFR 204.5(g)(2).

² 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 this 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).

On appeal, counsel indicates that the petitioner has demonstrated the ability to pay the proffered wage through the totality of the circumstances in this case. He cites *Matter of Sonogawa* 12 I&N Dec. 612 (Reg. Comm. 1967) as his authority. Counsel suggests that Citizenship and Immigration Services (CIS) should consider the date that the petitioner was established; the petitioner's gross receipts and gross profits; the petitioner's total salaries paid to all employees; and the small deficiencies in actual wages paid to the beneficiary in certain years; and, then find that the petitioner has shown the continuing ability to pay the wage. Counsel also asserts that "paper" losses such as depreciation should be considered as funds available to pay the wage. In addition, counsel suggests that CIS should consider the petitioner's total assets, not only its current assets, when analyzing the funds it has available to pay the wage. Finally, counsel urges CIS to consider stockholder's equity, capital stock and additional paid-in stock as funds available to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition subsequently based on that Form 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 beneficiary's proffered wages, although CIS will consider the totality of the circumstances affecting the petitioning business 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 this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onwards. However, the Forms W-2 in the record do indicate that in 2001, the petitioner paid the beneficiary \$20,723.58, or \$6316.42 less than the proffered wage; in 2002, the petitioner paid the beneficiary \$21,783.64, or \$5256.36 less than the proffered wage; in 2003, the petitioner paid the beneficiary \$21,659.84, or \$5380.16 less than the proffered wage; in 2004, the petitioner paid the beneficiary \$18,876.18, or \$8163.82 less than the proffered wage; in 2005, the petitioner paid the beneficiary \$26,782.29, or \$257.71 less than the proffered wage; and in 2006, the petitioner paid the beneficiary \$27,722.05, which is more than the proffered wage of \$27,040. Thus, the petitioner has established an ability to pay the wage in 2006 through its actual wages paid to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during all the years of the relevant period of analysis, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, contrary to counsel's assertions. 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced, also contrary to counsel's assertions. Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient. It is also insufficient for the petitioner to show that it paid wages in excess of the proffered wage.

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 court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* stated:

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 Chang* 719 F. Supp. at 537.

The petitioner's tax returns demonstrate the following financial information concerning its ability to pay the proffered annual wage of \$27,040 from the priority date of April 19, 2001 onwards:

- Petitioner's 2001 Form 1120S states a net income or loss³ of -\$26,199.
- Petitioner's 2002 Form 1120S states a net income or loss of -\$31,295.
- Petitioner's 2003 Form 1120S states a net income or loss of -\$43,679.
- Petitioner's 2004 Form 1120S states a net income or loss of \$6,277.
- Petitioner's 2005 Form 1120S states a net income or loss of -\$60,182.
- Petitioner's 2006 Form 1120S states a net income or loss of \$7,078.

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net income to pay the proffered wage, or to pay the balance of the proffered wage after actual wages paid to the beneficiary are subtracted. In 2004, the petitioner's net income fell \$1886.82 short of paying the balance of the proffered wage after subtracting what was actually paid the beneficiary in 2004. The petitioner has already demonstrated an ability to pay the wage in 2006.

In sum, the petitioner has demonstrated an ability to pay the proffered wage in 2006. It has not shown the ability to pay the wage during 2001, 2002, 2003, 2004 or 2005 through net income, or a combination of net income and actual wages paid.

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. Thus, in this matter, CIS will review the petitioner's assets for 2001, 2002, 2003, 2004 and 2005. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage, contrary to counsel's assertions.

³For purposes of this analysis, net income is equal to ordinary income (loss) from trade or business activities as reported on Line 21 of the Form 1120S, except in tax years 2001, 2003 and 2004. In 2001, 2003 and 2004 the figure reported on Line 23 of Schedule K varies from Line 21, page 1 of the petitioner's tax return. This indicates additional income from sources other than a trade or business. Thus, for 2001, 2003 and 2004 net income is equal to income (loss) reported on Line 23 of Schedule K.

Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, 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 net current assets (liabilities) during 2001 were -\$22,659.
- The petitioner's net current assets (liabilities) during 2002 were -\$54,832.
- The petitioner's net current assets (liabilities) during 2003 were -\$63,361
- The petitioner's net current assets (liabilities) during 2004 were -\$49,636.
- The petitioner's net current assets (liabilities) during 2005 were -\$99,276.

Thus, for the years 2001 through 2005, the petitioner has not shown that it had sufficient net current assets to pay the proffered wage, or to pay the balance of the proffered wage after subtracting actual wages paid to the beneficiary.

In sum, the petitioner has demonstrated an ability to pay the wage during 2006. It has not established that it had the ability to pay the beneficiary the full proffered wage during 2001, 2002, 2003, 2004 and 2005 through an examination of wages paid to the beneficiary, its net income or its net current assets.

It is noted that the petitioner's business checking and savings account statements submitted into the record do not help demonstrate that the petitioner has had the continuing ability to pay the proffered wage from the priority date onwards. Bank statements are not among the three types of evidence enumerated in 8 C.F.R. § 204.5(g)(2) as the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional evidence to be considered "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner in this matter. Also, the various bank statements submitted show the amount in the petitioner's checking account on a given date. Such statements standing alone cannot show an ability to pay the proffered wage from the priority date onwards. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's monthly checking statements somehow reflect additional available funds that were not listed on its tax returns.

Also, contrary to counsel's assertions, the petitioner's shareholders' equity, its capital stock and its paid-in capital are not funds that are readily available to pay the wage. As noted on the petitioner's Schedule L, these amounts actually represent liabilities.

⁴According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel's argument concerning the petitioner's size, longevity, and number of employees, however, 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, as in the present matter where the petitioner has shown an ability to pay in one year and has shown, through actual wages paid, an ability to pay an amount very near to the proffered wage during each of the other five years of the relevant period of analysis. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated over ten years ago and employs approximately forty employees according to information presented on the petition. Tax returns in the record reflect that during the relevant period of analysis, the petitioner paid between \$387,004 and \$485,229 in salaries and wages each year. The petitioner's gross income in 2001 was over \$1.15 million. Its gross income has steadily increased almost each year during the relevant period of analysis. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and that it has the ability to pay the proffered wage.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 been met.⁵

⁵ This office notes that the beneficiary has apparently been placed into removal proceedings in part based on charges that she obtained a Social Security number (SSN) fraudulently. Also, the petitioner's Forms W2 for the beneficiary list a different SSN for the beneficiary in 2001 than that used in 2002 through 2006. It is not clear from the 2001 Form W2 whether the SSN on that form was part of the beneficiary's employee record as it is written in by hand and the original SSN on that form has been blotted out. The record also does not make clear whether the petitioner, the beneficiary or some other party made these modifications to the beneficiary's 2001 Form W2. However, this office would underscore the following:

Misuse of another individual's SSN and other violations of applicable Federal laws regarding SSN fraud and misuse may lead to fines and/or imprisonment. Also, disregarding the work authorization provisions printed on one's Social Security card are also crimes which may lead to prosecution.

The AAO also notes that in December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981. With regard to Social Security laws and regulations, this Act states in relevant part that an individual who "willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title" has committed a felony.

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See Social Security Online, the official website of the U.S. Social Security Administration, <http://ssa-custhelp.ssa.gov> (accessed November 30, 2007).

Also, in October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) which indicates that an individual who "knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that

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

constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law” has committed a Federal offense.