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U.S. Citizenship
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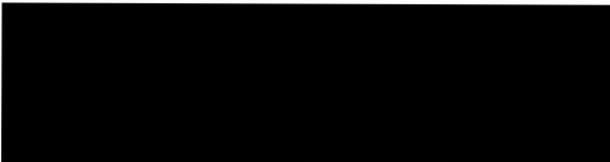
Petitioner:

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

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 dismissed.

The petitioner is a motel business. It seeks to employ the beneficiary permanently in the United States as a night hotel manager. 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. 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 denial dated March 29, 2006, the 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 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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *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 U.S. Department of Labor 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 December 13, 2002.¹ The proffered wage as stated on the Form ETA 750 is \$33,000.00 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

¹ It has been approximately five years since the Alien Employment Application has been accepted and the

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.²

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a support letter from the petitioner dated October 12, 2005; letters dated July 17, 2005 and January 6, 2006 from Fine Art Studios, Lusaka, Zambia; the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2002, 2003 and 2004; explanatory letters from counsel dated January 17, 2006, March 16, 2006, April 27, 2006 and September 6, 2006; approximately 21 pages of documentation concerning, *inter alia*, the beneficiary's payment of taxes in Zambia; the petitioner's Employers Quarterly Federal Tax Form (Form-941) statements for 2002 including a W-3 Transmittal of Wage and Tax statements (with eight W-2 statements) stating total wages paid for eight employees of \$17,970.35 in 2002; the petitioner's Employers Quarterly Federal Tax Form (Form-941) statements for 2003 with ten W-2 statements stating total wages paid for ten employees including a W-3 Transmittal of Wage and Tax statement of wages paid in the amount \$14,849.44 in 2003; an internally generated summary of four salaries paid by the petitioner in 2004 totaling \$16,045.00; a W-3 Transmittal of Wage and Tax statement of wages paid in the amount \$13,700.00 in 2005 including nine W-2 statements; Form 940-EZ, Employer's Annual Federal Unemployment tax return for 2005; the petitioner's Employers Quarterly Federal Tax Form (Form-941) statement for 2005; a letter from the petitioner dated February 23, 2006; an undated letter from the petitioner listing five employees; and, copies of documentation concerning the petitioner's incorporation and continuing existence.

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 1981 and to currently employ three 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 4, 2002, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director abused her discretion by not waiting for the petitioner to submit additional evidence. Further, counsel asserts that the director erred by not considering all the petitioner's assets as found on the tax returns submitted, and, erred by finding that the petitioner did not have the ability to pay the proffered wage from the priority date.

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes copies of the following documents: a letter from the petitioner's accountant dated September 1, 2006, stating that the petitioner amended the 2005's tax return and should have corrected the 2004 statement of "Other current assets;" CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; and the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2002, 2003, 2004 and 2005.

proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

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 Sonegawa*, 12 I&N Dec. 612 (BIA 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, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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). Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's appellate argument that its depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2002, the Form 1120S stated net income of \$51,840.00.
- In 2003, the Form 1120S stated net income of \$57,063.00.
- In 2004, the Form 1120S stated net income of \$25,638.00.
- In 2005, the Form 1120S stated net income of \$80,374.00.

Since the proffered wage is \$33,000.00 per year, the petitioner did have the ability to pay the proffered wage from an examination of its net income for years 2002, 2003 and 2005. In the 2004, the petitioner did not have adequate income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during the 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. 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. 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.³ 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 net current assets during 2002, 2003, 2004 and 2005 were <\$1,659.00>, \$7,903.00, \$220.00 and \$14,129.00 respectively.

Therefore, for the period which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Further counsel states that it is only in year 2004 that the petitioner had insufficient net income to pay the proffered wage. Counsel states that as the petitioner amended the 2005's tax return and should have corrected the 2004 statement of "Other current assets" to state a temporary loan since repaid, that "this money counts as a net current asset for 2004." Clearly what the petitioner should have done to change the information submitted to the U.S. Internal Revenue Service to restate the tax figures in the 2004 tax return is not evidential in this proceeding. The petitioner's tax return in 2005 does not alter the figures contained in the petitioner's 2004 tax return. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an

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

⁴ 8 C.F.R. § 204.5(g)(2).

effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The evidence submitted fails to establish that the petitioner had the ability to pay the proffered wage in 2004.

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.