

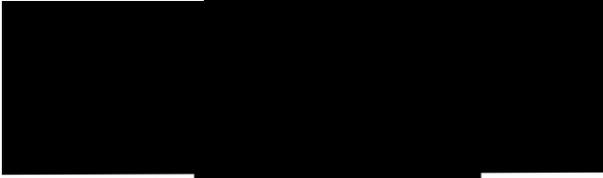
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**U.S. Citizenship
and Immigration
Services**

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prevent clearly unwarranted
invasion of personal privacy**

B6



File:



EAC-05-107-52220

Office: VERMONT SERVICE CENTER

Date: **JUN 14 2007**

In re:

Petitioner:

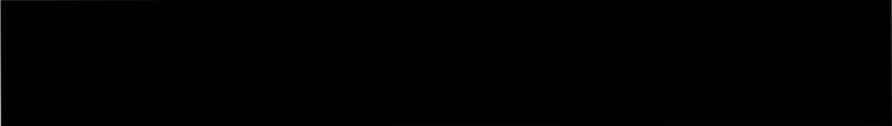
Beneficiary:



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 Acting Director, Vermont Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner is a restaurant, and seeks to employ the beneficiary permanently in the United States as a Cook, Specialty, Foreign Food (“Cook (Kosher)”). The petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s December 28, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate that it can pay the beneficiary the proffered wage.

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

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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

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).

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 23, 2001. The proffered wage as stated on Form ETA 750 is \$528.80 per week. The regular hourly wage would be equivalent to \$27,456 per year, based on a schedule of 40 hours per week. The petitioner listed an overtime rate of \$19.76 per hour. The labor certification was approved on March 24, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on February 25, 2005.² The petitioner's representative failed to list the following information on the I-140 Petition related to the petitioning entity: date established; gross annual income; and net annual income. The petitioner listed its current number of employees as four.

On June 28, 2005, the director issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding the petitioner's ability to pay from April 23, 2001 to the present, including the petitioner's 2003, and 2004 federal tax returns, as well as the beneficiary's Forms 1099 that the petitioner issued to the beneficiary. The RFE additionally requested an explanation why the petitioner issued the beneficiary a Form 1099, rather than a Form W-2 for wages paid to employees. The RFE also requested that the petitioner provide evidence that the beneficiary had the required four years of experience as listed on the certified Form ETA 750.³ The petitioner responded to the RFE. Following review, the director denied the petition on December 28, 2005 as the petitioner had not demonstrated its ability to pay the proffered wage. Counsel appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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 Form ETA 750B, signed by the beneficiary on May 13, 2003, the beneficiary listed that he has been employed with the petitioner since April 1997. The petitioner provided the following evidence of wage payment:

| <u>Year</u> | <u>Wages Paid</u> |
|-------------|--------------------------|
| 2005 | \$21,450.00 ⁴ |
| 2004 | \$23,650.00 ⁵ |

² The petitioner previously filed an I-140 on the beneficiary's behalf on May 7, 2004 based on the same position and labor certification. That petition was denied on September 15, 2004, as the petitioner did not establish its ability to pay. A different attorney represented the petitioner with respect to that filing. Additionally, a third and different attorney filed the appeal on behalf of the petitioner.

Additionally, it appears that the petitioner filed an I-140 petition on behalf of the petitioner, self-represented, on February 21, 2002, prior to Form ETA 750's certification. The director issued an RFE, to which the petitioner failed to respond, and the petition was denied due to abandonment on September 18, 2002.

³ Form ETA 750 required that the petitioner demonstrate that the beneficiary had four prior years of experience as a Kosher cook. The petitioner provided a letter from a prior employer, which documented that the beneficiary had five years of experience in preparing dishes in accordance with kosher laws.

⁴ Evidence submitted on appeal in the form of a wage report for the beneficiary demonstrates that the petitioner paid the beneficiary the foregoing amount from March 28, 2005 to December 31, 2005.

The petitioner paid wages for this year on Form 1099, and the "payer's name" on Form 1099 is listed as [REDACTED]. The petitioner is listed only as [REDACTED]. The petitioner's federal tax returns, however, also list the petitioning entity as [REDACTED].

| | |
|------|--------------------------|
| 2003 | \$20,900.00 ⁶ |
| 2002 | \$17,600.00 ⁷ |

Based on the foregoing, the petitioner has not paid the beneficiary the full proffered wage in any of the above years. Therefore, the petitioner is unable to demonstrate its ability to pay the beneficiary the proffered wage based on prior wage payment alone. The petitioner must demonstrate that it can pay the difference between the wages paid and the proffered wage.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now Citizenship and Immigration Services ("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 petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

| <u>Tax year</u> ⁸ | <u>Net income or (loss)</u> |
|------------------------------|-----------------------------|
| 2004 | -\$12,533 ⁹ |

Pizza & R.," so that we will accept the wages as proof of the petitioner's ability to pay.

⁶ The petitioner submitted both a Form 1099 and Form W-2 for 2003, each in the amount of \$10,450. The petitioner's individual Form 1040 federal tax return reflects that the beneficiary reported the W-2 wages on page one of his tax return, and reported Form 1099 wages on Schedule C as "business income." Further, the petitioner provided a statement that an outside payroll company began doing the petitioner's payroll and informed the petitioner that the petitioner should pay the beneficiary on Form 1099, as opposed to Form W-2.

The petitioner's owner additionally notes in her statement that the petitioner's restaurant is a "specialty restaurant, [and] is closed for religious reasons throughout the year." Regardless, the petitioner must demonstrate its ability to pay the full proffered wage from the priority date until the beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2).

⁷ The petitioner paid the beneficiary's 2002 wages on Form W-2.

⁸ The petitioner submitted its 2001, and 2002 federal tax returns with the first I-140 Petition filed on behalf of the beneficiary, and only submitted its 2003 and 2004 federal tax returns with the second I-140 Petition filed on behalf of the beneficiary. A petitioner must demonstrate its ability to pay from the priority date onward. See 8 C.F.R. § 204.5(g)(2). We will consider all documents within the record, including the petitioner's prior filing.

⁹ We note that based on the date of filing, the petitioner's 2005 federal tax return would not have been available. The petitioner provided a statement from its accountant dated August 31, 2005, which provided that the petitioner "is presently showing a profit year to date, and based upon this, I could definitely project a profit for the entire year 2005." The accountant does not provide that the petitioner could demonstrate its

| | |
|------|-----------|
| 2003 | -\$5,679 |
| 2002 | -\$12,783 |
| 2001 | -\$8,601 |

Based on the above, the petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years. As the petitioner's net income is negative in each of the above years, even if we combined the petitioner's net income with the wages paid, the petitioner would not be able to demonstrate its ability to pay the proffered wage.¹⁰

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 the difference between the petitioner's current assets and current liabilities.¹¹ 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, or, if filed on Form 1120-A, on Part III. 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, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

ability to pay the proffered wage in 2005, or that the profit would likely be sufficient to pay the proffered wage for this year. A visa petition may not be approved based on speculation of future eligibility or after the petitioner 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).

¹⁰ Counsel for the petitioner in the first filing argued that the beneficiary's wages paid in combination with depreciation would demonstrate the petitioner's ability to pay.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) 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.

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage.

¹¹According 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.

| <u>Tax year</u> | <u>Net current assets</u> |
|-----------------|---------------------------|
| 2004 | -\$19,155 |
| 2003 | -\$71,594 |
| 2002 | -\$72,297 |
| 2001 | -\$69,216 |

The petitioner cannot establish its ability to pay the beneficiary the proffered wage based on its net current assets either. Similarly, since the petitioner's net current assets are negative in each of the above years, the petitioner cannot demonstrate its ability to pay the proffered wage by combining the petitioner's net current assets and the wage paid to the beneficiary.

On appeal, counsel cites to the May 4, 2004 Memorandum from William R. Yates, Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2) (May 4 Yates Memo). The May 4 Yates Memo provides that CIS should examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary.

Counsel admits that the petitioner cannot establish its ability to pay through either the petitioner's net income or its net current assets, but asserts that the petitioner can pay the proffered wage based on criteria three, that the petitioner has employed the beneficiary. In support, counsel provides a record of wages paid to the beneficiary beginning on March 28, 2005 through December 31, 2005, which exhibits payment to the beneficiary in the amount of \$21,450 based on wages of \$550 a week. On this basis, counsel contends that the petitioner has demonstrated its ability to pay the proffered wage.

Although the petitioner may now be employing and paying the beneficiary the proffered wage, the May 4 Yates Memo does not negate the petitioner's regulatory requirement to show that it can pay the beneficiary the proffered wage from the priority date of April 2001 to the time that the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner has not demonstrated that it has paid the beneficiary the proffered wage since April 2001, or that it is able to pay the wage based on its net income or net current assets.

Accordingly, based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. 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 not been met.

ORDER: The appeal is dismissed.