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FILE: WAC-05-006-51254 Office: CALIFORNIA SERVICE CENTER Date: MAY 10 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:

SELF-REPRESENTED

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California 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 restaurant cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner failed to present sufficient evidence to establish its ability to pay the beneficiary the proffered wage from the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence. 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.

The petitioner in the instant petition and the employer in the related labor certification application were represented by [REDACTED] of International Legal Services at 1505 Fourth Street, Suite 206, Santa Monica, CA 90401 without any Form G-28. A review of recognized organizations and accredited representatives reported in October 2006 by the Executive Office for Immigration Review at <http://www.usdoj.gov/eoir/statspub/AC30405.pdf> and <http://www.usdoj.gov/eoir/statspub/AC30404.pdf> (accessed January 30, 2007), does not mention International Legal Services or [REDACTED]. Under 8 C.F.R. § 292.1, persons entitled to represent individuals in matters before the Department of Homeland Security ("DHS"), and the Immigration Courts and Board of Immigration Appeals ("Board"), or the DHS alone, include, among others, accredited representatives. Any such representatives must be designated by a qualified organization, as recognized by the Board. A recognized organization must apply to the Board for accreditation of such a representative or representatives. Thus, the petitioner is considered self-represented in this matter.

As set forth in the director's August 17, 2005 denial, the issue in this case is whether or not the petitioner has established its 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 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 April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$2,700,000, and to currently employ 60 workers. On the Form ETA 750B signed on March 18, 2001, the beneficiary claimed to have worked for the petitioner since October 2000.

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 appeal¹. Relevant evidence in the record includes the corporate federal tax returns for 2001 through 2004 and Form DE-6 for the last three quarters of 2004 and the first quarter of 2005 filed by RGI-SM, Inc., and the beneficiary's W-2 forms for 2000 through 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the 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 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).

The petitioner of the instant petition and the employer of the relevant labor certification application is [REDACTED]. The petitioner submitted a copy of business license for [REDACTED] for 2005, which shows that [REDACTED] is located at [REDACTED]. However, the record of proceeding does not contain any regulatory-prescribed evidence to establish the petitioner's ability to pay the proffered wage from the priority date to the present, such as the petitioner's annual reports, tax returns or audited financial statements for those relevant years. The petitioner did not provide its address on the Form I-140 but used the unauthorized representative's address as its business address. Instead the petitioner submitted tax returns and Form DE-6 for an S corporation named [REDACTED], located at [REDACTED].

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) and 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).

On appeal the petitioner claims that the [REDACTED] located at [REDACTED] [REDACTED] which employs the beneficiary of this petition, [REDACTED] is wholly-owned by [REDACTED], Sherman Oaks, CA. However, the petitioner does not submit any persuasive evidence to establish that [REDACTED] qualifies as a successor-in-interest to [REDACTED] or that [REDACTED] is the trade name of [REDACTED]. This status requires documentary evidence. [REDACTED]'s tax returns submitted in the record do not reflect that [REDACTED] runs the business under the trade name of [REDACTED] has different address from [REDACTED]. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the petitioner failed to establish its ability to pay the proffered wage with its own tax returns or other regulatory-prescribed evidence. The AAO affirms the director's decision that the petitioner failed to present sufficient evidence to establish its continuing ability to pay the proffered wage from the priority date.

Moreover, the AAO finds that even if the petitioner had established that [REDACTED] and the petitioner were the same entity, related, or that [REDACTED] was the trade name of [REDACTED] or otherwise a part of [REDACTED], [REDACTED]'s tax returns and other documentary evidence would not have established the petitioner's continuing ability to pay the proffered wage from the priority date to the present.

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 submitted [REDACTED]'s Form DE-6 and the beneficiary's W-2 forms issued by [REDACTED].

These documents show that [REDACTED] paid the beneficiary \$22,442.40 in 2001, \$20,595.18 in 2002, \$24,847.49 in 2003, \$22,703.76 in 2004 and \$6,924.17 in 2005 (the first quarter only). It is established that [REDACTED] paid the full proffered wage to the beneficiary in 2003, but partial wages in 2001, 2002 and 2004. The petitioner is obligated to demonstrate that it could pay the difference of \$1,581.60 in 2001, \$3,428.82 in 2002 and \$1,320.24 in 2004.

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 its gross income and gross profit on appeal is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

² The 2001 and 2002 tax returns for [REDACTED] indicate that [REDACTED] is part of a controlled group of 4 corporations. Corporations are classified as members of a controlled group if they are connected through certain stock ownership. While members of a controlled group may consolidate their tax returns, the evidence submitted in the instant case indicates that each member of the controlled group filed its own tax return. However, none of the evidence submitted establishes that the petitioner [REDACTED], is a part of [REDACTED].

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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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* further 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 contains copies of [REDACTED] Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2004. The tax returns for 2001, 2002 and 2004 demonstrate the following financial information concerning the ability to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date:

- In 2001, the Form 1120S stated a net income³ of \$(326,172).
- In 2002, the Form 1120S stated a net income of \$(35,088).
- In 2004, the Form 1120S stated a net income of \$(27,711).

Therefore, for the years 2001, 2002 and 2004, [REDACTED] did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and 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. The petitioner's total assets include depreciable assets that the petitioner

³ 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. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

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.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 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.

- [REDACTED] net current assets during 2001 were \$(270,686).
- [REDACTED] net current assets during 2002 were \$(320,688).
- [REDACTED] net current assets during 2004 were \$(809,743).

Therefore, for the years 2001, 2002 and 2004 [REDACTED] did not have sufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that [REDACTED] had the ability to pay the beneficiary the proffered wage as of the year of the priority date 2001, 2002 and 2004 through an examination of wages paid to the beneficiary, or its net income; or net current assets.

In addition, CIS record shows that the petitioner has filed other Immigrant Petitions for Alien Worker (Form I-140) for 22 more workers. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date. The instant case indicates that the petitioner failed to establish its ability to pay the single instant beneficiary the proffered wage. It is not likely that the petitioner could establish its ability to pay multiple proffered wages.

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.

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