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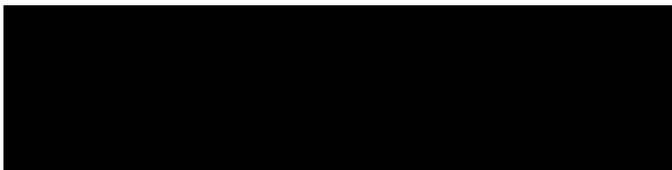
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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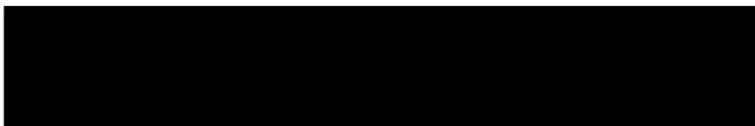


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: NOV 15 2007
SRC 07 025 51834

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. 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 and that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the issues in this case are whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and whether the petitioner has demonstrated that the beneficiary has the qualifications that the Form ETA 750 stated as necessary qualifications.

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

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on the Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition.¹ *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on August 15, 2003. The proffered wage as stated on the Form ETA 750 is \$10.50 per hour, which equals \$21,840 per year. The Form ETA 750 states that the position requires two years of experience in the job offered and describes the duties of the proffered position as,

Plans menus and cooks Cantonese dishes, desserts, and other foods, according to recipes. Prepares meats, soups, sauces, vegetables, and other foods. Portions, garnishes, and seasons food according to prescribed methods. Estimates food consumption and requisitions supplies.

The Form I-140 petition in this matter was submitted on November 6, 2006. On the petition, the petitioner stated that it was established on October 14, 1999 and that it employs two workers. The petition states that the petitioner's gross annual income is \$104,619 and that its net annual income is \$32,921.² Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in West Palm Beach, Florida.

On the Form ETA 750B, signed by the beneficiary on August 13, 2003, the beneficiary did not claim to have worked for the petitioner. The beneficiary claimed to have worked 40 hours a week as a cook at the Ildong Restaurant in Anyang City, Korea from August 1994 to July 1998. She described her duties as,

Cook Cantonese dishes by preparing and seasoning food according to recipes. Planned menus. Estimated food consumption and purchased supplies. Served customers.

¹ To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

² The petitioner's 2005 tax return, shows that the petitioner's gross receipts during that year were \$104,619, and that its Line 21 ordinary income was \$32,921. The petitioner's Schedule K, Line 17e income, which corresponds more closely to net income, was somewhat lower, as is explained further below.

The AAO maintains plenary power to review each appeal 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 AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.³ In the instant case the record contains (1) copies of the petitioner's 2003, 2004, and 2005 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) monthly statements pertinent to the petitioner's checking account, (3) the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the last quarter of 2004, (4) the petitioner's Florida Quarterly Wage report for the same quarter, (5) Florida Sales and Use Tax Returns showing, *inter alia*, the petitioner's gross receipts for the first six months of 2007, and (6) a spreadsheet showing those six months of gross receipts segregated by month. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In addition, the record contains (1) a letter in Korean and a translator's certification dated October 19, 2006, (2) a letter in Korean with an English translation dated February 10, 2007 and a translator's certification, and (3) an affidavit in Korean dated July 26, 2007 and an English translation and translator's certification. The record does not contain any additional evidence pertinent to the beneficiary's claim of qualifying employment experience.

The tax returns submitted show that the petitioner is a corporation, that it incorporated on October 14, 1999, and that it reports taxes pursuant to cash basis accounting and the calendar year.

During 2003 the petitioner declared Schedule K, Line 23 income⁴ of \$13,808. Because the petitioner did not complete Schedule L figures pertinent to the petitioner's current assets and current liabilities are not available to this office and the petitioner's end-of-year net current assets could not be computed.

During 2004 the petitioner declared Schedule K, Line 17e income of \$26,743. The corresponding Schedule L shows that at the end of that year the petitioner had \$5,106 in current assets and \$1,735 in current liabilities, which yields \$3,371 in net current assets.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁴ The Schedule K shows an income reconciliation at Line 17e on the 2004 and 2005 versions of the Form 1120S, or Line 23 on previous versions. That statistic corresponds to net income more closely than any other statistic on that form. Therefore, when a petitioner chooses to rely on the Form 1120S to demonstrate its ability to pay the proffered wage, this office regards that income reconciliation as its net income and uses it in the calculations pertinent to the ability to pay the proffered wage. Although that income reconciliation was not computed on the tax returns submitted, the other figures provided, ordinary income, dividend income, capital gain, *et cetera*, yield that figure.

During 2005 the petitioner declared Schedule K, Line 17e income of \$29,805. Because the petitioner did not complete Schedule L figures pertinent to the petitioner's current assets and current liabilities are not available to this office and the petitioner's end-of-year net current assets could not be computed.

The Federal quarterly return provided shows gross wages the petitioner paid, but not the name of the employee who was paid. The Florida quarterly report shows that the petitioner paid wages to only one employee, and that the employee was not the beneficiary in this case.

Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation that the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. 103.2(b)(3).

The first letter in Korean was submitted with the petition. The certification that accompanied that letter states that the affiant is competent to translate that employment verification letter from Korean to English, and that the translator translated that letter accurately. The translation, however, did not accompany that letter and is not in the record. This office will not consider the contents of the first letter in Korean.

The February 10, 2007 letter is from a restaurant owner and states that the beneficiary worked for him as a Korean and Cantonese specialty cook from August 1994 through July 31, 1998, and lists some of the foods she prepared. That letter is not on letterhead and does not contain the employing restaurant's address and phone number.

The director denied the petition on June 5, 2007 finding that the petitioner had failed to demonstrate that it had the continuing ability to pay the proffered wage beginning on the priority date and that the beneficiary had the requisite qualifications for the proffered position as described on the approved labor certification.

The July 26, 2007 affidavit was submitted on appeal. It was accompanied by an English translation and certification, states that it is from [REDACTED] who previously owned the Ildong Restaurant in Anyan, near Seoul, South Korea, and includes the former employer's address and telephone number. [REDACTED] stated that he employed the beneficiary as a cook from August 1994 to July 1998. Duties mentioned in the affidavit included cooking and garnishing Cantonese dishes and some Korean foods, using herbs and spices, and ordering supplies weekly.

Counsel appeared, in his appeal brief and previously, to imply that the petitioner's depreciation deductions during the various years should be included in the calculations pertinent to the petitioner's ability to pay the proffered wage. This office believes otherwise.

This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the

value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. [REDACTED] 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserted that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁵ Counsel appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁶ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. 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*

⁵ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

⁶ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid 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 that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

The evidence pertinent to the petitioner's gross receipts is not dispositive of its ability to pay the proffered wage. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the

petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁷ shown on lines 16(d) through 18(d). 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. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$21,840 per year. The priority date is August 15, 2003.

During 2003 the petitioner had net income of \$13,808. That amount is insufficient to pay the proffered wage. Because the petitioner submitted no evidence pertinent to its net current assets, it is unable to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid the proffered wage. The petitioner's 2003 tax return is insufficient, in itself, to demonstrate the ability to pay the proffered wage during 2003.

During 2004 the petitioner had net income of \$26,743. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

During 2005 the petitioner had net income of \$29,805. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2005.

The petition in this matter was submitted on November 6, 2006. On that date the petitioner's 2006 tax return was unavailable. On January 22, 2007 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner responded to that notice on April 10, 2007 and the record is deemed to have closed on that date. On that date the petitioner's 2006 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2006 and later years.

Of the three salient years, the petitioner's tax returns, in themselves, demonstrate that it was able to pay the proffered wage during the more recent two years. The 2003 return shows that the petitioner had net profit of \$13,808, whereas the annual amount of the proffered wage is \$21,840, a difference of \$8,032.

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967) relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of significantly more profitable or successful years. It indicates that a petition need not necessarily be denied merely because the petitioner suffered a loss or low profit in an unusually bad year if the totality of circumstances in the case indicates that it could, in fact, have paid the proffered wage.

In the instant case, the petitioner has been in business since 1999. It had low profit during 2003. Although no unusual circumstance was demonstrated or even alleged to explain away that low profit, the petitioner's fortunes improved during 2004 and 2005 to the extent that it would have been able to pay the annual amount of the proffered wage out of its annual net profit alone during those years. That trend toward profitability

⁷ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

may continue. Further, the record contains various references to the beneficiary's skill at cooking. Hiring the beneficiary may increase the petitioner's receipts and possibly its net income.

Under these circumstances this office finds that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date, thus overcoming one of the bases for the decision of denial. The remaining issue is whether the petitioner has demonstrated that the beneficiary has the requisite experience as described on the approved labor certification.

Although the evidence in the record when the director denied this case was insufficient to show that the beneficiary had the requisite experience, the petitioner submitted additional evidence on appeal. The additional evidence is the notarized employment verification letter dated February 10, 2007. The affiant states that he owned the restaurant at which the beneficiary worked in Korea. The description of the beneficiary's employment, as stated in the February 10, 2007 and July 26, 2007 employment verification letters, matches, in quantity and quality, the requirements stated on the labor certification. The additional evidence provided on appeal overcomes the remaining basis for denial.

Both bases of the decision of denial have been overcome and this office sees no additional bases for denying the petition. Further, the record does not contain suspicious circumstances that would prompt this office to return the record to the service center for investigation. Accordingly, appeal will be sustained and the petition will be approved.

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 met that burden.

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