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U.S. Citizenship  
and Immigration  
Services



B6

FILE:



Office: TEXAS SERVICE CENTER

Date: OCT 18 2007

SRC-06-800-13706

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, 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 restaurant. It seeks to employ the beneficiary permanently in the United States as an executive Teppan chef. A copy of an ETA Form 9089 Application for Permanent Employment Certification (the ETA Form 9089 or labor certification) approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to provide the original labor certification pursuant to 8 C.F.R. § 103.2(b)(4). The director also determined that the petitioner had failed to provide any initial evidence of its ability to pay the proffered wage. 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.

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. Section 203(b)(3)(A)(ii) also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> On appeal, the petitioner submits a printout relating to the petitioner's account with Washington Mutual and the petitioner's financial statements as of June 30, 2007 as evidence of its ability to pay the proffered wage.<sup>2</sup> Other relevant evidence in the record includes a copy of the certified ETA Form 9089, three paychecks issued by the petitioner to the beneficiary, and a letter from Robert Simpson, the general manager of the petitioner, in response to the director's request for evidence (RFE) dated June 22, 2006. The record does not contain any other evidence relevant to the original labor certification and the petitioner's ability to pay the proffered wage.

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<sup>1</sup> 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).

<sup>2</sup> On the Form I-290B, the petitioner indicated that he would be submitting a separate brief and/or evidence to the AAO within 30 days. Since the AAO has received nothing further more than one year later, the AAO sent a fax to the petitioner on August 30, 2007 informing the petitioner that no separate brief and/or evidence was received and requesting that the petitioner send a copy of the additional evidence and/or brief, along with evidence of the date it was originally filed, to the AAO within five (5) business days. The petitioner submitted additional evidence on September 6, 2007. It is noted that the additional documents are submitted without evidence of the date they were originally filed with the AAO.

As set forth in the director's July 21, 2006 denial, the first issue in this case is whether or not the petitioner submitted the original approved labor certification. On the Form I-290B, the petitioner claims that the original approved labor certification was submitted with the initial filing.

The certified ETA Form 9089 would be on blue security paper with threading. However, the petitioner only submitted a copy of the certified ETA Form 9089 in the instant case. The petitioner failed to provide the original labor certification pursuant to 8 C.F.R. § 103.2(b)(4). Therefore, the AAO concurs with the director's determination that the petitioner failed to provide the original approved labor certification, and the petitioner's assertion on appeal cannot overcome the ground of denial. The director's July 21, 2006 decision must be affirmed.

In addition, the regulation at 8 C.F.R. § 103.2(b)(4) states in pertinent part:

Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultation, and other statements must be submitted in the original unless previously filed with the Service.

In the instant case, the petitioner filed the petition with a copy of a certified ETA Form 9089 electronically filed with the DOL. It is noted that the ETA Form 9089 contains a note beneath both the places for the petitioner and the beneficiary to sign. The note states as follows:

**Note** – The signature and dates signed do not have to be filled out when electronically submitting to the Department of Labor for processing, but must be complete when submitting by mail. If the application is submitted electronically, any resulting certification **MUST** be signed *immediately upon receipt* from DOL before it can be submitted to [Citizenship and Immigration Services (CIS)] for final processing.

(Emphasis in original).

The record of proceeding shows that the petitioner submitted a copy of the certified ETA Form 9089 with the initial filing and another copy of the certified ETA Form 9089 in response to the director's June 22, 2006 RFE. Neither copy contains the original signatures and dates from the petitioner and the beneficiary.

The second issue in this case is whether or not the petitioner demonstrated that it had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 ETA Form 9089 Application for Permanent Employment Certification, was accepted for processing by any office within the DOL employment system. *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 ETA Form 9089 Application for Permanent Employment Certification as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on December 5, 2005. The proffered wage as stated on the ETA Form 9089 is \$15.04 per hour (\$31,283.20 per year). On the petition, the petitioner claimed to have been established in 1989, and to currently employ 10 workers. However, the petitioner did not provide information about its gross annual income and net annual income on the petition. On the ETA Form 9089, the beneficiary did not claim to have worked for the petitioner. However, the petitioner claimed in a letter dated July 11, 2006 that the beneficiary has been working for the petitioner since April 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form, 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 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 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 copies of three paychecks for the beneficiary. The paychecks show that the petitioner paid the beneficiary [REDACTED] per month in April, May and June of 2006 and has paid [REDACTED] as of the date to the year. The petitioner failed to demonstrate that it has been paying the beneficiary at the rate of the proffered wage since April 2006 because \$2,400 per month is not equal to or greater than the proffered wage. The ETA Form 9089 indicates that the proffered wage is \$15.04 per hour or \$ [REDACTED] month. The record does not contain any documentary evidence to show that the petitioner hired and paid the beneficiary in 2005, the year of the priority date. Thus, the petitioner failed to demonstrate that the petitioner paid the full proffered wage in 2005 and 2006 and the petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage of \$31,283.20 in 2005 and the difference of \$ [REDACTED] between wages actually paid to the beneficiary and the proffered wage in 2006.

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.

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.)

As an alternative method, 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 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.<sup>3</sup> 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.

However, the petitioner did not submit its tax returns for 2005 and 2006 or any other forms of evidence to establish its ability to pay the proffered wage in each of these two years, such as annual reports or audited financial statements, as set forth by the regulation at 8 C.F.R. § 204.5(g)(2). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns, annual reports or audited financial statements for either of these two years. The tax returns, annual reports or

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<sup>3</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

audited financial statements would have demonstrated the amount of taxable income or net current assets the petitioner reported for each of its tax years and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner submits its statements of revenues & expenses for six months ended on June 30, 2006 and six months ended on June 30, 2007 and statement of assets, liabilities and equity as of June 30, 2007. However, these financial statements are not audited. The petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements and the statements state on the bottom that they were compiled, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. In addition, the statement of revenues & expenses shows that the petitioner had net income of \$2,546.22 during the six months ended on June 30, 2007 and \$(1,243.90) during the six months ended on June 30, 2006 and the statement of assets, liabilities and equity shows that the petitioner had net current assets of \$1,257.51 as of June 30, 2007. Even if these financial statements were audited, neither the net income nor net current assets for the petitioner would have had been sufficient to pay the proffered wage of \$31,283.20.

The petitioner also submits a printout of the petitioner's account with Washington Mutual. It is not clear what type of the account the printout represents, however, it is clear that the petitioner's reliance on the balance in its bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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.

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 it had the ability to pay the beneficiary the proffered wage as of the year of the priority date 2005 and 2006 through an examination of wages paid to the beneficiary, its net income or its net current assets.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.