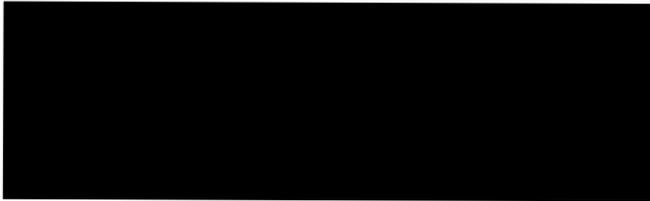


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Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

FEB 12 2008

EAC-06-107-50331

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 preference visa petition was denied by 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.¹ It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook (Indian specialty 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 establish its 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 August 23, 2006 denial, the single 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).

¹ This office notes that the petitioner's corporate status is inactive in the State of New York as of this date. See http://appsex8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_SEARCH.ENTITY (accessed on December 3, 2007).

The Form ETA 750 was accepted on April 6, 2001 and certified on March 28, 2002 initially on behalf of the original beneficiary.² The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$39,291.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. The I-140 petition on behalf of the instant beneficiary³ was submitted on February 24, 2006. The instant petition is for a substituted beneficiary.⁴ On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of \$300,000, and to currently employ four workers. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the substituted beneficiary. On the Form ETA 750B signed by the beneficiary on February 20, 2006, the beneficiary did not provide any information about her employment after December 2000.

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 appeal⁵. On appeal counsel submits a brief, and an agreement of sale between the petitioner and JMDB Inc. Other relevant evidence in the record includes the petitioner's corporate tax returns for 2001 through 2004, the beneficiary's W-2 form for 2004 and Form 7004, Application for Automatic 6-Month Extension of Time To File Certain Business Income Tax, Information, and Other Returns, for JMDB Inc. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that submitted evidence established the successor-in-interest relationship between JMDB Inc. and the petitioner and also established both companies' continuing ability to pay the proffered wage beginning on the priority date.

The successor-in-interest status requires documentary evidence that the successor-in-interest has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the successor-in-interest is doing business at the same location as the petitioner does not establish that JMDB Inc. is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. In the instant petition, the record contains a copy of an agreement of sale made on November 24, 2004 between the petitioner and JMDB Inc. by which

² The I-140 petition (EAC-02-261-51849) on behalf of the original beneficiary based on the relevant certified labor certification was filed on August 12, 2002, and approved on April 23, 2003, however, the petition was withdrawn on February 21, 2006.

³ Citizenship and Immigration Services (CIS) records show that another entity filed an I-140 petition (EAC-03-001-51731) on behalf of the instant beneficiary with a priority date of February 16, 2001 on September 20, 2002, however, the petition was denied on May 2, 2003 and the subsequent appeal was summarily dismissed on January 4, 2005.

⁴ An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

⁵ 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).

the petitioner sold its restaurant to JMDB Inc., and Form 4797, Sales of Business Property attached to the petitioner's tax return for 2004 that indicates that the petitioner sold its business on November 24, 2004. On appeal, counsel asserts that "JMDB Inc. has acquired the business of [the petitioner] and the lease for the business premises at [redacted] New York. JMDB Inc. is now carrying on the food service business of Curry and Curry Restaurant and Sweets that was previously owned by [the petitioner]. Accordingly, JMDB Inc. is a successor in interest to [the petitioner], and it is entitled to pursue the instant I-140 petition on behalf of the beneficiary."

The AAO concurs with counsel's assertion that the evidence submitted establishes that JMDB Inc. acquired the restaurant business of the petitioner on November 24, 2004, has been the successor-in-interest to the petitioner since then and thus, is entitled to continue pursuing the instant petition. However, counsel does not submit any documentary evidence showing that JMDB Inc. is willing to pursue the instant I-140 petition as a successor-in-interest to the petitioner. The record does not contain such a letter from the legal representative of JMDB Inc. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, the record does not contain a Form G-28 properly executed by both counsel and the legal representative of JMDB Inc. to authorize the instant counsel to represent JMDB in pursuing the instant petition.

In the instant case, the successor-in-interest relationship occurred on November 24, 2004. Without being informed of that change, the director issued a RFE on May 26, 2006 requesting the petitioner to submit evidence to establish the petitioner's ability to pay the proffered wage for 2002 through 2006. However, in response to the director's RFE on August 11, 2006, 20 months after JMDB Inc. became the successor-in-interest to the petitioner, counsel did not submit any evidence to establish JMDB Inc.'s successor-in-interest status, nor did even reveal the fact.

The purpose of the request for evidence (RFE) is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence of the sale of the petitioner's business to be considered, it should have submitted the documents in response to the director's RFE. *Id.* A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence pertinent to JMDB Inc.'s successor-in-interest status and the relevant request submitted on appeal in an effort to make a deficient petition conform to CIS decision. Consequently, the appeal must be dismissed.

In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Even if JMDB had properly documented its successor-in-interest status and its willingness to continue pursuing the instant petition as a successor-in-interest to the petitioner, JMDB would have to establish its ability to pay the proffered wage since November 24, 2004 and the petitioner's ability to pay the proffered wage from 2001, the year of the priority date, to 2004 when the sale of business occurred. Therefore, the AAO will also discuss whether or not the petitioner has established its ability to pay the proffered wage beginning on the priority date in 2001 to 2004.

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, 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 did not submit W-2 forms, 1099 forms or other documents showing the petitioner paid the beneficiary during the relevant years, except for the beneficiary's W-2 form for 2004. The beneficiary's W-2 for 2004 shows that the petitioner paid the beneficiary \$28,800 that year. The petitioner failed to establish its ability to pay through the examination of wages actually paid to the beneficiary for 2001 through 2004. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$39,291.20 per year from 2001, the year of the priority date to 2003 and the difference of \$10,491.20 in 2004 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

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 total income and wage expense 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.) *Chi-Feng Chang* at 537.

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001 through 2004. According to the tax returns, the petitioner is structured as a C corporation and its fiscal year is based on a calendar year. The tax returns for 2001 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage from the year of the priority date:

- In 2001, the Form 1120 stated a net income⁶ of \$21,436.
- In 2002, the Form 1120 stated a net income of \$24,961.
- In 2003, the Form 1120 stated a net income of \$(29,705).
- In 2004, the Form 1120 stated a net income of \$29,791.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the proffered wage of \$39,291.20 while the petitioner's net income in 2004 was sufficient to pay the difference of \$10,491.20 between wages actually paid to the beneficiary and the proffered wage, and thus, the petitioner established its ability to pay the proffered wage in 2004 with wages paid and its net income.

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.⁷ 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.

- The petitioner's net current assets during 2001 were \$63,959.
- The petitioner's net current assets during 2002 were \$76,459.
- The petitioner's net current assets during 2003 were \$32,298.

⁶ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁷ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the years 2001 and 2002, the petitioner had sufficient net current assets to pay the proffered wage and thus established its ability to pay the proffered wage for these years. However, the petitioner did not have sufficient net current assets to pay the proffered wage in 2003.

On appeal counsel recommends on the use of retained earnings of \$6,364 reported in the petitioner's 2003 tax return to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings. Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's unappropriated retained earnings are cash or current assets that would be available to pay the proffered wage.

Counsel asserts that "the original beneficiary was employed by the petitioner in 2003 and received a salary of approximately \$25,000. However, the petitioner is unable to locate a copy of the original beneficiary's W-2 for 2003." The record does not, however, verify the original beneficiary's full-time employment, or provide evidence that the petitioner has replaced or will replace him with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record does not contain the original beneficiary's W-2 form for 2003. 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)). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel also argues that the petitioner's gross revenues of \$330,663, salaries and wages of \$110,500, and officers' compensation of \$31,200 in 2003 should be noted. However, CIS will not consider gross income without also considering the expenses that were incurred to generate that income. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Although compensation of officers may be considered as additional financial resources of the petitioner, counsel did not document that the officer is willing and able to forgo a significant percentage of his/her officer's compensation to pay the beneficiary the proffered wage in 2003. In addition, the claimed officer's compensation is not supported by Schedule E of the tax return or the officer's W-2 forms.

Therefore, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage in 2003, and thus it failed to establish its continuing ability to pay the proffered wage from the priority date to

the time when its business was sold through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel noted that CIS had previously approved a petition filed by the petitioner on behalf of the original beneficiary. The director's decision does not indicate whether she reviewed the prior approval of the petition for the original beneficiary. If the previous petition were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of [the beneficiary], the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage in 2003.

The record does not contain any evidence showing the successor-in-interest to the petitioner, JMDB Inc., established its ability to pay the proffered wage from November 24, 2004 when it allegedly assumes all rights from the petitioner to the present. Nor does the record contain any documents showing that JMDB Inc. has ever requested to be substituted for the petitioner as a successor-in-interest and is willing to have the instant petition continuously pursued on its behalf as the successor-in-interest to the petitioner.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner and/or its successor-in-interest. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.