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U.S. Citizenship
and Immigration
Services

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FILE:

Office: VERMONT SERVICE CENTER

Date: NOV 13 2008

EAC-06-113-51792

IN RE:

Petitioner:

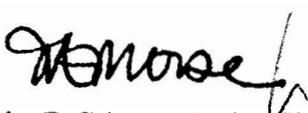
Beneficiary:

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.


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont 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 Cook – Italian Style. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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. 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 November 29, 2006 denial, the single issue in this case is whether or not the petitioner has the 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 DOL. *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 DOL 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 25, 2001. 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 fielding the job offered.

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.¹ On appeal, counsel has submitted copies of the Form W-2 Wage and Tax Statement issued to the beneficiary for 2001, 2002, 2003, 2004 and 2005. Counsel has also submitted a letter from the petitioner's accountant dated December 19, 2006, and two letters from the petitioner. Other relevant evidence in the record includes petitioner's corporate tax returns for 2001, 2002, 2003, 2004, and 2005, as well as an earlier letter from petitioner's accountant, dated January 26, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1995 and to currently employ 12 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 20, 2001, the beneficiary did not claim to have worked for the petitioner. However, counsel states that the applicant was employed by the petitioner on a part-time, temporary basis from 2001 to 2004. Counsel has submitted copies of the Form W-2 Wage and Tax Statement issued to the beneficiary by the petitioners for 2001, 2002, 2003, 2004 and 2005.

On appeal, counsel asserts that additional factors should be considered in determining the petitioner's ability to pay the proffered wage including amounts paid by the petitioner to the beneficiary during the requisite period, as well as depreciation. Counsel also asserts that, from 2001 to 2004, the petitioner was paying wages to a number of part-time, temporary workers. Counsel further asserts that, because the beneficiary would replace these workers, wages paid to these workers should be considered in determining the petitioner's ability to pay.

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).

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, there is evidence in the record showing that the petitioner employed the beneficiary from 2001 through 2005. The petitioner submitted the following W-2 statements for the beneficiary:

| <u>Year</u> | <u>Wages Paid</u> |
|-------------|-------------------|
| 2001 | \$325.00 |

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

| | |
|------|-------------|
| 2002 | \$8,645.00 |
| 2003 | \$12,990.00 |
| 2004 | \$16,278.00 |
| 2005 | \$18,975.00 |

The W-2 statement exhibits partial payment of the proffered wage to the beneficiary for the years 2005 and 2006. Since the proffered wage is \$39,291.20 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which, for the years 2001 through 2005, is as follows:

| <u>Year</u> | <u>Proffered Wage less Wages Actually Paid</u> |
|-------------|--|
| 2001 | \$39,041.60 |
| 2002 | \$30,646.20 |
| 2003 | \$26,301.20 |
| 2004 | \$23,013.20 |
| 2005 | \$20,316.20 |

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 gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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. The court specifically rejected the argument that CIS 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 petitioner's tax returns demonstrate the petitioner's net income for 2001, 2002, 2003, 2004 and 2005, as shown in the table below.

- In 2001, the Form 1120S stated net income² of -\$12,450.00.
- In 2002, the Form 1120S stated net income³ of -\$2,172.00.
- In 2003, the Form 1120S stated net income⁴ of -\$3,160.00.
- In 2004, the Form 1120S stated net income⁵ of -\$33,831.00.
- In 2005, the Form 1120S stated net income⁶ of \$25,123.00.

The petitioner has established that it had the ability to pay the proffered wage in 2005 because its net income is greater than the difference between wages actually paid to the beneficiary and the proffered wage. However, for the years 2001, 2002, 2003, and 2004, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. 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 tax returns demonstrate its end-of-year net current assets for 2003, 2004 and 2005 as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$9,832.00.
- In 2002, the Form 1120S stated net current assets of -\$14,585.00.
- In 2003, the Form 1120S stated net current assets of \$1,433.00.
- In 2004, the Form 1120S stated net current assets of -\$16,263.00.

For the years 2001, 2002, 2003, and 2004, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

² 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found line 23 of Schedule K (for tax years 1997 through 2003) or line 17e of Schedule K (for tax years 2004 and 2005). See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income credits, deductions or other adjustments shown on its Schedule K for 2001, the petitioner's net income is found on Schedule K of its tax return for 2001.

³ As listed on line 23 of Schedule K. See footnote 3.

⁴ Ordinary income (loss) from trade or business activities as reported on Line 21.

⁵ As listed on line 17e of Schedule K. See footnote 3.

⁶ As listed on line 17e of Schedule K. See footnote 3.

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, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

As noted above, counsel has submitted a letter from the petitioner's accountant in support of this appeal. The letter, dated December 19, 2006, is signed by [REDACTED] CPA. Mr. [REDACTED] notes that the petitioner paid wages to many part-time, temporary workers during the tax years 2001 through 2004. Mr. [REDACTED] asserts that the petitioner would replace all of these workers upon the beneficiary's hiring. The record does not, however, name these workers, state their wages, verify their employment, or provide evidence that the petitioner has replaced or will replace them 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, there is no evidence that these "part-time, temporary workers" all performed the same duties as those set forth in the Form ETA 750. If those employees performed other kinds of work, then the beneficiary could not have replaced them.

Finally, in determining the petitioner's ability to pay the proffered wage, CIS will consider the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the instant case, Mr. [REDACTED] notes that the petitioner opened a second restaurant in 2004 and that this had a significant impact on the petitioner's revenues in 2004. However, no details have been provided to show the impact that this had on the petitioner's ability to pay the proffered wage. Further, Mr. [REDACTED] concedes that the second restaurant only impacted the petitioner's revenue in 2004. Therefore it has no bearing on the petitioner's ability to pay the proffered wage in 2001, 2002, or 2003. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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 from the day the Form ETA 750 was accepted for processing by the DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 not met that burden.

ORDER: The appeal is dismissed.