

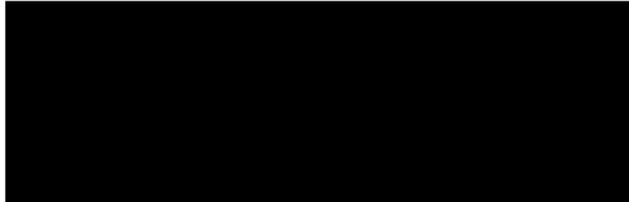
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U.S. Department of Homeland Security
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**U.S. Citizenship
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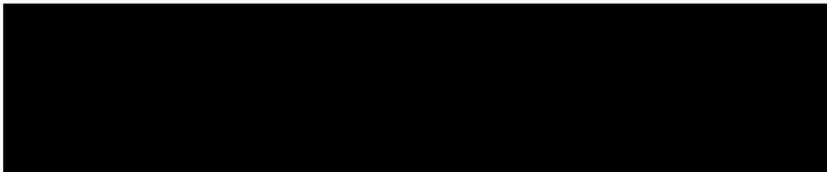
Date FEB 04 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian-style restaurant. It seeks to employ the beneficiary permanently in the United States as a Manager, Indian Style Restaurant. 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 and 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.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$2,900.00 per month (\$34,800.00 per year). The Form ETA 750 states that the position requires two years of college and two years of experience in 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 submits a written statement.² Other relevant evidence in the record includes copies of the petitioner's Form 1120 U.S Corporation Income Tax Returns for the years 2001 through 2005 and a letter from Bank of America regarding the petitioner's business checking account. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the I-140 petition the petitioner claimed to have been established in 1984 and to currently have four employees. The petitioner listed its gross annual income as \$433,369.00 and its net annual income as -\$54,419.00. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary did not claim to have worked for the petitioner.

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, U.S. Citizenship and Immigration Services (USCIS) 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, USCIS 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 has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2004 or subsequently.

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).

² Counsel indicated on the Form I-290B that he would submit a brief and/or evidence to this office within 30 days of filing the appeal. No such brief or evidence appears in the record. Counsel was contacted by this office on December 23, 2008 and a copy of the brief and/or additional evidence was requested. No response from counsel has been received.

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, USCIS 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). For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2001 through 2005 as shown in the table below.

- In 2001, the Form 1120 stated net income of -\$46,699.00.
- In 2002, the Form 1120 stated net income of \$8,374.00.
- In 2003, the Form 1120 stated net income of \$19,104.00.
- In 2004, the Form 1120 stated net income of -\$87,467.00.
- In 2005, the Form 1120 stated net income of -\$54,419.00.

The petitioner did not have sufficient net income to pay the proffered wage in 2001, 2002, 2003, 2004 or 2005.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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 the years 2001 through 2005 as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$38,894.00.⁴
- In 2002, the Form 1120 stated net current assets of \$6,760.00.
- In 2003, the Form 1120 stated net current assets of \$11,633.00.
- In 2004, the Form 1120 stated net current assets of \$50,109.00.

³According 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.

⁴The director found that the petitioner had -\$6,310.00 in net current assets in 2001. The director reached this figure because he included "loans from shareholders" in his calculation of current liabilities. This was incorrect, as "loans from shareholders" is listed on line 19 of Schedule L, and is therefore not properly included in the calculation of current liabilities.

- In 2005, the Form 1120 stated net current assets of \$33,358.00.

The petitioner had sufficient net current assets in 2001 and 2004 to pay the proffered wage. The petitioner did not have sufficient net current assets in 2002, 2003 or 2005 to pay the proffered wage.

The petitioner has not established that it had the ability to pay the beneficiary the proffered wage in 2002, 2003 or 2005 through wages paid to the beneficiary, net income or net current assets.

On appeal, counsel asserts that the director erred in finding that the petitioner did not have the ability to pay the proffered wage. Specifically, counsel asserts that the petitioner's "net assets" exceed the proffered wage. It appears that, in making this assertion, counsel was referring to the petitioner's "total assets" as listed on Schedule L, line 15 of the petitioner's tax returns.⁵ As discussed above, USCIS considers the petitioner's net current assets rather than its total assets in determining the petitioner's ability to pay the proffered wage. The petitioner did not have sufficient net current assets to pay the proffered wage in 2002, 2003 or 2005.

Counsel also states that the letter from Bank of America established the petitioner's ability to pay the proffered wage. This letter, dated February 22, 2007, states that the average balance in the petitioner's business checking account since September of 2001 was \$15,842.73. Counsel's reliance on the balance in the petitioner's 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. 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 reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel further states that the petitioner's "current amount of payrolls" establishes the petitioner's ability to pay the proffered wage. However, 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.

Finally, counsel notes that the amount paid by the petitioner for "outside services" exceeded the proffered wage in 2001, 2002, 2003 and 2005. The amount paid by the petitioner for "outside services" is listed on the petitioner's tax returns as a component of "other deductions."⁶ Counsel

⁵ In response to a request for evidence issued by the director on December 21, 2006, counsel stated that the petitioner's "Net Assets under Schedule L" were \$209,291.00 in 2001, \$165,941.00 in 2002, \$156,116.00 in 2003 and \$155,920.00 in 2005. These are the amounts listed on Schedule L, line 15 of the petitioner's tax returns.

⁶ The specific amount spent on "outside services" in each tax year is listed on the "Other Deductions

seems to indicate that, if the petitioner employs the beneficiary, the petitioner will no longer have to pay for these “outside services” and will therefore have sufficient funds available to pay the proffered wage. However, there is no explanation of what the “outside services” are, and it is not clear that the beneficiary can or would perform these services or that the “outside services” include the duties of the proffered position. 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). Therefore, the amounts paid by the petitioner for “outside services” will not be considered in determining the petitioner’s ability to pay the proffered wage.

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.

Statement” accompanying the petitioner’s tax returns. The petitioner spent the following amounts on “outside services”: \$39,253.00 in 2002, \$57,235.00 in 2003 and \$38,213.00 in 2005.