

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

B6

PUBLIC COPY



FILE:



Office: VERMONT SERVICE CENTER

Date: **AUG 15 2006**

EAC-04-071-51361

IN RE:

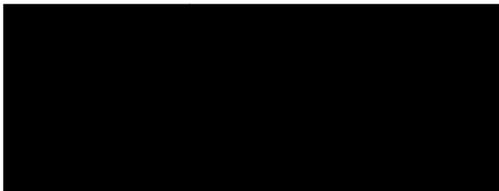
Petitioner:



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, 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 restaurant 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. 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.

On appeal, counsel submits a brief statement and additional evidence.¹

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 CFR § 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$600.00 per week (\$31,200 per year). The Form ETA 750 states that the position requires four (4) years of experience as a cook. On the Form ETA 750B signed by the beneficiary on April 30, 2001, he claimed to have worked for the petitioner since February 2001.²

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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

² However, on Form G-325 signed by the beneficiary on January 5, 2004 he indicates that he has been

On the petition, the petitioner claimed to have been established in 1985, to have a gross annual income of \$859,346, to have a net annual income of \$367,561, and to currently employ three (3) workers.

With the petition, the petitioner submitted the first page of its Form 1120S, U.S. Income Tax Return for an S Corporation for 1999 pertinent to its ability to pay the proffered wage.

Because the submitted tax return for 1999 was not relevant and to establish the petitioner's ability to pay the proffered wage beginning on the priority date in 2001, the director issued a request for evidence (RFE) on August 3, 2004, requesting additional evidence to establish that the petitioner had the ability to pay the proffered wage or salary of \$600 per week as of April 30, 2001 and continuing to the present. The director specially requested the 2001 United States federal income tax return with all schedules and attachments or annual reports for 2001 with audited or reviewed financial statements as an alternative. The director also requested the beneficiary's Form W-2 Wage and Tax Statements since 2001.

In response to the RFE, counsel submitted the petitioner's Form 941 Employer's Quarterly Federal Tax Return for 2001 through 2003, however, did not submit the petitioner's income tax returns for 2001 through 2003 or the beneficiary's W-2 forms from the petitioner.

On December 29, 2004 the director denied the petition, finding that the petitioner has not established the ability to pay the proffered wage with the evidence submitted.

On appeal, counsel asserts that the Form 941s indicate that the petitioner had the ability to pay the beneficiary's proffered wage and the newly submitted 2001 tax return shows that the petitioner has gross receipts in excess of \$900,000 and paid salaries in excess of \$87,000 and its assets outweigh the liabilities.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 any documents showing the petitioner paid the beneficiary compensation during the years despite the director specially requesting the beneficiary's W-2 forms from 2001 in his RFE dated August 3, 2004. In response to the RFE counsel submitted the petitioner's Form 941s for all four quarters of 2001, 2002 and 2003, however, the Form 941s do not indicate how much the petitioner paid to the beneficiary each quarter or each year. 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. Therefore, the petitioner failed to establish that it paid the beneficiary the full proffered wage in the years from the priority date to the present, thus the petitioner is obligated to demonstrate that it could pay the proffered wage from 2001, the year of the priority date, to the present with its net income or 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*

working for the petitioner since October 2000.

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). On appeal counsel asserts that the petitioner had gross receipts in excess of \$900,000 and paid salaries of \$87,000 in 2001 which establish the petitioner's ability to pay the proffered wage at the time the labor certification was filed. Counsel's reliance on its gross receipts and on wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid compensation to officers 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further clearly 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* at 537.

The record contains incomplete copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001. The evidence indicates that the petitioner is an S corporation. According to the tax returns the petitioner's fiscal year is based on a calendar year. The petitioner's tax return for 2001 indicates that the petitioner reported an ordinary loss of \$21,375³ for that year. Therefore, for the year 2001 the petitioner did not have sufficient net income to pay the proffered wage. Counsel did not submit the petitioner's federal tax returns for 2002 and 2003 nor did he explain why the 2002 and 2003 tax returns were not submitted. Therefore the petitioner failed to establish its ability to pay the proffered wage in 2002 and 2003.

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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

³ Ordinary income (loss) from trade or business activities as reported on Line 21.

⁴ 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

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.

Counsel contends on appeal that the petitioner's assets outweighed the liabilities and the petitioner had treasury stock valued at \$71,600. However, counsel did not submit any documentary evidence to support his assertions. 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 petitioner's 2001 tax return submitted by counsel is incomplete and without Schedule L despite the director specially requesting the submission of tax returns with all schedules and attachments. As previously noted counsel did not submit the petitioner's 2002 and 2003 tax returns including their Schedules L. The AAO cannot assess the petitioner's net current assets for these years to determine whether the petitioner had sufficient net current assets to pay the beneficiary the proffered wage in 2001, 2002 or 2003. Further, without the schedule L itself the AAO cannot assess the petitioner's alleged treasury stock whether or not it can be considered as a part of current assets or even a part of net current assets although the record contains a copy of the statement attached to Schedule L – Cost of Treasury Stock. The petitioner failed to demonstrate its ability to pay the proffered wage through its net current assets because it did not submit the relevant tax documentation.

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 for the three years from the priority date. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS 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).

In addition, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for two more workers. The petition EAC-99-242-52604 was filed on August 11, 1999 with a priority date of January 1, 1998 and approved on December 14, 1999. The relevant adjustment of status application was approved on June 5, 2001. The petition EAC-02-118-50037 was filed on February 15, 2002 with a priority date of April 13, 2001 and approved on April 1, 2002, and the relevant adjustment of status application is still pending. The priority date in the instant petition is April 30, 2001. According to regulations the petitioner must demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Therefore, the instant petitioner must demonstrate that it had the ability to pay the proffered wage to all the three beneficiaries in 2001, and to the two beneficiaries in 2002 to the present.

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 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.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel indicates that the petitioner paid \$19,238 to its officer in 2001. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's

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

taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Income Tax Return for an S Corporation. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 100 percent of the company's stock and operates the restaurant. According to the petitioner's 2001 IRS Form 1120S Line 7 (Compensation of Officers), the petitioner elected to pay himself \$19,238. However, counsel did not support this figure by [REDACTED]'s W-2 form for 2001 and did not document his compensation for other years. The record does not contain any documents showing the sole shareholder is willing to allocate his compensation to pay the beneficiary the proffered wage.⁵ In addition, even if all of the officer's compensation in 2001 was used to pay the beneficiary it would still be insufficient to pay the full proffered wage. Therefore, officer's compensation could not establish the petitioner's ability to pay the proffered wage in 2001.

Counsel refers to a decision issued by the AAO concerning the beneficiary's payments proved with the petitioner's quarterly returns, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore, the petitioner's quarterly returns submitted in the instant case could prove the beneficiary's compensation if detailed information on name and figure of each employee was attached.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented and cannot overcome the ground of the director's denial decision.

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.

⁵ 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).