

PUBLIC COPY

~~identifying data deleted to
prevent disclosure of warrant
invasion of privacy~~

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[REDACTED]

File: [REDACTED] Office: TEXAS SERVICE CENTER

Date:

AUG 06 2003

IN RE: Petitioner:
Beneficiary:

[REDACTED]

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:

[REDACTED]

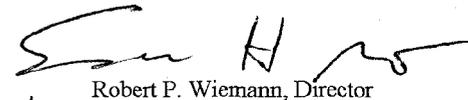
INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a general store and grocery. It seeks to employ the beneficiary permanently in the United States as its manager. 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 was not a United States Employer within the meaning of 8 C.F.R. 204.5(1)(1). The director also 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.

On appeal, counsel submits a brief and additional evidence.

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.

8 C.F.R. § 204.5(1)(1) states that:

Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker.

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.

In addition to the issue of whether the petitioner qualifies as a United States employer, eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage

beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *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 \$13.45 per hour, which equals \$27,976 per year.

With the petition counsel submitted the Schedule C, Profit or Loss from Business (Sole Proprietorship), from the petitioner's owner's 2000 Form 1040 personal tax return. That Schedule C shows that the petitioner earned a net profit of \$14,180 during that year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Texas Service Center, on April 12, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested complete copies of the petitioner's owner's 2000 and 2001 tax returns, copies of the petitioner's Form 941, Employer's Quarterly Tax Returns for all four quarters of 2001, and evidence of the petitioner's owner's United States citizenship or immigration status.

In response, counsel submitted the requested 2001 Form 941 reports. Those reports did not indicate whether or not the petitioner employed the beneficiary during that year.

Counsel also submitted the 2000 and 2001 Form 1040 joint tax returns of the petitioner's owner and the owner's spouse. The 2000 return shows that the petitioner's owner and the owner's spouse declared an adjusted gross income of \$77,250 during that year, including all of the \$14,180 net profit from the petitioner. During that year, the petitioner's owner and the owner's spouse had six dependents.

This office notes that the priority date of the petition is April 30, 2001. As such, the finances of the petitioner and the petitioner's owner during 2000 are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date or to any other issue in the case.

The 2001 return shows that the petitioner's owner and the owner's spouse declared an adjusted gross income of \$103,886, which amount included a loss of \$10,579 sustained by the petitioner. During that year, the petitioner's owner and the owner's wife had four dependents.

The director denied the petition on July 24, 2002. The denial was based on the director's determination that the evidence submitted did not establish that the petitioner had the ability

to pay the proffered wage and that the petitioner is not a United States employer within the meaning of 8 C.F.R. § 204.5(l)(1).

On appeal, counsel argues that pursuant to the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner's owner need not necessarily be a United States Citizen. This office agrees with counsel's argument pertinent to the meaning of "United States employer" and will not discuss that point further.

Counsel also argued that the petitioner had shown the ability to pay the proffered wage. Counsel stated, "There is no indication that the reviewer took into consideration the fact that the petitioner employed the beneficiary at a salary level of over \$8,100 in 2001."

With the appeal counsel provided photocopies of the petitioner's Kentucky Unemployment Insurance Fund form for the first, second, and third quarters of 2000. Those documents indicate that the petitioner paid \$1,515.75, \$1,564, and \$2,570.28, respectively, to [REDACTED] and [REDACTED] respectively. The same social security number appears beside each name, purporting to show that those amounts, totaling \$5,650.03, were all paid to the same person during 2000.

Counsel provided a fourth Kentucky Unemployment Insurance Fund form. This form also purports to be for the fourth quarter of 2000, as does one of the forms described above. That form states that the petitioner paid \$2,455.28 to the beneficiary during that quarter. This office notes that if that amount is added to the amounts shown on the other three forms submitted, the total accords with the amount counsel states that the petitioner paid the beneficiary during 2000. Counsel provided no explanation of the discrepancy between those two forms, both purporting to be the petitioner's Kentucky Unemployment Insurance Fund form for the third quarter of 2000.

Although counsel faults the Service Center for failing to consider this evidence earlier, this office notes that it was first presented on appeal. Further, the form that purports to be the petitioner's Kentucky Unemployment Insurance Fund form for the first quarter of 2000 contains a blatant arithmetic error. That form states that the petitioner paid Susana G. Hernandez \$1,515.75, as was stated above, and that it paid another employee \$1,463.20 during that quarter. The form states that those amounts total \$3,078.95 which, of course, they do not. This office questions whether a form submitted to the Kentucky Unemployment Insurance Fund with such an error would have gone uncorrected. Based on that, and the discrepancy noted above, this office questions whether this form, submitted on appeal and not previously, was ever submitted to the Kentucky Unemployment Insurance Fund.

Further, even if those forms are genuine, counsel does not explain how he determined that the [REDACTED] and [REDACTED] listed on those forms are the beneficiary, [REDACTED] and provided no evidence of that assertion on appeal.

Finally, even if those forms were presumed to be authentic, they would only show amounts that the petitioner paid to the beneficiary during 2000. Because the priority date is April 30, 2001, those forms would bear no relevance to the continuing ability of the petitioner to pay the proffered wage beginning on the priority date. The amounts shown on the Kentucky Unemployment Insurance Fund forms will not be included in the determination of the petitioner's ability to pay the proffered wage.

Counsel also provided a copy of a police report showing that the beneficiary was tending the petitioner's store on March 4, 2001 when it was robbed. This office accepts that document as proof that the beneficiary has worked at the store. That document, of course, contains no information pertinent to the wages the beneficiary received.

Counsel provides a letter from an Evansville, Indiana bank. That letter states that the petitioner has a line of credit with that bank in the amount of \$30,000. Counsel apparently submits this letter as evidence of the petitioner's ability to pay the proffered wage.

A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

The proffered wage is \$27,976 per year. The priority date is April 30, 2001. During 2001, the petitioner sustained a loss. Because the petitioner is a sole proprietor, however, the petitioner's owner is obliged to pay the petitioner's debts and obligations. During 2001, the petitioner's owner and owner's wife declared an adjusted gross income of \$103,886 and had four dependents.

Had the petitioner been obliged to pay the proffered wage beginning on the priority date, it would not have been obliged to pay the entire proffered wage during 2001. On the priority date, 245 days of that 365-day year remained. The petitioner would have been obliged to pay $245/365^{\text{th}}$ of the proffered wage, or \$18,778.41.



The director's decision states that the "evidence in the file does not persuasively show that the petitioner can pay the wages offered" but does not elaborate. This office is unable to discern any reason why the petitioner's owner might not have paid the beneficiary \$18,778.41 during that year and still supported a family of six on the \$85,207.59 of his adjusted gross income which he would have retained.

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 met that burden.

ORDER: The appeal is sustained.

RECEIVED
MAY 11 1964