

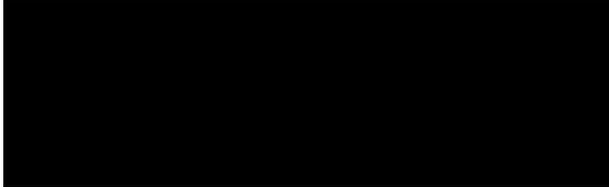
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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



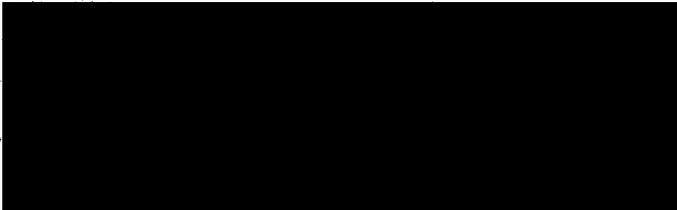
FILE: WAC 02 153 50764 Office: CALIFORNIA SERVICE CENTER Date: APR 01 2004

IN RE: Petitioner:
Beneficiary:



PETITION: 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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, who subsequently affirmed his decision upon the petitioner's motion to reopen and reconsider, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner develops and markets network and management software. It seeks to employ the beneficiary permanently in the United States as a computer software applications engineer. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is March 9, 2001. The beneficiary's salary as stated on the labor certification is \$95,000 per year.

Former counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated August 28, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's complete federal income tax returns, with all schedules and tables, or audited financial statements for 1998-2001. The RFE, further, required verification of the beneficiary's experience, including dates of employment and the number of hours worked per week.

In response to the RFE, former counsel submitted Internal Revenue Service (IRS) printouts and signed exemplars of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 1998-2001. Several employers responded concerning the prior experience of the beneficiary.

The director reviewed the ordinary income or (loss) from trade or business activities for 1998-2001, namely, \$18,597, (\$10,965), \$40,828, and (\$32,152), each less than the proffered wage. Schedule L of the federal tax returns reported net current assets as the difference of current assets minus current liabilities, respectively, \$52,012, \$29,816, \$75,616, and \$32,099, each less than the proffered wage.

The director noted that the petitioner's consulting agreement, with Household International, Inc., dated June 10, 2002 (HI, Inc. contract), terminated on June 30, 2003. The director denied the petition, in part, because the HI, Inc. contract did not constitute an offer of permanent full-time employment from the petitioner to the beneficiary. See 20 C.F.R. § 656.3, *Employment*. The director determining, also, that the petitioner did not establish its ability to pay the proffered wage, denied the petition in a decision dated November 16, 2002 (NOD1).

On December 26, 2002, substituted counsel (counsel) filed a response to NOD1, viz., a Motion to Reopen and Reconsider or Alternatively Brief on Appeal (MTR1), and stated, as to the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence, that the following facts proved it:

[The petitioner] has recently entered into new services agreements with three entities to provide additional software consulting services, which will require the employment of not only the beneficiary, but also additional new employees, who will have to be hired in the coming months. These agreements are in addition to the ongoing contract that was previous [sic] submitted with Household Credit Services [sic], which although not indicated in the current agreement, is anticipated to be extended beyond its June 30, 2003, expiration date. (See Exhibit 6, *infra*). . . .

Petitioner also submits a Statement of Profit and Loss for the first ten months of 2002, and a balance sheet for the month [sic] of October 31, 2002, previously unavailable, to reflect further its current ability to meet payroll and over the proposed salary of the Beneficiary. (See Exhibit 4 – Current Financials; see also Exhibit 5 – Accountants Letter, vouching the financials).

MTR1 added, as to the requirement for the offer of permanent, full-time employment, that:

Petitioner has provided evidence that the position, as of October 31, 2002, has been paid and [sic] the rate of 95% of a full time salary. (See Exhibit 6 – Beneficiary's Payroll Stubs]. We are advised that Petitioner [sic] took some time off for which he was not paid.

The director determined that MTR1 did not specify an incorrect application of law or policy of Citizenship and Immigration Services (CIS), formerly the Service or INS, did not support the reconsideration of NOD1 with precedent decisions, and did not articulate the respect in which NOD1 was incorrect, based on the evidence of record at the time. The director, therefore, affirmed the previous denial in a decision issued March 3, 2003 (NOD2).

Counsel asserts, in the brief on appeal, that the director ignored issues raised in MTR1 and cavalierly rendered NOD2, because:

7. The decision fails to articulate any reason for ignoring the newly introduced, previously unavailable facts, as part of the Motion to Reopen. Failure to consider all relevant facts or to articulate the substantive basis for a denial is an abuse of discretion. [Citations omitted].

Counsel conceded, in MTR1, that MTR1 relied on facts beyond the record at the time of NOD1. In fact, MTR1 postulated that they were unavailable at the time of NOD1. Certainly, the director's denial of the I-140 is correct, if based on facts available at the time of NOD1.

Provisions in 8 C.F.R. § 103.2(b)(12) require the denial:

(12) *Effect where evidence submitted in response to a request does not establish eligibility at the time of filing.* An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. An application or petition shall be denied where any application or petition upon which it was based was filed subsequently.

Counsel asserts that CIS must now consider the record, after the entry of NOD1, with regard to new facts. The petitioner, however, does not specify how new facts were unavailable until after the entry of NOD1, nor does the petitioner claim that new facts relate to the priority date and require the approval of the petition.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

All of MTR1, with its exhibits 1-6, relates to periods after the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner offers consulting agreements on appeal and says it may assign one or more to the beneficiary as evidence of its future ability to pay the proffered wage. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Instead, the AAO applies a multiple pronged analysis as of the priority date. As the proceedings document no payment of any wage to the beneficiary in 2001, the inquiry branches to the petitioner's 2001 ordinary loss of (\$32,152), less than the proffered wage. Thence, the reasoning turns to net current assets as seen in Schedule L of the 2001 federal income tax return, \$32,099, less than the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will 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. Tex. 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).

In *K.C.P. Food Co., Inc.*, 623 F.Supp at 1084, the court held that 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

An enrolled agent, who has prepared the petitioner's books and income tax returns for some time, in a letter dated December 12, 2002 (advisory letter), interpreted financial data for a hypothetical 2001 fiscal year of April 1 to December 31, 2001, to the effect that:

Based on the information provided to us, and based on the discussions with officials, it was observed that the [petitioner] had received cash inflow income to the tune of \$96,045 from April 2001 through December 2001. This amount less expenses, exceeds the cash necessary to fund the three quarters (April-December) of the year's projected \$96,000 per annum salary. In addition, the company has cash reserves of \$29,362. . . .

To the contrary, the 2001 Form 1120S, in Schedule L, reported no additional "cash reserves." The director already considered net current assets of which cash is component. No authority supports the count of cash, again, as "cash reserves." The advisory letter postulates "cash flow income to the tune of \$96,045" minus expenses. The ordinary loss for 2001 already showed the effect of expenses. The advisory letter identifies no asset beyond those in the tax returns. See 8 C.F.R. § 204.5(g)(2). Consequently, the advisory letter carries little evidentiary weight in this instance.

The AAO may, in its discretion, use, as advisory opinions, statements submitted as expert testimony. However, when an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept, or may give less weight to, that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1998).

Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is also misplaced. It relates to a petition filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

After a review of the federal tax returns, advisory opinion, unaudited financial statements, and payroll records, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

In a second basis of the NOD1, the director emphasized that the petitioner did not establish the offer of a permanent, full-time position to the beneficiary and said:

. . . [D] ocumentation submitted with the petition indicates that the beneficiary will not be employed in a permanent position.

In response to [the RFE], [the HI, Inc. contract] was sent. After reviewing the [HI, Inc. contract] and accompanying paperwork, it is determined that the beneficiary is only guaranteed a job until 2003, thus making the job temporary and not permanent as required by Section 203(b)(3)(A)(ii) [sic] of the [Act, 8 U.S.C. § 1153(b)(3)(A)(ii)].

Exhibits 1-3 of the appeal brief are new consulting agreements, all dated December 2, 2002, of the petitioner with other companies, not HI, Inc. Exhibit 1 refers to the beneficiary as working with Solanki and states a term not to exceed December 31, 2006, or until completion of services, or until termination upon notice of four (4) weeks, or upon no prior notice in certain instances (the Solanki contract). It contradicts both counsel's assurance that the petitioner's HI, Inc. contract will extend beyond June 30, 2002 and its extension through June 30, 2003. The Solanki contract does not identify the employer who will be responsible, when the beneficiary obtains lawful permanent residence, for the offer of employment to the beneficiary.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Furthermore, the Solanki contract contains powers of termination and limits on the term of the beneficiary's employment. They contradict the petitioner's permanent employment of the beneficiary. The beneficiary has no job offer from, and has assented to no employment with, the petitioner, HI, Inc., or Solanki.

The Form ETA 750, in Part A, items 6 and 7, sets forth that the petitioner will employ the beneficiary at its own premises. Exhibits 1-6 on appeal establish neither a job offer between the beneficiary and petitioner nor any at the petitioner's premises, as set forth in Form ETA 750.

Provisions of 20 C.F.R. § 656.30(c) specify that:

(2) A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment as stated on the [Form ETA 750].

Significantly, provisions of the regulation at 20 C.F.R. 656.3 effect restrictions against temporary or seasonal employment under § 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i):

Employment means permanent, full-time work by an employee for an employer other than oneself.

Employer means a person, association firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker. . . .

The consulting agreements indicate that the petitioner's third party client, rather than the petitioner, may permanently employ the beneficiary. The Solanki contract indicates that the client will have control over the beneficiary's employment. Precedent indicates that the party controlling such incidents of an alien's employment as compensation, hiring, and firing is the alien's actual employer. See *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968). Thus, based on the evidence of record, it seems unlikely that the petitioner is the beneficiary's actual employer providing a permanent offer of employment. For these reasons, the petitioner has not overcome the second basis of NOD1, and the petition may not be approved.

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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.