



U.S. Citizenship
and Immigration
Services

B6



File: EAC 02 136 51197 Office: VERMONT SERVICE CENTER

Date: AUG 20 2004

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 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

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office 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. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. 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.

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.

The regulation at 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.

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. Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour, which equals \$39,291.20 per year.

With the petition counsel submitted a copy of a 1998 Form 1120 U.S. Corporation Income Tax Return. That return is clearly labeled as belonging to the petitioner, GNI Pizza, Inc. The return states that it covers the period from October 1, 1998 to December 31, 1998 and shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$5,130 during that period. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$5,443 and current liabilities of \$0, which yields net current assets of \$5,443. That return further states that **the petitioner was incorporated on October 1, 1998.**

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on May 29, 2002, requested additional evidence pertinent to that ability. The Service Center specifically requested the petitioner's 1997, 1999, 2000, and 2001 income tax returns. In addition, the Service Center requested that if the petitioner employed the beneficiary between 1997 and 2001 it submit copies of Form W-2 Wage and Tax Statements

showing wages paid to the beneficiary. Finally, the Service Center requested that, if the petitioner would replace a current employee, it provide evidence of the salary paid to that current employee.

In response, counsel submitted a letter, dated August 23, 2002, in which he stated that the petitioner was established in October of 1998, and the proffered position was created then. With that letter, counsel submitted the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return, and the 2000, and 2001 Form 1120S U.S. Income Tax Returns for an S Corporation of David, Peter, and Paul, Inc. All three were signed by the tax preparer on August 13, 2002. Counsel submitted no evidence that David, Peter, and Paul, Inc. is the successor-in-interest or otherwise related to the named petitioner, GNI Pizza, Inc.

The petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$9,151 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$17,554 and current liabilities of \$0, which yields net current assets of \$17,554.

The 2000 return shows that [REDACTED] declared a loss of \$10,260 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year David, Peter, and Paul, Inc. had current assets of (\$3,619) and current liabilities of \$0, which yields negative net current assets.

The 2001 return shows that [REDACTED] declared a loss of \$5,575 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the David, Peter, and Paul, Inc. had current assets of \$873 and current liabilities of \$0, which yields net current assets of \$873.

Counsel also submitted the beneficiary's 1998, 1999, 2000, and 2001 Form 1040 personal tax returns, all signed by the same tax preparer on August 14, 2002. Counsel submitted neither the Schedules C nor the W-2 forms which should have been attached to those tax returns and would have shown the provenance of the beneficiary's income during those years. This office notes that the beneficiary's personal income tax returns contain no evidence of the petitioner's ability to pay the proffered wage. Counsel provided no evidence, either with the initial submissions or in response to the request for evidence, that the beneficiary ever worked for the petitioner or that the beneficiary would replace a current employee.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on November 14, 2002, denied the petition.

On appeal, counsel submits copies of the corporate income tax returns previously submitted. Counsel states that those returns show a payment to the beneficiary of \$40,000 per year. Counsel did not indicate which particular line item on those tax returns shows that payment.

The version of the petitioner's 1998 Form 1120 U.S. Corporation Income Tax Return submitted on appeal, and dated December 19, 2002, is not the same as the version of the petitioner's 1998 Form 1120 U.S. Corporation Income Tax Return previously submitted, which was dated January 14, 2002. The 1998 return previously submitted states that the petitioner incorporated on October 1, 1998 and that the return covers the period from that date until the end of the calendar year. The 1998 return submitted on appeal states that the petitioner was incorporated on October 1, 1997 and that the return covers the entire 1998 calendar year. Further, various numeric entries on those two forms differ.

Counsel merely states that the Form 1120 U.S. Corporation Income Tax Return submitted on appeal is "amended." The proper form to amend a Form 1120 U.S. Corporation Income Tax Return, however, is a Form 1120X. Further, counsel provided no explanation of the fact that both returns are dated, and apparently were prepared, during 2002. Whatever the explanation, only one of those two very different returns is the petitioner's actual tax return. The other is not a true version of the petitioner's tax return, although it was presented as such. The submission of a document that is, at the very least, inaccurate, adversely affects the credibility of all of the petitioner's submissions.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Counsel provides what purport to be copies of the beneficiary's 2000 and 2001 Form 1040X, Amended U.S. Individual Income Tax Returns. The 2000 amended return states that it was amended because "Income for taxpayer incorrectly stated on original return." The 2001 amended return states that it was amended because "Taxpayer did not report additional income since he did not receive 1099 from employer."

Counsel also provides copies of what purport to be 1998, 1999, 2000, and 2001 Form 1099 Miscellaneous Income statements and 2000 and 2001 W-2 forms. Those 1099 forms purport to show payments to the beneficiary of \$40,000, \$40,000, \$29,600, and \$19,200, respectively. The W-2 forms purport to show payments to the beneficiary of \$10,400 and \$20,800, respectively. The 1998 and 1999 forms purport to have been issued by [REDACTED], the petitioner. The 2000 and 2001 forms purport to have been issued by [REDACTED] the same address. This office notes that those forms purport to show that the petitioner and [REDACTED] paid the beneficiary \$40,000 annually from 1998 through 2001. Whether those W-2 and 1099 forms were issued timely is unclear, in view of the fact that the reason given for amending the beneficiary's 2001 tax return is that he did not receive the 1099 form from his employer.

Also on appeal, counsel stated that the previous assertion that the petitioner began operations during October 1998 was incorrect. Counsel now asserts that the petitioner began operations during October 1997.¹

In so stating, counsel asserts that the petitioner was in business at the time the Form ETA 750 was submitted. Counsel is correct that, if the petitioner were not in business at that time, that fact would bar approval. This office would not be favorably disposed toward a petition, asserting an inability to locate suitable employees, filed by a then non-existent business.

Counsel's assertion, however, does not explain the evidence in the file that indicates that the petitioner did not come into existence until October 1998. Counsel asserts that his own statement, contained in his letter of August 23, 2002, that the company began operations during October 1998 "was incorrect and was probably a typographical error." The first version of the petitioner's 1998 Form 1120 U.S. Corporation Income Tax Return, however, states that it covers the period from October 1, 1998 to December 31, 1998. That return further states that **the petitioner incorporated on October 1, 1998**. Counsel's assertion, that the petitioner

¹ Counsel did not, however, provide a copy of the petitioner's 1997 tax return, which the Service Center requested on May 29, 2002.

incorporated during October of 1997, is inconsistent with some of the evidence in the record. Counsel does not attempt to reconcile his assertion with that evidence.

Only two explanations occur to this office for the odd period on that return. One is that the petitioner began operations on October 1, 1998, as counsel previously asserted, and contrary to counsel's more recent assertion. The other possibility is that the tax return submitted is not the petitioner's authentic tax return. A typographical error does not reconcile the evidence in this case. The petitioner either misrepresented, through counsel, the date upon which its began operations, or it submitted, through counsel, a sham tax return. In either event, the petitioner's credibility is adversely affected.

In either event, the credibility of the evidence the petitioner, through counsel, submitted in this case suffers. As was noted above, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 590.

The priority date is January 14, 1998. The proffered wage is \$39,291.20 per year. On appeal, the petitioner, through counsel, submits W-2 forms and Forms 1099 showing that, from 1998 through 2001, the petitioner paid the beneficiary \$40,000. Ordinarily, that would be dispose of this case.

In this case, however, the evidence indicates that the petitioner has submitted various questionable documents through counsel, all dated, and apparently prepared, during 2002, although they relate to years as early as 1998. The credibility of documents the petitioner submitted, through counsel, is at a low ebb. Those documents so lack credibility that they can be accorded no evidentiary value. Neither the compensation they indicate the petitioner paid to the beneficiary nor the income they indicate the petitioner had during salient years will be considered.

The petitioner and counsel failed to submit evidence sufficient to demonstrate credibly that the petitioner had the ability to pay the proffered wage during any of the years from 1998 through 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Whether David, Peter, and Paul, Inc. is the petitioner's successor-in-interest is also unclear. In view of this office's decision pertinent to the evidence of the petitioner's ability to pay the proffered wage, however, this office need not dwell upon that issue.

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.