

U.S. Citizenship
and Immigration
Services



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FILE: EAC 02 160 52374 Office: VERMONT SERVICE CENTER Date: JUL 21 2004

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other Worker or Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning plant. It seeks to employ the beneficiary permanently in the United States as a dry clean high-pressure boiler operator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 and denied the petition accordingly.

On appeal, the petitioner¹ submits additional income for consideration.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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.

The petitioner must demonstrate the 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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 8, 1999. The proffered wage as stated on the Form ETA 750 is \$9.89 per hour, which amounts to \$20,571.20 annually. The visa petition, filed in April 2002, indicates that the petitioner was established in 1994 and has two employees. Part B of the approved labor certification (ETA-750), signed by the beneficiary, reflects that the petitioner has employed the beneficiary since 1999.

With the petition, the petitioner submitted incomplete copies of its Form 1120, U.S. Corporation Income Tax Return for 1999, 2000 and 2001. These tax returns show that the petitioner files its returns using a standard calendar year. The tax return for 1999 reveals that the petitioner declared -\$44,422 in taxable income before the net operating loss (NOL) deduction. The 2000 corporate tax return shows -\$73,817 in taxable income before the

¹ The record contains a G-28, Notice of Entry of Appearance as Attorney or Representative signed by "Evelyn Sineneng-Smith" as a "Bonded Immigration Consultant, Juris Doctor Bond #WM11211877." There is no indication in the record that, pursuant to 8 C.F.R. §§§§ 103.2(a)(3), 1.1(f), 292.1(a)(4), or 292.1(a)(2)(i), (iii) and (iv), that Ms. Sineneng-Smith is an attorney or an accredited representative. As the petitioner signed the appeal (Form I-290B), the petitioner will be considered self-represented.

NOL deduction. The petitioner's 2001 tax return discloses that it had \$5,431 in taxable income before the NOL deduction.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 8, 2002, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its ability to pay the proffered wage² beginning on the priority date of September 8, 1999 and continuing to the present. The director also advised the petitioner to submit copies of the beneficiary's Wage and Tax Statements (W-2s) for 1999, 2000, and 2001 that show the amount of wages paid by the petitioner to the beneficiary during those years.

In response, the petitioner resubmitted partial copies of its 1999 and 2000 corporate tax returns and a more complete copy of its 2001 corporate tax return that included a statement of its assets and liabilities as shown on Schedule L. The Schedule L balance sheet accompanying the 2001 tax return shows that the petitioner had \$14,650 in current assets and \$13,311 in current liabilities, producing \$1,339 in net current assets. In addition to a petitioner's net income, CIS will also consider a petitioner's net current assets as an alternate resource out of which a beneficiary's proposed wage offer may be paid. Net current assets represent the amount of liquidity that a petitioner has as of the date of filing. It reflects the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the tax return.

In addition, the petitioner submitted copies of drafts of W-2s for 1999, 2000, and 2001 that it proposes to file if the beneficiary is issued a federal tax identification or social security number. It also included a copy of an application for a taxpayer identification number completed in the beneficiary's name. The W-2s purport to show that the beneficiary was paid \$7,716.80 in 1999 and \$30,867.20 in 2000 and 2001. The petitioner submitted no other evidence supporting the amount of wages paid to the beneficiary.

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 February 13, 2003, denied the petition. The director rejected consideration of the W-2s because they were never filed and do not represent primary evidence of the wages paid to the beneficiary. The director also determined that the petitioner's tax returns failed to establish that either its net income or net current assets could cover the beneficiary's proffered wage.

On appeal, the petitioner submits copies of its 1999 and 2000 corporate tax returns, which include the Schedule L balance sheets. In 1999, the petitioner had \$5,135 in current assets and \$13,502 in current liabilities, resulting in net current assets of -\$8,367. In 2000, the petitioner declared \$5,881 in current assets and \$13,538 in current liabilities, yielding -\$7,657 in net current assets. As shown on the petitioner's corporate tax returns for 1999, 2000, and 2001, the beneficiary's proffered annual salary of \$20,571.20 could not be paid out of the petitioner's net income of -\$44,422, -\$73,817, or \$5,431, in those respective years. Nor could the petitioner's net current assets of -\$8,367 in 1999, -\$7,657 in 2000, or \$1,339 in 2001, cover the proffered wage in any of those years.

² The director misstated the proffered wage as \$30,867.20.

The petitioner also submitted a letter, dated February 27, 2003, from Fernando M. Gonzaga, a certified public accountant, on appeal. Mr. Gonzaga states that a \$10,000 non-cash item characterized as "amortization of goodwill" should be added back to the petitioner's operating income in 1999, 2000, and 2001. Mr. Gonzaga also asserts that a previously unreported accounts receivable amount of \$150,000 should be factored into the petitioner's 2000 computation of operating income.

The accountant's assertion is not persuasive. In determining a petitioner's ability to pay a proffered wage as set forth on the approved labor certification, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses that a petitioner asserts should be added back to the net income. 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). In *K.C.P. Food Co., Inc. v. Sava*, 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income. It is further noted that no documentation of any unreported receivable expense of \$150,000 was offered to the record. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Even considering Mr. Gonzaga's hypothesis that goodwill and this receivable amount of \$150,000 should be added back to the petitioner's reported net income, the results still show that the petitioner's net income was insufficient to cover the proffered wage in two out of the three salient years.

The petitioner offers copies of the 2002 W-2s of three of its employees on appeal. It is unclear what purpose they serve as none of the W-2s reflects wages paid to the beneficiary, or even that the petitioner employs anyone at the proffered wage of \$20,571.20. The AAO concurs with the director that the drafts of W-2s offered in support of a record of wages paid to the beneficiary are not sufficient to prove the amount of wages paid to the beneficiary by the petitioner. See *Matter of Treasure Craft of California, supra*. Included on appeal are also what appear to be original check stubs showing that the petitioner was paid slightly more than the proffered wage for the period from February 6, 2003 to March 6, 2003. The stubs also show state and federal tax withholdings. Even if this were persuasive in establishing that the petitioner may be currently employing the beneficiary at the proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner establishes a *continuing* ability to pay the proposed wage offer *beginning as of the priority date*. The record in this case fails to satisfactorily document any wages paid to the beneficiary and fails to establish that the petitioner's net income or net current assets could cover the proffered wage in 1999, 2000 or 2001.

Following a review of the petitioner's tax returns and other evidence contained in the record, the AAO finds that the petitioner failed to persuasively demonstrate that it has had the continuing ability to pay the proffered wage beginning as of the visa priority date of September 8, 1999.

Beyond the decision of the director, it is noted that the terms of the labor certification describe the work experience required for the position of dry clean high pressure boiler operator as 6 months to one year in the job offered. To be eligible for approval, the beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. As noted above, the filing date of the petition is the initial receipt in the

Department of Labor's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

In this case, this experience must be attained as of the visa priority date of September 8, 1999. There are certain safeguards within the regulatory scheme governing the alien labor certification process to facilitate that petitioning employers do not treat alien workers more favorably than U.S. workers. Pursuant to 20 C.F.R. § 656.21(b)(5), a petitioning employer is required to document that its requirements for the proffered position are the minimum necessary for performance of the job and that it has not hired or that it is not feasible for the petitioner to hire workers with less training and/or experience. Furthermore, the regulation at 20 C.F.R. § 656.21(b)(5) addresses the situation of a petitioning employer requiring more stringent qualifications of a U.S. worker than it requires of the beneficiary alien; the petitioner is not allowed to treat the beneficiary alien more favorably than it would a U.S. worker. See *ERF Inc., d/b/a Bayside Motor Inn*, 1989 INA 105 (U.S. Dept. Labor, BALCA, Feb. 14, 1990). According to the DOL's interpretation of 20 C.F.R. § 656.21(b)(5), the beneficiary must have obtained his or her qualifying employment experience with an employer different than the petitioning employer. See *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 1990 INA 200 (U.S. Dept. Labor, BALCA, May 23, 1991). The AAO will defer to the DOL's interpretation of its own regulation.

The only evidence contained in the record that substantiates the beneficiary's past qualifying work experience as a dry clean high pressure boiler operator is a letter from the petitioner that states that it has employed the beneficiary since May 1999. This is not acceptable evidence of the beneficiary's past employment experience as a dry clean high pressure boiler operator. It not only fails to document at least six months of relevant experience accrued as of September 8, 1999, but it comes from the petitioner's own employment of the beneficiary in the position offered. Accordingly, the beneficiary does not meet the requirements of the labor certification because it has not been established that he has acquired 6 months to one year of experience with a different employer than the petitioner, as a dry clean high pressure boiler operator.

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.