

BS



U.S. Citizenship
and Immigration
Services



FILE: LIN 02 263 52164 Office: NEBRASKA SERVICE CENTER Date: SEP 03 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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
Robert P. Wiemann, Director
Administrative Appeals Office

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Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 from 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. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is January 15, 2002. The beneficiary's salary as stated on the labor certification is \$12.70 per hour or \$26,416 per year.

Counsel initially submitted the petitioner's 2001 Form 1120-A, U.S. Corporation Short Form Income Tax Return, and six (6) months of bank statements for periods ending December 31, 2001 to July 31, 2002 (2002 bank balances). A fragmentary letter without a full translation, dated July 17, 1988, averred that the beneficiary worked as a baker from August 15, 1985 until July 17, 1988 (the fragmentary experience letter). The director deemed the financial documents insufficient. In a request for evidence (RFE) dated November 4, 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 most recent Employer's Quarterly Federal Tax Return (Form 941) with the name and social security number of each employee or, if applicable, the petitioner's Wage and Tax Statement (Form W-2), as evidence of wage payments to the beneficiary, or the beneficiary's most recent pay voucher with a record of his income and withholding to date and the pay period.

In response to the RFE, counsel omitted the record of employees by name and social security number and submitted only:

1. Copy of [the petitioner's Form 941] showing Total Wages and Tips, plus other compensation amounting to \$9,500.00 which covers Naji's compensation on a quarterly basis.

The director noted the absence of the beneficiary's W-2, or any documentation of the employee and considered that 2002 bank balances were all less than the proffered wage. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits new evidence consisting of bank balances, including December 31, 2001 to May 31, 2003 (2003 bank balances). The highest was \$10,692.15 as of August 30, 2002, less than the proffered wage. Counsel states that bank balances prove the ability to pay the proffered wage.

Counsel's reliance on commercial bank statements in order to demonstrate sufficient cash flow to pay the proffered wage at the priority date is misplaced. First, bank statements are not among the types of evidence specified for proof of the ability to pay the proffered wage in 8 C.F.R. 204.5(g)(2). This regulation allows additional material in "appropriate cases," but the petitioner has not shown that the prescribed documentation is inapplicable, inaccurate, or unavailable. The RFE was explicit and thorough in the alternatives available to the petitioner. Second, bank statements show only the amount in an account on a single date. Every balance was less than the proffered wage. *A fortiori*, once spent, the balance reveals no source of other funds to support the proffered wage. Third, no evidence proved that the petitioner's bank statements, somehow, represent additional funds beyond those of the Forms 941 or Forms W-2 that the RFE requested.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The AAO has observed that, as of December 31, 2001, the petitioner's 2001 Form 1120-A, in Part III, reported the difference of current assets of \$43,170 minus current liabilities of \$0, or net current assets, as \$43,170, equal to, or greater than, the proffered wage.¹ This evidence does not apply to the year of the priority date, 2002.

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).

Counsel states on appeal that "3. The Privacy Act prevents disclosure of names and social security numbers" and "4. Where one is employed and paid, ability to continue to pay is not an issue."

¹ Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. See *Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). Current assets and current liabilities appear on designated lines, in this case Part III of the 2001 Form 1120-A. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for that period.

Counsel does not identify the holder and the statutory or other authority to invoke this privilege or immunity against disclosure in these proceedings. The RFE exacted Forms W-2 or supplements to Forms 941, and the petitioner gives no convincing reason that it may not produce them. Furthermore, only counsel's statement supports the claims that the petitioner paid any wages for [REDACTED] compensation."

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 I-140 reflected that the petitioner was established September 30, 1998, had net current assets of \$43,170 in 2001 and three (3) employees in 2002, whom it steadfastly refused to identify. No evidence indicates any unusual expenses or any history of successful business operations.

Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is 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 2002 was an uncharacteristically unprofitable year for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers. The Immigrant Petition for Alien Worker (I-140) states that the beneficiary will not occupy a new position. The petitioner does not, however, name the worker whom the beneficiary might replace, state the wages, verify full-time employment, or provide evidence that the petitioner replaced the worker with the beneficiary. 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.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

After a review of the 2001 Form 1120-A and attachments, 2002 and 2003 bank balances, Forms 941, and the brief, 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.

Beyond the RFE and the director's decision, the other issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. The Form ETA 750 indicated that the position of baker required two (2) years of experience in the job offered. The AAO does not make this qualification a basis of this decision, since the director did not raise it. AAO notes, however, that the fragmentary experience letter conflicts with Form ETA 750, Part B, block 15c (block 15c), which only vaguely states the prior experience as 1986 to 1988. The fragmentary experience letter, dated 17/07/1988 [July 17, 1988], contradicted that start date:

This is to certify that [REDACTED] was working in The [sic] in our company as a baker. [sic] from 15/8/1985 till 17/7/1988.

Moreover, the fragmentary experience letter lacks a complete and accurate certified translation of the letterhead. Consequently, it reveals neither the employer's location and contact nor the issuer's identity, and, further, block 15c omits this response.

The translation of the experience letter did not comply with the terms of 8 C.F.R. § 103.2(b):

- (3) *Translations.* Any document containing foreign language submitted to the Service [now Citizenship and Immigration Services (CIS), formerly the Service or the INS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The fragmentary experience letter contradicted block 15c and certified more experience than block 15c claimed. The fragmentary experience letter, moreover, did not establish that the prior experience was full-time, though that is not now a basis of this decision. Employment is permanent, full time work. 20 C.F.R. § 656.3, *Employment*.

For these additional reasons beyond the scope of the decisions of the director and the AAO, but related to the Form ETA 750, Part A, block 14, the I-140 may not be approved. A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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.