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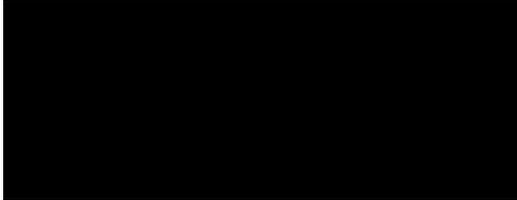
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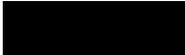
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U.S. Citizenship
and Immigration
Services

BB



FILE:  Office: CALIFORNIA SERVICE CENTER Date: SEP 03 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 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.

Loi Br

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a toy distributor and wholesaler. It seeks to employ the beneficiary permanently in the United States as a sales manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the college degree that the Form ETA 750 states is a requirement of the proffered position. The director also found that the petitioner had failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date. The director denied the position accordingly.

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 granting 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.

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 March 26, 2001. The proffered wage as stated on the Form ETA 750 is \$44,782.40 per year.

The petitioner must also demonstrate that the beneficiary is qualified for the proffered position pursuant to the requirements stated on the Form ETA 750. The Form ETA 750 states that the proffered position requires a two-year degree in business administration from a junior college and two years of experience.

On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner stated that it was established during 2000 and that it employs 5 workers. With the petition, counsel submitted a copy of its 2001 Form 1120 U.S. Corporation Income Tax Return, a compiled balance sheet as of September 30, 2002, and a compiled profit and loss statement for the period from April 1, 2002 through September 30, 2002. Pertinent to the beneficiary's education, the petitioner submitted what purports to be a graduation certificate from Shenzhen University Department of Business Administration stating that the beneficiary studied there beginning January 1994, that he completed

all prescribed courses and passed all required examinations. The petitioner also provided a purported English translation of that document. The purported English translation was not certified in accordance with 8 C.F.R. § 103.2(b)(3). That document includes a transcript of only four classes.

The petitioner submitted similar evidence pertinent to his graduation from the School of Chinese Medicine at the Beijing Union University. Because that portion of the beneficiary's education is not directly relevant to the educational requirements on the labor certification, it will not be addressed further.

The profit and loss statement indicates that during the five-month period from April through September 2002, the petitioner had net operating income of \$41,570 before taxes. Because the compiled balance sheet does not segregate current liabilities, the petitioner's net current assets cannot be calculated from that balance sheet. The accountant's report which accompanied those financial statements makes clear that they were compiled, rather than audited, that they consist of the representations of management presented in standard form, and that the accountant expresses no opinion as to their accuracy.

The 2001 tax return shows that the petitioner reports taxes based on a fiscal year running from April 1 of the nominal year to March 31 of the following year. During the 2001 fiscal year, which ran from April 1, 2001 through March 31, 2002, the petitioner declared taxable income before net operating loss deduction and special deductions of \$11,032. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$1,083,657 and current liabilities of \$1,083,505, which yields net current assets of \$152.

On May 16, 2003, the California Service Center requested additional evidence pertinent to the beneficiary's education and the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested that the petitioner provide evidence that the beneficiary has the education stated as mandatory on the labor certification, including an educational evaluation. The Service Center also requested a certified translation of the beneficiary's graduation certificate as stipulated by 8 C.F.R. § 103.2(b)(3).

As to the petitioner's ability to pay the proffered wage, the Service Center requested, in accordance with 8 C.F.R. § 204.5(g)(2), copies of annual reports, federal tax returns, or audited financial statements for 2001 and 2002. The Service Center also requested that if the petitioner had employed the beneficiary, it provide Form W-2 Wages and Tax Statements pertinent to that employment. The Service Center also requested the petitioner's California Form DE-6 for each of the previous four quarters.

In response, counsel submitted an educational evaluation from The Knowledge Company stating that the beneficiary's graduation from Shenzhen University is the equivalent of two years of study toward a bachelor's degree in Business Administration at an accredited U.S. university. That evaluation does not state that the beneficiary's education includes the equivalent of a degree in Business Administration from a junior college in the United States.

Counsel also submitted an additional copy of the beneficiary's graduation certificate from Shenzhen University and a certified English translation. As was noted above, that certificate includes a transcript of only four classes.

Counsel submitted a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return covering the fiscal year from April 1, 2002 through March 31, 2003. That tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$58,693 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of \$1,058,485 and current liabilities of \$1,000,937, which yields net current assets of \$57,548. Counsel noted that the petitioner had not yet submitted that return to the IRS.

The petitioner's California Forms DE-6 for the second, third, and fourth quarters of 2002 and the first quarter of 2003 show that the petitioner had only one employee during those quarters, and paid him \$4,500 during each quarter.

The director determined that the evidence submitted did not establish that the beneficiary has a degree in Business Administration from a U.S. junior college or an equivalent foreign degree, and did not establish that the petitioner has continuing ability to pay the proffered wage beginning on the priority date. On July 18, 2003, the director denied the petition.

On appeal, counsel asserts that the evidence demonstrates that the beneficiary has the education required by the labor certification.

Counsel also asserts that higher net current assets are not indicative of a more healthy company, and should not, therefore, be taken as an indication of a petitioner's ability to pay the proffered wage. In support of that assertion, counsel submitted a letter, dated September 10, 2003, from the petitioner's accountant that offered the same assertion.

Counsel also indicated that the petitioner's low net income during 2001 is not indicative of an inability to pay the proffered wage. Counsel asserts that the petitioner's income will increase upon hiring the beneficiary. Based on those assertions, counsel states that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

The Form ETA 750 labor certification states that the position requires graduation from a two-year business administration program at a junior college. In its stead, CIS will accept an equivalent foreign degree. The educational evaluation does not state that the beneficiary's graduation certificate is equivalent to graduation from a two-year business administration program at a junior college. Rather, it states that the petitioner's graduation certificate is the equivalent of two years toward completion of a bachelor's degree, but does not state that it is the equivalent of any United States degree at all. That is insufficient. The petitioner has not demonstrated that the beneficiary has the minimum requirements for the proffered position as listed on the labor certification.

The Service will not accept a degree equivalency when a labor certification plainly and expressly requires a specific degree. To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir.

Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The petitioner has not established that the beneficiary is qualified for the proffered position.

Although counsel argued against reliance upon net income and net current assets as indices of a petitioner's ability to pay the proffered wage, counsel offered no argument pertinent to any other statistic that could be used to show that ability.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied the petitioner's financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel asserts, but provides no evidence to demonstrate, that the petitioner's profits will increase as a result of hiring the beneficiary. If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of gross income the beneficiary might generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is speculative. The petitioner has submitted no evidence that hiring the beneficiary would generate any additional income, let alone that the net income generated by the beneficiary would offset the beneficiary's wages. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. Absent any evidence pertinent to the net income that would be generated by hiring the beneficiary, this office will make no such assumption. See generally, *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. See *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should

have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang*, 719 F. Supp. at 537. See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$44,782.40 per year. The priority date is March 26, 2001. The petitioner's nominal 2002 income tax return demonstrates that the petitioner had the ability to pay the proffered wage during the fiscal year it covers.

The petitioner's nominal 2001 income tax return shows that during its fiscal year running from April 1, 2001 through March 31, 2002, the petitioner declared taxable income before net operating loss deduction and special deductions of \$11,032. That amount is insufficient to pay the proffered wage. The petitioner ended the year with net current assets of \$152. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during its 2001 fiscal year. The petitioner has not, therefore, demonstrated that it was able to pay the proffered wage during its 2001 fiscal year.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. Further, the petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has a two-year degree in Business Administration from a United States junior college or an equivalent foreign degree. For both reasons, the instant petition may not be approved.

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.