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U.S. Citizenship
and Immigration
Services

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APR 13 2005



FILE:

[Redacted]
EAC 03 105 51619

Office: VERMONT SERVICE CENTER

Date:

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:

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

Cc:



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 specialty building restoration company. It seeks to employ the beneficiary permanently in the United States as a construction superintendent. 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 requisite experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, the petitioner submits a brief statement 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 unavailable in the United States.

8 C.F.R. § 204.5(l)(2) defines "skilled worker" as follows:

[A]n alien who is capable, at the time of petitioning for this classification, 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.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

8 C.F.R. § 204.5(l)(4), states:

Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor. In the case of a Schedule A occupation or a shortage occupation within the Labor Market Pilot Program, the petitioner will be required to establish to the director that the job is a skilled job, i.e., one which requires at least two years of training and/or experience.

Eligibility in this matter hinges on the petitioner demonstrating that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor.

Here, the request for labor certification was accepted for processing on August 10, 1999. The labor certification states that the position requires two years experience. The beneficiary signed a sworn statement on the back of the application stating that he had previously worked in Woodside, New York, for contractor P & C Giampilis, Inc.,¹ starting in the month of August 1997 and leaving in the month of September 1999.

On January 10, 2003, the petitioner filed a Form I-140 petition for an immigrant visa, with which it also submitted an approved Form ETA750, labor certification application, along with forms and documents pertinent to adjustment of status.

On April 7, 2003, the director determined that evidence submitted did not demonstrate that the beneficiary meets the requirement of two years experience as a manager as of the priority date, the director sent the petitioner a request for evidence (RFE). The RFE stated:

A review of the evidence submitted with the I-140 petition filed on behalf of [REDACTED] not include evidence of the beneficiary's work experience as required by the labor certification.

Submit evidence to establish that the beneficiary possessed the required two years of experience as manager as of August 10, 1999, the date of filing.

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relation to the alien's experience will be considered.

On June 4, 2003, counsel responded by submitting a letter from the prior employer, P & C Giampilis, dated July 2, 2002. The letter states that the beneficiary "was employed with my organization for a period of two years," and did not specify when that employment had occurred. The petitioner did not submit evidence of any other work experience of the beneficiary.

On August 7, 2003, the director denied the petition, stating, in part:

On June 7, 2003, the Service received your response. An experience letter from a previous employer was submitted stating that the beneficiary possessed the required two years of experience. The letter however did not state when the beneficiary gathered the experience. Therefore, the Service is unable to establish that the beneficiary possessed the required experience as of August 10, 1999.

¹ The petition states the petitioner would also have the beneficiary work in Woodside, New York.

On appeal, the petitioner asserted that the beneficiary does have the required two years of experience, stating its reason for the appeal, in part, as follows:

Due to an [sic] human error, the person preparing the beneficiary's letter of experience omitted how the beneficiary gained the experience. To correct this mistake the previous employer provided a letter stating how the beneficiary gained the experience.

Please accept the letter to correct the deficient [sic] evidence.

As noted above, the director has correctly noted that P & C Giampilis' first letter "did not state *when* the beneficiary gathered the experience [emphasis added]." On appeal the petitioner uses the term "how," stating that "the beneficiary's letter of experience omitted *how* the beneficiary gained the experience [emphasis added]" rather than using the word "when," as the director had in his decision. The petitioner has submitted a second letter from P & C Giampilis, claiming to correct a deficiency in the record from the first letter, submitted in response to the RFE.

The petitioner is required to submit evidence, including affidavits, to "establish eligibility for a requested immigration benefit. The non-existence or other unavailability of required evidence creates a presumption of ineligibility." See 8 C.F.R. 103.2(b). Here, the petitioner had submitted the first P & C Giampilis letter, which stated that the beneficiary had the two-years experience required for the proffered position without stating precisely when.

This office can only speculate that the petitioner may not have understood the impact of failing to establish that on or before August 11, 1997, was the start-date for the beneficiary's prior employment. Regardless, by submitting the August 18, 2003 letter [REDACTED] the petitioner has clarified what was previously unclear from the record.² The petitioner's evidence shows that the beneficiary was six days short of possessing the two years experience called for in the petitioner's submitted labor certification application. Therefore, the record is now clear that the beneficiary did not have the required qualifications stated on the ETA 750 as of the priority date.

Beyond the decision of the director, the RFE asked the petitioner for evidence of its ability to pay the proffered wage on the priority date and continuously thereafter until the beneficiary adjusts status. In response, the petitioner submitted Form 1120 tax returns for both 2000 and 2001.

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.

² Were the petitioner able to produce documentary evidence of an earlier start-date with the P & C Giampilis Contracting Company, the petitioner could move this office to reopen or reconsider for a review its decision.

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). The proffered wage as stated on the Form ETA 750 is \$25.47 per hour, which amounts to \$52,977.60 annually. 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 claimed to have been established on July 5, 1995, to have a gross annual income of \$1.6 million, and to currently employ 15 workers. In support of the petition, the petitioner stated it had submitted federal income tax returns; the director, in the RFE, stated that the petitioner had not submitted any evidence of ability to pay.

In the RFE, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns for 1999 – 2001, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted Form 1120S tax returns for the petitioner for the years 1999 – 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 the full proffered wage on or after the priority date.

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, CIS will next 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. 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).

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts

liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. As shown in the paragraph that follows, however, the petitioner's net current assets during the year in question, 1999, were negative, and in 2000, were \$35,570, or less than the proffered wage. As such, the director's failure to consider the petitioner's net current assets did not prejudice the petitioner's cause.

The tax returns reflect the following information for the following years:

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income	\$37,934	\$107,531	\$108,316
Current Assets	\$57,342	\$159,091	\$160,410
Current Liabilities	\$130,905	\$123,521	\$101,520
Net current assets	(\$73,563)	\$35,570	\$58,890

It is clear from the petitioner's tax returns that it has not established if it had the ability to pay the proffered wage in 1999, based upon either its income or its assets. Thus, it is concluded that the petitioner has failed to prove its financial strength and viability or to show that it continually has the ability to pay the proffered wage since the priority date.

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. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed. The petition is denied.

payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.