



U.S. Citizenship
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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **AUG 22 2005**
SRC-03-169-51242

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

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:
[Redacted]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is involved in business investments and leasing. It seeks to employ the beneficiary permanently in the United States as a manager. 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 and denied the petition accordingly. The director also determined that the petitioner failed to demonstrate that the beneficiary is qualified for the proffered position.

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 first issue to be discussed in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date.

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 April 12, 2001¹. The proffered wage as stated on the Form ETA 750 is \$54,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 2000.

On the petition, the petitioner claimed to have been established in 1999. In support of the petition, the petitioner submitted its Forms 1120, U.S. Corporation Income Tax Returns for 2000² and 2001.

¹ It appears that the date of receipt was amended and the amendment was approved by DOL on page 1 of Form ETA-750A; however, the subsequently issued cover sheet Final Determination reflects a priority date a day later, which the AAO will use as the accurate priority date since it would be the last action undertaken by DOL in this matter.

² Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 30, 2003, 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, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director reviewed the beneficiary's Form G-325, Biographic Information sheet, accompanying a concurrent filing of an application to adjust status to lawful permanent resident that indicated that she had stopped working for the petitioner and began employment with a different employer. The director requested that the petitioner explain why it would re-hire the beneficiary and who was managing in the meantime.

In response, the petitioner's counsel stated that the beneficiary has been an excellent employee and thus the petitioner intends to continue the sponsorship of her employment-based immigrant visa. Additionally, counsel stated that "[the petitioner had to downsize during a period of recession, and change business locations as a result, but [the petitioner] plans to re-hire [the beneficiary] after the current contracted employment has ended." The petitioner submitted a copy of a Form W-2, Wage and Tax Statement, issued from it to the beneficiary reflecting wages paid to the beneficiary of \$3,000.00 in 2000. The petitioner also submitted a W-2 form from a different company showing wages earned by the beneficiary by that company. Additionally, the petitioner submitted a copy of its quarterly federal tax return for the second and third quarters in 2003 that did not reflect any 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 January 23, 2004, denied the petition. The director discussed the petitioner's multiple relocations and failure to provide evidence about its hiring practices.

On appeal, counsel asserts that the director made irrelevant determinations belying a preconceived intent to deny the petition. The petitioner submits copies of its leases to evidence multiple relocations, which counsel asserts is in connection with its expansion over the years, and its 2002 corporate tax return.

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

	<u>2001</u>	<u>2002</u>
Net income ³	\$56,413	\$6,324
Current Assets	\$480,169	\$247,534
Current Liabilities	\$137,483	\$69,176
Net current assets	\$342,686	\$178,358

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 in 2001 or 2002.

³ Taxable income before NOL deduction and special deductions as reported on Line 28.

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). 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*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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 should have considered income before expenses were paid rather than net income.

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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001, the petitioner's net income and net current assets are greater than the proffered wage of \$54,000, and in 2002, the petitioner's net current assets are greater than the proffered wage. Thus, the petitioner has shown the ability to pay the proffered wage during 2001 and 2002.

The AAO concurs with counsel that the director erred by failing to consider the petitioner's tax returns and diverting her discussion to seemingly irrelevant issues⁵. The petitioner submitted evidence sufficient to

⁴ 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 payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ If the director raised the relocation issue to ensure the validity of the labor certification application, she could have stated so. The AAO notes that the petitioner has sustained its business in Georgia and thus the change in the job location does not adversely impact the test of the labor market overseen by the Department of Labor during the labor certification application process. Additionally, the petitioner's hiring practices are irrelevant to its demonstration of a continuing ability to pay the proffered wage beginning on the priority date.

demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date. The director's portion of her decision discussing the issue of the petitioner's continuing ability to pay the proffered wage beginning on the priority date is hereby withdrawn.

The second issue to be discussed in this case is whether or not the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 12, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|-------|
| 14. | Education | |
| | Grade School | Blank |
| | High School | Blank |
| | College | Blank |
| | College Degree Required | Blank |
| | Major Field of Study | Blank |

The applicant must also have two years of training in order to perform the job duties listed in Item 13, which states "Manage all aspects of investment firm, including accounts, customer and vendor files and contacts and recordkeeping." Item 15 indicates that there are no special requirements.

The beneficiary set forth her credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she indicated that she worked for the petitioner since May 2000 and for Tanzania Leaf Tobacco Company Ltd. (Tanzania Leaf) in Morogoro, Tanzania, as a quality control manager from May 1994 to July 1997. The beneficiary described the work she performed for Tanzania Leaf as managing complete operations, supervising data input, training new recruits, and general office management.

With the initial petition, the petitioner submitted a letter from Tanzania Leaf promoting the beneficiary to Executive Quality Control Manager "with responsibilities of the entire control of the Product," and duties similar to what the beneficiary set forth on the Form ETA-750B Item 15b. The letter is dated July 15, 1997 and reflects that the beneficiary had been with Tanzania Leaf since 1994. The letter is signed by [REDACTED] Managing Director.

The director requested additional evidence concerning the evidence of the beneficiary's qualifications on August 30, 2003. The director noted the language used by [REDACTED] that the beneficiary transferred to a new company in a "higher" position of Executive Quality Control Manager and requested a letter in compliance with 8 C.F.R. § 204.5(l)(3)(ii).

In response to the director's request for evidence, the petitioner submitted another letter signed by [REDACTED] (Mr. [REDACTED]), Sales Director, on Tanzania Leaf letterhead, stating that the beneficiary worked as Executive Quality Control Manager from 1994 to 1999 and listed the duties she performed, which included inputting data, managing

leaf and sales activities, preparing final technical reports, summarizing manuals and instructions, ensuring calibration of laboratory equipments, and ensuring customer satisfaction.

The director noted the conflicting information presented in the two different letters submitted by the petitioner to establish her qualifications for the proffered position and denied the petition accordingly on January 23, 2004.

On appeal, counsel states that the letters do not conflict but rather should be considered in their totality to give “an accurate view of her work history” with Tanzania Leaf. Counsel states that the letter from Mr. [REDACTED] reflects her position at Tanzania Leaf as an Executive Quality Control Manager, and the letter from Mr. [REDACTED] reflects her transfer to a new company in the same position. Counsel states that “[t]he reference to ‘higher position’ was only meant to reflect the substantial increase in her responsibilities, based on the merge with a much larger, more successful company.”

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(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.

The AAO accepts counsel’s explanation and determines that the evidence contained in the record of proceeding establishes the beneficiary’s qualifications for the proffered position. The phrase in Mr. [REDACTED] letter about the beneficiary’s “higher position” does not necessarily qualify the notice of her transfer to a sister company in the position of Executive Quality Control Manager. It could be interpreted as counsel suggests. Additionally, while the letter from Mr. [REDACTED] uses the end date of 1999 for the beneficiary’s completion of her employment at Tanzania Leaf, but the beneficiary indicated on Form ETA-750B, Item 15b that she completed her employment at Tanzania Leaf in 1997, the AAO believes this is a typographical error on the Form ETA-750B, Item 15b, since she also indicated that her next employment commenced in the United States in 2000 and she did not arrive in the United States until mid-1999. Even if the beneficiary was not an Executive Quality Control Manager the entire time of her employment at Tanzania Leaf, the position indicates that she would have been promoted from a regular Quality Control Manager, and in either event, the types of duties described in both letters are akin to the duties of the proffered position as delineated in Item 13 on Form ETA-750A. And even if she was only employed in a managerial capacity from the time of the transfer, it appears that the beneficiary obtained two years of qualifying employment experience from that time as well. Both letters are written by a supervisor or manager of the beneficiary, describe the period of employment and the beneficiary’s duties, provide the contact information of the supervisor and manager, and are on Tanzania Leaf letterhead. Thus, the letters conform to the requirements of 8 C.F.R. § 204.5(l)(3)(ii).

Because the evidence submitted establishes that the beneficiary is qualified to perform the duties of the proffered position, the AAO overturns the portion of the director’s decision that discusses 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.