

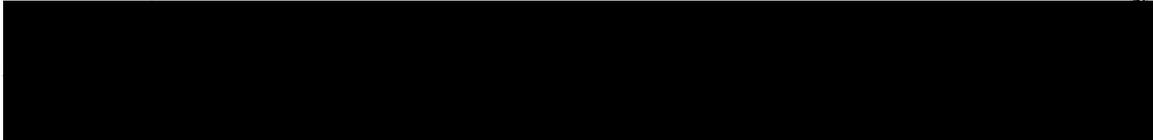
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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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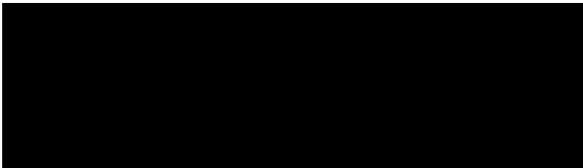


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 19 2005  
SRC 03 152 50477

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:



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 Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a food store. It seeks to employ the beneficiary permanently in the United States as a manager -- retail. 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.

On appeal, counsel submits a statement.

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 21, 2002. The proffered wage as stated on the Form ETA 750 is \$21.32 per hour, which equals \$44,324.80 per year.

On the petition, the petitioner did not state the date it was established in the space provided for that purpose. The petitioner did not state its current number of employees, its gross annual income, or its net annual income in the spaces provided for those figures. The petition indicates that the petitioner would employ the beneficiary in Fort Pierce, Florida, and the Form ETA 750 indicates that the petitioner will employ the beneficiary in Fort Lauderdale, Florida. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, counsel submitted no evidence pertinent to the petitioner's ability to pay the proffered wage. Therefore, on December 9, 2004, the Director, Texas Service Center, requested evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered

wage beginning on the priority date. The Service Center also specifically requested the petitioner's 2002 Federal tax return.

In response, counsel submitted copies of the petitioner's 2002 and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation. Those returns show that the petitioner is a corporation, that it incorporated on January 12, 2001, and that it reports taxes pursuant to the calendar year.

The 2002 return shows that the petitioner declared ordinary income of \$9,640 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$25,630 and no current liabilities, which yields net current assets of \$25,630.

The 2003 return shows that the petitioner declared a loss of \$12,313 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of \$0. That return also states that it is the petitioner's final return.

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 March 22, 2003, denied the petition.

On appeal, counsel states,

The ability to pay proffered wage to the prospective employee by the Petitioner was the only issue which the denial was based upon. The Petitioner respectfully appeals on this basis.

Counsel submits a letter, dated June 24, 2005, to supplement that appeal. In the letter counsel stated that by providing the petitioner's tax returns the petitioner had complied with the Request for Evidence, and the petition should be approved.

Initially, this office notes that the evidence was requested to clarify whether the petitioner was able to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Approval of the petition is not contingent merely upon counsel's submission of the requested evidence, but upon that evidence demonstrating that the petition is approvable.

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 a given 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. *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 total 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 income tax returns, rather than the petitioner's gross income. 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income 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 \$44,324.80 per year. The priority date is March 21, 2002.

During 2002 the petitioner declared ordinary income of \$9,640. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$25,630. That amount is insufficient to pay the proffered wage. The petitioner has submitted no evidence of any other funds that were available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared a loss of \$12,313. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had no net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no evidence of any other funds that were available to it during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002 or 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date, and the petition was correctly denied on that ground.

Additional issues exist in this case that were not raised in the decision of denial. The petitioner's 2003 tax return stated that it was the petitioner's final return. This could mean that the petitioner has ceased operations or it could mean that the petitioner has changed its mode of ownership.<sup>1</sup>

If the petitioner has ceased operations, it is no longer a U.S. employer within the meaning of 8 C.F.R. §204.5(l), and the petition may not be approved.

If, on the other hand, the petitioner has changed its mode of ownership, then the substituted petitioner, the new entity, must show that it is entitled to rely on the Form ETA 750 approved for use by the original petitioner. In order to rely on that approved Form ETA 750 the substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. See *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Further, the petition in this matter indicates that the petitioner intends to employ the beneficiary at [REDACTED]. The Form ETA 750 indicates that the petitioner intends to employ the beneficiary at [REDACTED]. Although those two locations purport to have the same street address, they are in different cities, in different counties, and more than 100 miles distant from each other. No reason exists to believe that a labor certification approved for employment in one Florida county is valid for employment in another Florida county. Because this issue was not raised in the decision below, however, and the petitioner has not been accorded an opportunity to address it, this office will not rely, even in part, on this ground in today's decision.<sup>2</sup>

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

<sup>1</sup> Other facts might also cause a taxpayer to state that its corporate tax return is a final return. The statement denotes that the taxpayer does not anticipate filing another return of the same type - Form 1120 U.S. Corporation Income Tax Return, Form 1120S, U.S. Income Tax Return for an S Corporation, or whatever form of return the statement is made on, for the ensuing year. If the petitioner did not cease operations after 2003 and did not change its form of ownership, or if the petitioner is able to comply with the requirements of *Matter of Dial Auto Repair Shop, Inc.*, *supra*, then this apparent ground for denial of the petition might be overcome. In the event that counsel seeks to overcome the basis of this decision pursuant to a motion, counsel should also address this other evidentiary foible.

<sup>2</sup> Again, however, if the petitioner seeks to overcome today's decision in a motion, it should address this discrepancy.