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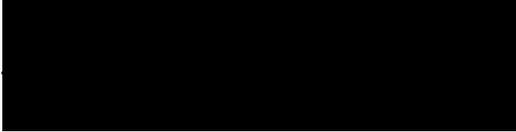
IN RE: Petitioner:



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.

  
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 paint manufacturer corporation. It seeks to employ the beneficiary permanently in the United States as a tinter. 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, that it 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 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 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 regulation at 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate 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).

Here, the Form ETA 750 was accepted on October 26, 1998. The proffered wage as stated on the Form ETA 750 is \$17.31 per hour (\$36,004.80 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 2000 and 2001; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested pertinent evidence on October 16, 2003, on July 12, 2003, and on May 7, 2004 of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested a copy of the beneficiary's W-2 Wage and Tax Statement for 2002; evidence of a fictitious business name registration; and, additional evidence of the ability to pay the proffered wage for years 1998, 1999, 2002, and 2003. Also, the director requested the petitioner's Form W-3 for 2002.

In response to the requests for evidence (and the notice of intent to deny the petition) of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's fictitious name filing; and, W-2 statements for the beneficiary from 1997 to 2002.

The director denied the petition on July 17, 2004, finding 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, that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience as a tinter.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage and that the prior employer [REDACTED] contrary to the investigator's report, does exist. Counsel submits a letter typed on the petitioner's letterhead that is undated and unsigned. It states that petitioner is submitting its U.S. tax returns for 2000, 2001, and 2002 and that "... you are already in possession of our returns for 1999 and 1998 ...". In light of the fact that petitioner's U.S. federal tax returns for 1998 and 1999 were requested by the director but, according to the record of proceeding, never received, we find this statement to be erroneous. The petitioner has not submitted tax returns for 1998 and 1999.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary. In 1999, the petitioner paid the beneficiary \$21,285.96; in 2000, \$23,496.25; in 2001, \$28,060.29; in 2002, \$28,872.88; and, in 2003, \$29,579.75.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$36,004.80 per year from the priority date of October 26, 1998:

- In 2000, the Form 1120S stated taxable income of \$125,283.00.
- In 2001, the Form 1120S stated taxable income of \$121,955.00.
- In 2002, the Form 1120S stated taxable income of \$111,988.00.

Since the priority date is October 26, 1998, and, no U.S. federal tax returns for 1998 and 1999 were submitted into evidence by petitioner, the petitioner has not come forward, despite various opportunities to do so, with probative evidence to prove the ability to pay the proffered wage from the priority date.

The second issue in this case is the director's finding that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification. *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. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The beneficiary set forth his work experience on Form ETA-750B (Application for Alien Employment Certification).

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15 (c), sets forth work experience that the beneficiary listed for the position of tinter between the dates stated below.

\* \* \*

#### 15. c. WORK EXPERIENCE

NAME AND ADDRESS OF EMPLOYER

NAME OF JOB

Tinter

DATE STARTED

Month – 03 [March] Year - 1983

DATE LEFT

Month – 05 [May] Year - 1989

KIND OF BUSINESS

Paint manufacturer

DESCRIBE IN DETAIL DUTIES...

Mixes pigments or base colors with paints, enamels, or lacquers to match standard or sample colors ...

NO. OF HOURS PER WEEK

40

Since the beneficiary was born on April 15, 1969, [REDACTED] would have employed the beneficiary between the ages of 14 and 20 years of age.

The director sent a notice to deny the petition on May 7, 2004 in which it stated that an investigation was conducted of the above stated work experience. The investigation report stated that it could not substantiate that the company [REDACTED] existed at the location given above. The telephone number printed upon this past employer's stationery, given as an experience verification, was for another company, unrelated to [REDACTED]

In response to the notice counsel stated in an explanatory letter that [REDACTED] is a company with over 156 locations and found on the Internet as well as "State Registered for Business." Counsel submits a copy of a web page for [REDACTED] located at [REDACTED] as well as other outlets in other locations. None of the locations match the address given in the ETA 750B, Section 15 (c) stated above. Counsel submits a foreign language document from [REDACTED] manager [REDACTED] (Telefono [REDACTED]) attesting to the beneficiary's employment as a tinter (and other positions) from March 27, 1983 through May 1989. The letter is dated December 20, 2002. According to the investigation report that telephone number is for an establishment called [REDACTED]. The owner of that business did not know of [REDACTED]. Counsel offers no explanation for this inconsistency or explanation why [REDACTED] is not located at [REDACTED] or why it can not be contacted at the telephone number present on its stationery (i.e. 43631151).

A second letter from [REDACTED] manager of [REDACTED] dated December 20, 2002, and notarized September 13, 2002, was introduced by counsel stating that the beneficiary worked for [REDACTED] from March 1983 through May 1989. This letter is on [REDACTED] stationery and bears the same telephone number on its stationery (i.e. 43631151). Again there is no explanation for the telephone number for an unrelated business, or why, contrary to the labor certification information and petitioner's rebuttal evidence, no [REDACTED] is located at [REDACTED]

On appeal, counsel submits a letter from an attorney, [REDACTED] General Manager of [REDACTED]. This letter is dated August 6, 2004. It states that the beneficiary "worked in this company" as a paint matcher from March 1983 through May 1989. Again this letter does not explain the discrepancy in the addresses, confirm the above two letters that any job verification given previously in this matter is correct or explain the inconsistencies mentioned above. The AAO finds that the petitioner has not submitted probative evidence sufficient to show that the beneficiary had two years of experience in the occupation of tinter. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA

1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner has not come forward with evidence to demonstrate its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor, that is for years 1998 and 1999, although requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The evidence submitted does not demonstrate credibly that the beneficiary had the requisite two-years of experience as a tinter. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.