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U.S. Citizenship
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Services



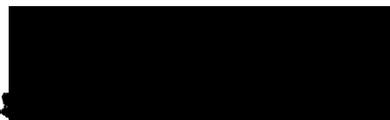
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File: EAC 02 166 52099

Office: VERMONT SERVICE CENTER

Date: FEB 03 2005

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 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental laboratory technician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on April 26, 2001, and approved by the Department of Labor on March 28, 2002. 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, the petitioner submits an affidavit from [REDACTED] who signed the petition on the petitioner's behalf, and a copy of the beneficiary's 2001 Individual Income Tax Return.¹

Ability to Pay

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 petitioner must demonstrate eligibility 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. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$15.27 per hour, or \$31,761.60 per year.

With the petition, counsel submitted only the ETA 750. Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on July 26, 2002, requested additional evidence pertinent to that ability.

¹ The petitioner appears to have retained representation as evidenced by the letter of inquiry dated July 30, 2003. The petitioner's ostensible representative filed a Form G-28, Notice of Entry of Appearance in this matter. That notice does not state that the representative is an attorney. Further, neither the putative representative's name, nor the name of the organization, Immigration and Pro Services, Inc. appears on the roster of accredited representatives and organizations. The record contains no indication that the petitioner's putative representative is authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner.

Specifically, the Service Center requested that the petitioner provide evidence of its ability to pay the proffered salary of \$31,761.60 as of the date of the filing of the petition. The Service Center noted three forms of evidence that could be submitted, as well as possible forms of alternative evidence. In addition, the Service Center requested that the petitioner submit the W-2 Wage and Tax Statements for the petitioner since 1998 which would demonstrate the salary actually paid to the petitioner.²

In response, on August 11, 2002 the petitioner submitted a statement from [REDACTED] identified as the president of JJ Dental Lab³, and additional documents. The additional documents consisted of the 2000 Form 1065 U.S. Return of Partnership Income for the petitioner, and the 2001 Form 1040 U.S. Individual Income Tax Return for 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 November 20, 2002, denied the petition.

On appeal, the petitioner submitted another affidavit from [REDACTED] and again submitted the beneficiary's 2001 Individual Tax Return. The affidavit asserts that the company's 2000 tax returns are irrelevant to the determination of the petitioner's ability to pay the wage. The petitioner now asserts that as it had only petitioned for the beneficiary in April 2001, earlier records are irrelevant. In addition, the affidavit states that according to the beneficiary's 2001 tax returns, he received \$9,440 in wages and \$25,061 in profit sharing from the business. Further, he argues that since the business filed the petition in the second quarter of the year that only a pro rata amount of the salary need be demonstrated, or \$20,767.20.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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 both CIS and 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 the INS, now 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 v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, supra* at 1054.

The petitioner is essentially relying upon two documents, the petitioner's 2000 U.S. Return of Partnership Income, and the beneficiary's 2001 U.S. Individual Income Tax Return. Although the petitioner itself submitted the partnership's 2000 tax return, it now asserts that such return is irrelevant since the petition was not filed until the second quarter of 2001. Even assuming that the 2000 partnership return is irrelevant, the petitioner has not submitted sufficient evidence for the 2001 tax year. The petitioner seeks to rely solely

² The ETA 750 Part B reflects that the beneficiary had worked for petitioner since June 1998.

³ Although the affidavit purports to be an affidavit from [REDACTED] the affidavit is not signed by [REDACTED] but instead is submitted through and signed by the representative, [REDACTED]. The affidavit will be given little weight.

upon the beneficiary's 2001 tax return, including representations made in that tax return about the beneficiary's share of partnership income. It has nonetheless, neglected to supply the petitioner's partnership tax return for 2001, which would serve to support the assertions as to the beneficiary's compensation. The failure to submit such document casts doubt upon the representations made in connection with the petition. 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 petitioner seeks to rely upon the beneficiary's share of partnership income (asserted to be \$25,061), coupled with the beneficiary's wages (asserted to be \$9,440), as represented in the beneficiary's 2001 individual tax return. This method of computing the proffered wage is problematic for a couple of different reasons. First, although the Service Center specifically sought the beneficiary's W-2 Wage and Tax Statements, the petitioner has failed to submit such statements, including any that related to the beneficiary's 2001 individual tax return. Second, we do not agree with the petitioner's method of apportioning the distributions and considering the beneficiary's share in computing the petitioner's ability to pay the proffered wage. The petitioner and the Service Center have taken different approaches, but have committed the same error. The petitioner seeks to rely on the beneficiary's share of the partnership distribution as evidence of the petitioner's ability to pay the wage. The Service Center, while not explaining its approach in the decision, apparently found it impermissible to consider the beneficiary's share of partnership income to the extent that it resulted in a partnership distribution to the beneficiary. As such, it considered only 50% of the partnership's net income; presumably the percentage distributed to the petitioner.⁴ We believe both approaches are flawed. Because the business is organized as a general partnership, the entire ordinary income, as listed in Line 22 of the Form 1065 is considered. This, however, does little to assist the petitioner, as no partnership return was submitted for 2001 or 2002. Accordingly, the petitioner has failed to submit relevant information pertinent to its ability to pay the wage. With respect to the evidence in the record, the petitioner has provided very little, has failed to offer an explanation as to why requested documents were not submitted, and has changed position as to the relevance of documents it has, itself, elected to provide.

Additional Issues Beyond the Director's Decision

Beyond the director's decision, the petitioner's reluctance to provide requested information, coupled with information reflected in the documents it *has* submitted, raises questions regarding the beneficiary's experience, and the bona fides of the job offer. As to the first issue, there are apparent deficiencies in the evidence submitted in support of the beneficiary's required employment experience. The ETA-750 indicates that a minimum of two years experience as a dental lab technician is required. The evidence submitted in support of the experience consists of an undated letter submitted by [REDACTED]. The letter contains inconsistent, alternate references to a male and a female employee.⁵ In addition, the letter fails to specify the actual dates of the alleged employment, and whether such employment was part time or full time. Consequently, it fails to satisfy the requirements of 8 C.F.R. § 204.5(l)(3)(ii).

⁴ We note that this information was from the petitioner's 2000 tax return, which is not relevant to a determination of the petitioner's ability to pay the proffered wage.

⁵ This is a significant discrepancy because additional information in support of the petition indicates that the beneficiary's spouse, Cecilia, has also worked as a dental technician. As such, it appears that the letter may actually relate to both the beneficiary and his wife, as it is possible that they were both employed by the former employer, just as it appears that they both have worked for JJ Dental.

As to the second issue, there exists significant doubt as to whether the petitioner is actually seeking to employ the petitioner, or whether this is a self-employment situation, contrary to the regulatory requirements. The regulations define employment as follows:

Employment means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.

See 20 C.F.R. § 656.3.

The purpose of the labor certification process is to ensure that the job that is the subject of the petition is a job that was, in fact, open to qualified U.S. workers and not a subterfuge to permit the employment arrangement to be structured in such a way that those U.S. workers are not actually considered for the position. The employer/petitioner bears the burden to demonstrate that a bona fide job opportunity exists. The AAO referred the matter to the Office of Fraud Detection and National Security (FDNS), for the purposes of having that office conduct an inquiry into that issue. While the results of that inquiry appear to be inconclusive, they raise an additional issue, namely, a successor-in-interest issue.

The FDNS inquiry disclosed the following as reflected in the G-166C Memorandum dated December 28, 2004. The FDNS officer's inquiry disclosed that the petitioner's president [REDACTED] and the beneficiary started the business known as JJ Dental in June 1998, as equal partners, after working together at a different dental laboratory. At some point, the business changed its status from its original partnership form to that of a corporation. It appears that at about the same time, the beneficiary turned over his share of the business to the president, [REDACTED]. On or about December 31, 2002, the business lost its corporate status, and appears to have ceased operations as JJ Dental.⁶ The FDNS inquiry also revealed that the beneficiary has ceased working for the petitioner, but indicates a willingness to do so in the future.⁷

The entity's tax returns, including the 2000 Form 1065 for the partnership, the beneficiary's 2001 Form 1040, and the related schedules demonstrate that JJ Dental was organized as a domestic general partnership consisting of only two partners [REDACTED] who submitted the petition on behalf of the petitioner, and [REDACTED], the beneficiary. The record does not contain any additional financial records relating to JJ Dental. Based upon the findings of the FDNS, and the publicly available information, it is likely that any such records would be in the form of corporate records for the period of time that JJ Dental was organized as a corporation. It is unknown what form any financial records would take for any business operations subsequent to the dissolution of the corporation, assuming it remained as an ongoing business entity.

This information raises considerable doubt about the continued viability of the entity which sought and obtained the labor certification and which filed the petition on the beneficiary's behalf. These concerns exist because of: 1) the petitioner's failure to provide tax returns for the petitioner related to the year of the priority date and beyond,⁸ and 2) the absence of any documentation relating to the partnership arrangement, or even any documentation on the business' letterhead; and 3) the findings made by the FDNS. While this does not necessarily indicate that JJ Dental is no longer in business, it is possible that is the case. Even if still

⁶ Publicly available information from the Virginia Business Information Center likewise indicates that JJ Dental, listed in their records as a *corporation*, is no longer listed as a Virginia corporation due to its failure to pay its annual incorporation fee.

⁷ The information that the beneficiary no longer works for JJ Dental came from the beneficiary himself. The petitioner's president provided contradictory information, indicating that the beneficiary still worked for him.

⁸ Should this case be the subject of a request for reopening/reconsideration, we note that at a minimum, the petitioner would need to update the tax records up through the 2002 tax year, and possibly the 2004 tax year depending on the date of such a motion.

in business, it would appear it may have converted to corporate status, a business arrangement different than noted in the ETA 750 and I-140. If this is the case, the current business entity may be required to submit its own I-140 petition on behalf of the beneficiary. *See Memorandum, Amendment of Labor Certifications in I-140 Petitions, HQ 204.24-P from James A. Puleo, Acting Executive Associate Commissioner, Office of Operations (December 10, 1993).*

Furthermore, the new petitioner would need to establish what relationship it bears to the petitioner and whether it is considered a successor-in-interest. The successor-in-interest 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. The successor-in-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning when on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-in-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

Aside from the issues surrounding the petitioner's current status, the AAO notes that several factors point provide the AAO with reason to believe that that the position may not have been a bona fide job opportunity that was open and available to U.S. workers within the meaning of the regulations, but rather that the position is one that realistically was open only to the beneficiary. However, given the findings already made in this case, the AAO does not need to address this additional 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 not met that burden.

ORDER: The appeal is dismissed.