



U.S. Citizenship
and Immigration
Services

B6

[Redacted]

FILE: [Redacted]
EAC-03-067-55001

Office: VERMONT SERVICE CENTER

Date: MAY 19 2005

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

PETITION: 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]

When filing, data deleted to
prevent identity misrepresentation
for reasons of personal privacy

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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 F. 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 residential construction firm. It seeks to employ the beneficiary permanently in the United States as a cement mason. 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$14.15 per hour, which amounts to \$29,432.00 annually. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary claimed to have worked for the petitioner beginning in March 1999 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on November 21, 2002. On the petition, the petitioner claimed to have been established on March 21, 1996, to currently have 30 employees, to have a gross annual income of \$2,599,339.00, and to have a net annual income of -\$943.00. With the petition the petitioner submitted supporting evidence consisting of an undated statement from the president of a construction company stating the beneficiary's experience with that company as a construction worker from October 1996 until March 1999; a copy of a Form W-2 Wage and Tax Statement showing compensation received from the petitioner in 2001 by an individual named [REDACTED] and a copy of page one of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001.

In a request for evidence (RFE) dated October 2, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director

specifically requested copies of the petitioner's U.S. federal income tax returns for 2001 and 2002, with all schedules and attachments.

In response to the RFE, counsel submitted a letter dated December 26, 2003 and copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2002.

In a decision dated March 3, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000, 2001 and 2002. The copies of the 2001 and 2002 returns are duplicates of copies submitted previously for the record. In his brief, counsel states that a copy of the petitioner's federal tax return for 1997 is attached, but a copy of that return is not among the documents submitted on appeal, nor was a copy of that return submitted previously.

Counsel states on appeal that the director erred by limiting his analysis to the petitioner's taxable income. Counsel also states that depreciation expenses should be considered as additional financial resources of the petitioner, since they do not represent cash expenses. Counsel states that the petitioner's financial evidence shows steady and stable growth in its business, and establishes the petitioner's ability to pay the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, the only document newly submitted on appeal is a copy of the petitioner's tax return for 2000. That document was not specifically requested by the director. Therefore no grounds would exist to preclude that document from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary claimed to have worked for the petitioner beginning in March 1999 and continuing through the date of the ETA 750B. No documentary evidence to substantiate the beneficiary's claim of prior employment was submitted, nor any

evidence indicating the amount of any compensation received from the petitioner by the beneficiary. The record contains a copy of a Form W-2 Wage and Tax Statement showing compensation received from the petitioner in 2001 by an individual named [REDACTED] but nothing in the record suggests that that name is one which has been used by the beneficiary. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The beneficiary's claim to have been employed by the petitioner therefore fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the following amounts for taxable income on line 28: \$29,651.00 for 2000, -\$943.00 for 2001; and \$78,373.00 for 2002. The figure for 2000 is not directly relevant to the instant petition, since the priority date is in the following year. The figure for 2001 is negative, therefore it fails to establish the petitioner's ability to pay the proffered wage that year. The figure for 2002 is greater than the proffered wage of \$29,432.00 and it is therefore sufficient to establish the petitioner's ability to pay the proffered wage that year.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's 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 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: \$7,578.00 for the beginning of 2000; -\$3,505.00 for the end of 2000; -\$65,828.00 for the end of 2001; and -\$79,468.00 for the end of 2002. The year-end figure for 2000 is relevant to the instant petition, since the end of 2000 was less than four months before the priority date of April 20, 2000. But since that figure is negative, as are the year-end figures for 2001 and 2002, those figures also fail to establish the ability of the petitioner to pay the proffered wage during the relevant period.

Counsel cites several cases as authority in his brief, but only one of those cases is a binding precedent on the AAO, *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). However, counsel's reliance on *Matter of Sonogawa* is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. The evidence shows that the petitioner's net income in 2000 was slightly higher than the proffered wage, was then negative in 2001, and then was significantly higher than the proffered wage in 2002. The petitioner's year-end net current assets were negative in each of the three years for which the petitioner submitted tax returns. The evidence in the record does not establish facts similar to those relied upon in the decision in *Matter of Sonogawa*, 12 I&N Dec. 612.

As noted above, in his brief counsel states that a copy of the petitioner's federal tax return for 1997 is attached. However, a copy of that return is not among the documents submitted on appeal, nor was a copy of that return submitted previously. If a copy of that return had been submitted, it might have shed light on the petitioner's business history. Similarly, the petitioner's federal tax returns for 1998 and 1999 may contain information relevant to the petitioner's business history, but no copies of those returns were submitted for the record.

In his decision in the instant petition, the director correctly summarized the petitioner's tax return evidence and found that the evidence failed to establish the petitioner's ability to pay the proffered wage in the year 2001. The director therefore denied the petition. The director's decision was correct, based on the evidence then in the record.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, CIS electronic records indicate that the petitioner has filed other petitions which have been pending during the time period relevant to the instant petition.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977)

(petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2).

CIS electronic records show that the petitioner has filed a total of seven I-140 petitions since 1998. One petition was filed in 1998, four were filed in 2002 (including the instant petition), one was filed in 2003 and one was filed in 2004.

Evidence in the record of another I-140 petition of the petitioner also pending on appeal with the AAO indicates that the I-140 petition which was filed in 1998, and which was approved in 1999, is being withdrawn by the petitioner and that the labor certification underlying that petition is being applied to a substituted beneficiary in the other I-140 petition which is now pending on appeal with the AAO. But, aside from the petition filed in 1998, each of the other petitions filed by the petitioner remain relevant to the instant petition.

Even a petition already approved in a given year may still be relevant in a later year, since a beneficiary of an approved petition who does not immigrate to the United States immediately may choose to do so later. Approved employment-based immigrant petitions are valid indefinitely, unless revoked under section 203(e) or 205 of the Act. 8 C.F.R. § 204(n)(2). Therefore, any beneficiary of an approved petition who has not yet immigrated could do so in the future and then be hired by the petitioner, adding to the petitioner's proffered wage commitments for the year in which the person is hired.

Even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996); *see* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 (Mathew Bender & Company, Inc. 2004) (available at "LexisNexis" Mathew Bender Online). Therefore, the approved ETA 750's underlying any withdrawn petitions retain potential relevance to the petitioner's total proffered wage commitments for a given year.

The record in the instant case contains no information about the proffered wages for other potential beneficiaries of I-140 petitions filed by the petitioner. No information is submitted about the priority dates of any of the I-140 petitions other than the instant petition. No information is provided about the current immigration status of any of the beneficiaries, whether any beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to any beneficiary. Furthermore, no information is provided about the names or the current employment status of each potential beneficiary, the dates of any hirings and the current wages of any beneficiary.

Lacking evidence about the beneficiaries of other petitions submitted by the petitioner, even if the record contained sufficient evidence about the petitioner's finances, the record in the instant petition would still fail to establish the ability of the petitioner to pay the proffered wage to each beneficiary for whom it has filed a petition, since the record fails to provide a basis for calculating the petitioner's total proffered wage obligations during the relevant period.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition during the relevant period. The record also fails to establish the petitioner's

ability to pay the proffered wage to the beneficiary of the instant petition while also paying the proffered wages to the beneficiaries of other petitions filed by the petitioner.

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.