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DATE 10/05/2006

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



U.S. Citizenship
and Immigration
Services



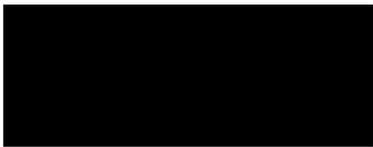
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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 05 2006
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IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 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 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 April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$11.82 per hour, which equals \$24,585.60 per year.

The petition was submitted to CIS on May 27, 2003. On the petition, the petitioner stated that it was established during September of 1992¹ and that it employs 25 workers.² The petitioner declined to report its gross annual income in the space provided for that purpose. The petition states that the petitioner's net annual income is \$25,200.³ On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since November 2001. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Seattle, Washington.

¹ Another petition filed by the petitioner in the instant case, File number [REDACTED] stated that the petitioner was established during January of 1994.

² The petition in [REDACTED] stated that the petitioner employs nine workers.

³ This assertion is not supported by any of the evidence subsequently provided.

In support of the petition, counsel submitted the petitioner's 1999, 2000, and 2001 Form 1120-A U.S. Corporation Short Form Income Tax Returns and an unaudited income statement.

The tax returns show that the petitioner is a corporation, that it incorporated on January 1, 1994,⁴ and that it reports taxes based on the calendar year. During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$3,174. At the end of that year the petitioner's current liabilities exceeded its current assets.

Because the priority date of the petition in this matter is April 23, 2001, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The 1999 and 2000 returns will not be considered for that purpose.

Counsel's reliance on unaudited financial statements is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the unsupported representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on September 26, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements⁵ to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The Service Center also specifically requested that the petitioner provide (1) its bank statements, (2) Form 1099 miscellaneous income statements or Form W-2 Wage and Tax Statements showing amounts paid to the beneficiary since the petitioner hired her, (3) Form 941 Employer's Quarterly Federal Tax Returns for some unspecified year or years, and (4) state unemployment compensation report forms for some unspecified year or years.

Finally, the Request for Evidence states, "Pay vouchers must identify both beneficiary and employer by name and specify the beneficiary's gross/net pay, income received year to date, income tax deductions withheld, and length of pay period."

⁴ This conflicts with the statement, made on the instant petition, that the petitioner was founded during September of 1992.

⁵ Actually, as phrased, the Request for Evidence appears to oblige the petitioner to submit both annual reports and audited financial statements. Most companies, however, neither produce annual reports nor commission audited financial statements. Under these circumstances, this office is not inclined to enforce that request as phrased. The petitioner is obliged, consistent with 8 C.F.R. § 204.5(g)(2), to provide either copies of annual reports, federal tax returns, or audited financial statements to show its continuing ability to pay the proffered wage beginning on the priority date.

Counsel's response is dated December 18, 2003. With that response, counsel submitted (1) semi-weekly payroll printouts covering the period from January 7, 2001 to October 12, 2003, (2) monthly bank statements covering the period from April 2000 through June 2001, (3) statements of an account at a different bank covering and July 2002 through July 2003,⁶ and a Washington State Unemployment Insurance Report for the third quarter of 2003.

Counsel did not provide Federal Form 941 Quarterly Returns, which the Service Center requested. Counsel also provided neither Form 1099 Miscellaneous Income statements nor Form W-2 Wage and Tax Statements, as requested by the Service Center, to show amounts paid to the beneficiary. Counsel provided no explanation of those omissions.

The payroll printouts show that the petitioner employed between seven and ten workers during the period they cover, but do not show that it employed the beneficiary. The printouts for the three pay periods ending May 25, 2003, June 8, 2003, and June 22, 2003 each indicate that the petitioner employed eight workers during those pay periods, which appears to contradict the petitioner's assertion, made on the petition, which was submitted on May 27, 2003, that the petitioner then employed 25 workers. None of those printouts indicate that the petitioner employed the beneficiary during the periods they cover.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

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 September 15, 2003, denied the petition.

On appeal, counsel submits a declaration of [REDACTED] who states that he is the petitioner's president. Mr. [REDACTED] that the petitioner is able to pay the proffered wage and has, in fact, been paying wages to the beneficiary since 1996. Mr. [REDACTED] does not state the amount of those wages or provide any additional evidence in support of his statement.

Counsel argues that the decision of denial "ignores the fact that the alien beneficiary has been working for the petitioner corporation for a considerable period of time, predating the filing of the application for labor certification." Counsel notes that this asserted fact is supported by employer's declaration. Counsel asserts that, although the petitioner's profits were small, the beneficiary's wages would not constitute a new expense, because the petitioner has already been paying wages to the beneficiary. Counsel further argues that the petitioner's payroll printouts, quarterly tax statements, bank statements and tax returns show the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

⁶ Counsel provided no bank statements for the period from July 2001 through June 2002.

The Service Center requested that the petitioner submit bank records. Notwithstanding that request, bank records are not generally reliable evidence of a petitioner's continuing ability to pay the proffered wage beginning on the priority date, and counsel's reliance on those bank statements is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows CIS to consider additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot generally show the sustainable ability to pay a proffered wage.⁷ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

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's president stated that the petitioner has employed the beneficiary since 1996, but neither the petitioner nor counsel provided contemporaneous documentary evidence of that assertion, notwithstanding that the Service Center requested that it provide either Form 1099 statements or W-2 forms. Evidence that was provided, the bi-weekly wage reports, do not support the assertion that the petitioner employed the beneficiary during the period they cover. Especially in view of the apparent misstatement of the number of workers the petitioner employs, the discrepancy in the evidence pertinent to the date the petitioner was founded, and the additional scrutiny occasioned by those apparent misstatements, this office finds that the petitioner did not establish that it employed and paid the beneficiary at any time.

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, 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); *Uheda 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would

⁷ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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 \$24,585.60 per year. The priority date is April 23, 2001.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$3,174. That amount is insufficient to pay the proffered wage. At the end of the year the petitioner had negative 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. The petitioner submitted no reliable evidence of any other funds that were available to it with which it could have paid the proffered wage during 2001. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

Although the September 26, 2003 Request for Evidence asked, consistent with 8 C.F.R. § 204.5(g)(2), that the petitioner submit copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, the petitioner submitted no such evidence pertinent to 2002. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

Further, the priority date of the petition in A97 594 191 was also April 23, 2001. Because the appeal in that case was only recently dismissed, that petition was pending during much of the same time as the petition in the instant case, including during most of 2001 and all of 2002. The petitioner is obliged to demonstrate the ability to pay the proffered wage offered in all pending cases, rather than merely in the instant case. The wage proffered in [REDACTED] could have been included in the calculations pertinent to the petitioner's ability to pay the wage proffered in the instant case. Because the petitioner has not demonstrated even the ability to pay the wages of the instant beneficiary, however, this office need not further analyze its ability to pay concurrently that proffered wage plus the wage offered to the beneficiary in [REDACTED]

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Additional issues exist in this case that were not addressed in the decision of denial.

The record in [REDACTED] states, in various places, that the petitioner's owner's name is Anabel Sahagun, a fact not stated in the instant record. This office observes that, in the instant case, the beneficiary's family name is also Sahagun. This indicates that the petitioner and the beneficiary may be related either by blood or marriage, which would cast suspicion on the assertion that the petitioner is hiring the beneficiary because it was unable to locate suitable U.S. workers for the proffered position.

Pursuant to 20 C.F.R. §626.20(c) (8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship." *See Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000). Because this issue was not raised by the Service Center, however, and the petitioner has not been accorded an opportunity to respond, this office does not base today's decision, in whole or in part, on that issue.

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, in the September 26, 2003 Request for Evidence, the Service Center requested that the petitioner provide its Form 941 Quarterly Returns and that it provide copies of either 1099 forms or W-2 forms showing that it paid wages or other compensation to the beneficiary. Counsel provided none of that requested evidence and no explanation for that omission. 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 petition should have been denied on this additional ground.

The petition will be denied for the above stated reasons, with each reason considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.