



U.S. Citizenship
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Services

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FILE: EAC 03 034 54823 Office: VERMONT SERVICE CENTER Date: OCT 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]

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

The petitioner is a residential siding and roofing firm. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition, having determined that the petitioner had established neither its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, nor the beneficiary's qualifications met those specified in the Form ETA 750 as of the priority date.

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 \$13.06 per hour, which amounts to \$27,165 annually. On the Form ETA 750B, signed by the beneficiary on November 1, 2000, the beneficiary claimed to have worked for the petitioner since February 2000 and continuing until he signed the ETA 750B on November 1, 2000.

The I-140 petition was submitted on November 12, 2002. On the petition, the petitioner claimed to have been established in 1978, to currently have 15 employees, but left blank the boxes asking for the petitioner's gross annual income and net annual income.

In support of the petition, the petitioner submitted:

- Counsel's Form G-28;
- An original certified ETA 750;
- The statement of [REDACTED] in English and not on letterhead, notarized on March 17, 2000, that the beneficiary worked for [REDACTED] "for a period of two years in 1998 and 1999;"
- An immigration court notice served upon the beneficiary on April 24, 2002, for a removal hearing on November 27, 2002; and,

- The petitioner's Form 1120S return for the fiscal year ending June 30, 1998 showing ordinary income of \$4,341.

In a request for evidence (RFE) dated October 21, 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 also specifically requested:

- The petitioner's 2001 and 2002 federal income tax returns;
- Copies of any Form W-2 Wage and Tax Statements for 2001 and 2002 issued to the beneficiary;
- More statements, preferably on letterhead, to establish that the beneficiary has required two-years-minimum job experience.

In response to the RFE, the petitioner submitted, on January 20, 2004¹:

- A second affidavit of January 14, 2004, not on letterhead, in which ██████████ stated his company had employed the beneficiary as a residential roofer from January 1998 until January 2000;
- The Form 1040 return for 2001 of the petitioner's owner ██████████ showing adjusted gross income of \$123,925, and Schedule C net profits of \$80,393 from "Champ's", a siding and cornice business; and,
- The 2002 Form 1040 tax return of the petitioner's owner, ██████████ showing adjusted gross income gains of \$110,851 and Schedule C net profits of \$73,151 from "Champ's".

In a decision dated April 1, 2004, the director determined that the evidence did not establish that the petitioner either had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, or that the beneficiary's qualifications for the position met the requirements specified by the Form ETA 750 as of the petition's priority date. The director stated that she could not consider the property holdings of the petitioner's owners or shareholders in determining whether the petitioner had established its continuous ability to pay the proffered wage. She also said the evidence showed that "██████████ [the petitioner] was not in existence at the time the priority date was established." She further found the evidence failed to demonstrate that the beneficiary possessed the requisite two-year-minimum job experience given that the second ██████████ affidavit stated the beginning and ending of the beneficiary's work at the company in terms of months, not dates.

On appeal, counsel submits no brief or additional evidence. On the Form I-290B counsel asserts that, contrary to the decision, the petitioner did exist as of the priority date but that the petitioner had only changed the name under which it was operating from that of ██████████ Company Inc." to ██████████ Contractors." Further, counsel asserts that the plain language of the second ██████████ affidavit could only mean that the beneficiary had worked for the company for 24 months. Counsel then promised to submit, within 30 days, evidence of the beneficiary's previous roofer work for other companies that predated his job with Sanchez's company.

Counsel checked a box on the Form I-290B indicating that within 30 days he would send a brief and/or evidence to the AAO within 30 days. However, despite this office on September 28, 2005, having faxed counsel a request for the additional evidence promised on the Form I-290B, as of the end of the five business days this office has received nothing further from counsel to date. Accordingly, this office will review the documents currently in the file as the complete record of proceedings.

¹ The RFE had specified that the director must receive the petitioner's response on or before January 16, 2004.

Counsel has not submitted any later tax documents demonstrating the petitioner's existence on the priority date. Instead, counsel has submitted the 2001 and 2002 personal income tax returns of the petitioner's owner each with Schedule C attachments showing net profits of a company with a federal tax ID number different from that listed for the petitioner on the 1998 return. In that regard, this office notes the petitioner declared on the 1998 return that it was a "final return," marking it as the petitioner's last return. By failing to submit the promised documentation to demonstrate counsel's claim, that Champs Contractors was merely the petitioner "operating under a different name," it has failed to establish how the petitioner and Champs are related. While this office concedes a commonality of ownership for both the petitioner and [REDACTED] the petitioner must still establish how the two companies are related, and whether [REDACTED] is the petitioner's successor in interest, under the analysis provided by *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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. 142 (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, the beneficiary claimed to have worked for the petitioner beginning in February 2000, and continued working through November 1, 2000, when the beneficiary signed the ETA 750B. However, despite the RFE requests for the W-2s counsel submitted no W-2s. Accordingly, the claim made in the ETA750B is without documentary support. *Matter of Soffici, supra*.

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 was an S corporation until it filed its final return for tax year 1998. The record of proceedings fails to indicate the form of business structure under which the petitioner currently operates. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. However, counsel has only submitted the 1998 Form 1120S "final" return, which in any event antedates the priority date and outside the range of tax years relevant for this office to assess the petitioner's ability to pay the proffered wage, starting with tax year 2001.

Counsel asserts, however, that [REDACTED]'s 2001 and 2002 Form 1040 returns, with attached Schedule C's listing \$80,393 in net profits from Champ's "cornice and siding contract" business, "show that the company as operated by [REDACTED] had substantial income and assets both in 2001 and 2002." Aside from this assertion, the record of proceedings contains no information regarding the relationship of [REDACTED] and Champs, the company listed on Schedule C of [REDACTED] submitted tax returns.

The director correctly disregarded the submitted 2001 and 2002 returns of [REDACTED], however, stating that a shareholder's income and assets are typically not reachable to creditors of a corporation or nor are shareholders legally obligated to make their personal income and assets available to those operating the corporation. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else.² As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Further, counsel has failed to document how Champs became a successor in interest to [REDACTED]. 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. See *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

Therefore the record of proceedings contains no information for [REDACTED] for the period from the priority date onward, nor does the evidence document that Champs is the petitioner's successor-in-interests. It is accordingly concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The AAO notes that any future proceedings in this matter must address the relationship between J.T. Siding, Inc. and [REDACTED] company as listed on Schedule C of his returns.

The other issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

The petitioner is a roof and siding firm. It seeks to employ the beneficiary permanently in the United States as a roofer. 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 the beneficiary had the two years of job experience as required on the Form ETA 750, despite the director's request for such evidence in the RFE, and she denied the petition accordingly.

² Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

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)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

As stated above, counsel for the petitioner submitted two affidavits from the same employer, a roofing-construction company located in Leesburg, Virginia. The first affidavit indicates the beneficiary had worked for two years in 1998 and 1999³ but without specifying dates, while the second affidavit stated the job began in January 1998 and ended in January 2000, both at unspecified dates. The director correctly observed that by not specifying starting and ending dates for the job, the affidavits left open the possibility that the job lasted less than the full two years required. See, § 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).

On the Form I-290B, counsel promised that the beneficiary "can and will supplement his experience as a Roofer through his employment with other companies, since 1990," which counsel stated had already been requested. Not having the promised documentation, this office can only conclude that the directly denied the petition based upon the evidence failing to establish that the beneficiary has the requisite job experience required on the Form ETA 750.

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.

³ The firsts affidavit implies the beneficiary's end-date at the job occurred in December 1999 and not in January 2000, in conflict with the time period given in both the second affidavit and in the Form ETA750.