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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

Bc

FILE: EAC 02 041 53814 Office: VERMONT SERVICE CENTER Date: **SEP 12 2005**

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:

[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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, revoked approval of the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is in the business of cutting and installing marble and granite. It seeks to employ the beneficiary permanently in the United States as a marble cutter and setter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. Subsequent to approval of the visa petition the Acting 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. The Acting Director revoked approval of the visa petition accordingly.

On appeal, counsel submits a brief.

Section 205 of the Immigration and Nationality Act (the Act) (8 U.S.C. 1155) provides, in pertinent part,

The attorney general may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under Section 204. Such revocation shall be effective as of the date of approval of any such petition.

Section 203(b)(3)(A)(i) of 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.

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.

8 C.F.R. § 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 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 November 13, 2000. The proffered wage as stated on the Form ETA 750 is \$28.72 per hour, which equals \$59,737.60 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

On the petition, the petitioner stated that it was established on June 2, 1986 and that it employs nine workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in New Rochelle, New York.

With the petition, counsel submitted a letter, dated September 4, 2000, from a company in Lebanon engaged in the same business as the petitioner. That letter states that the beneficiary worked for that company full-time as a marble cutter and setter from January 1998 to September 2000.

Counsel also submitted the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner is a corporation and reports taxes pursuant to the calendar year. During 2000 the petitioner reported taxable income before net operating loss deduction and special deductions of \$35,806. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The Vermont Service Center issued a Request for Evidence in this matter on March 5, 2002. The Service Center requested additional evidence that the beneficiary has the requisite employment experience as stated on the approved Form ETA 750 labor certification.

In response counsel submitted a letter dated March 29, 2002. That letter is ostensibly from the same company that originally submitted a letter attesting to the beneficiary's qualifying employment. Although both letters purport to be signed by George Abdul Massih, the owner and general manager of that company, however, the two signatures are markedly different. Further, the second employment verification letter states that the beneficiary worked as a marble cutter and setter for that company from January 1998 to November 13, 2000, a period slightly different from that stated in the first employment verification letter. The petition was approved on May 20, 2002.

The record contains a memorandum, dated December 26, 2002, from the vice consul of the American Embassy in Damascus, Syria. That memorandum states that, in an interview the beneficiary admitted that he had never worked as a stonecutter, but only as an apprentice.

On June 18, 2003 the Director, Vermont Service Center,¹ issued a Notice of Intent to Revoke approval of the petition in this matter. The director noted that during a consular interview the beneficiary admitted that he had no experience in the proffered position. The director also questioned the ability of the petitioner to pay the proffered wage.

In response, counsel submitted an affidavit in Arabic from the beneficiary, dated July 2003, and an English translation. In that affidavit the beneficiary states that the report of his interview is incorrect, that he worked as a marble cutter and setter as stated on his employment documentation, and that did not state otherwise at his consular interview. In a cover letter dated July 14, 2003, counsel argued that the report of the consular interview is apparently in error.

The Acting Director revoked approval of the petition on January 6, 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.

On appeal, counsel asserts,

The beneficiary has documented his experience as a marble cutter including the fact that he has been an apprentice in marble cutting since childhood since it was his family's business for generations. Additionally, the question raised with regard to the salary by Honorable American Consul has been previously raised by Immigration Service during the course of a decision making process on the visa petition and the [Acting Director] found in favour [sic] of the petition. [sic]

In a brief filed to supplement that appeal counsel argues that the petitioner's 2000 taxable income added to its depreciation deduction demonstrates its ability to pay the proffered wage. Counsel again asserts that the report of the consular interview is incorrect, that the beneficiary worked as a marble cutter and setter as stated in his employment documentation, and did not stated otherwise at the interview. Finally, counsel implies that, having been approved based upon the evidence of record; the petition may not now be revoked.

The regulation at 8 C.F.R. § 205.2(a) indicates that a petition may be revoked. Counsel implicit assertion that approval of the instant petition may not be revoked is incorrect.

Counsel argues, based on the beneficiary's affidavit, that the beneficiary did not admit that he had never worked as a stonemason as reported in the report of the consular interview. Doubt cast on any aspect of the petitioner's proof, however, may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition, and 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

¹ Between June 18, 2003, when the Notice of Intent to Deny was issued in this case, and January 5, 2004, when the decision revoking approval of the petition was issued, directorship of the Vermont Service Center passed to an Acting Director.

Dec. 582 (Comm. 1988). In the absence of competent, objective supporting evidence, the affidavit from the beneficiary is insufficient to impeach the credibility of the report of the consular interview. Approval of the petition was correctly revoked on that ground.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

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 did not establish that it employed and paid the beneficiary.

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); *Ubeda 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 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, however, 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 \$59,737.60 per year. The priority date is November 13, 2000.

The petitioner's 2000 tax return shows that it reported taxable income before net operating loss deduction and special deductions of \$35,806. 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, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence of any other funds available to it during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

The petitioner is also required to demonstrate its ability to pay the proffered wage during 2001 and subsequent years, but provided no evidence pertinent to any years other than 2000. Because the petition will be denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage during 2000, this office need not now further examine the petitioner's ability to pay the proffered wage during 2001 and subsequent years. If any further action is taken on this petition, however, the petitioner should address the issue of its ability to pay the proffered wage from 2001 forward.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, approval of the petition was correctly revoked on that additional basis.

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.