



U.S. Citizenship
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FILE: 
EAC 03 043 50927

Office: VERMONT SERVICE CENTER

Date: **SEP 12 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:



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

The petitioner is an auto body and paint shop. It seeks to employ the beneficiary permanently in the United States as a body and fender mechanic/painter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the 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 denied the petition accordingly.

On appeal, counsel 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 3, 2001. Giuliano Esposito, who is identified on that form as the petitioner's owner, signed the Form ETA 750. The proffered wage as stated on the Form ETA 750 is \$18.50 per hour, which equals \$38,480 per year.

On the petition, the petitioner stated that it was established during 1986. The petitioner did not reveal the number of workers it employs in the space provided. 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 would employ the beneficiary in Berwyn, Pennsylvania.

In support of the petition, counsel submitted the first page of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner is a subchapter S corporation and reports taxes pursuant to the calendar year. That first page of the petitioner's 2001 tax return also states that

the petitioner incorporated on September 30, 1982.¹ During 2001 the petitioner reported ordinary income of \$205. Because the corresponding Schedule L was not provided the petitioner's net current assets could not be computed.

Counsel also submitted a letter, dated October 16, 2002, from [REDACTED] Mr. [REDACTED] stated that he is the successor-in-interest to [REDACTED] in his auto body repair business, having purchased the business from him and taken over the lease, equipment, accounts, and personnel. Mr. [REDACTED] also stated that he intends to employ the beneficiary pursuant to the terms of the approved labor certification.

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 August 22, 2003, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested that, if the petitioner employed the beneficiary during 2001 or 2002, it provide copies of the Form W-2 Wage and Tax Statements showing wages it paid to the beneficiary during those years.

In response, counsel submitted no W-2 forms, but submitted a letter, dated November 6, 2003, in which he stated that the petitioner did not employ the beneficiary during 2001 or 2002. Counsel stated that the petitioner employed Mr. [REDACTED] [sic] Esposito during 2001 and for a short time during 2002. Counsel provided W-2 forms showing the wages the beneficiary paid to Mr. [REDACTED] during those years. Counsel provided no other evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The Acting 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 February 10, 2004, denied the petition. In the decision the Acting Director noted that the petitioner had submitted no evidence that it no longer employs [REDACTED] and has not demonstrated, therefore, that the wages formerly paid to him are now available to pay the proffered wage.

On appeal, counsel asserts,

The [Acting Director] denied the above referenced petition based on the fact that the petitioner did not submit documentation to show that Mr. [REDACTED] was no longer employed. There is no documentation of the absence of employment. The only documentation is the existence of employment. Moreover, the question of "ability to pay" is an invention of the regulations which [sic] imposes a higher burden of proof on a petition than the statute requires. When this artificial barrier is then required to be proven at a standard of proof which [sic] exceeds the civil burden of proof it denies the petitioner due process of law.

Counsel submits a brief to supplement the appeal. Counsel states,

¹ This appears to contradict the assertion on the petition that the petitioner was established during 1986.

The proof that is required of ability to pay, as in any other civil issue, is more likely than not a higher standard, such as clear and convincing, requires a Congressional enactment, which is not the case for this issue.

With the appeal, counsel submits an affidavit, dated April 14, 2004, from [REDACTED]. In the affidavit Mr. [REDACTED] attests that he has not worked for that company since May 1, 2001,² and that when he worked there he earned approximately \$740 per 40-hour work week.

Counsel offered no evidence, or even a detailed argument, in support of the assertion that an incorrect standard was applied. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner must, therefore, demonstrate by a preponderance of the evidence that it has the continuing ability to pay the proffered wage beginning on the priority date.

That Mr. [REDACTED] no longer works for the petitioner, however, does not demonstrate that the wages he received were available to pay the proffered wage. The record contains no evidence that Mr. [REDACTED] duties consisted, in whole or in part, of automobile bodywork and painting, rather than, for instance, managerial duties.³ If those wages were paid for the performance of managerial duties or some work other than automobile bodywork and painting, then they were not apparently available to pay wages to an automobile body and fender mechanic/painter, the proffered position, as they were needed to remunerate a manager.

Further, Mr. [REDACTED] assertion that he has not worked for the petitioner since May 1, 2001 appears to be contradicted by other evidence. Mr. [REDACTED] asserted wage of \$740 per week equals \$38,480 per year. A W-2 form in the file shows that Mr. [REDACTED] was paid \$48,100 during 2001, although Mr. [REDACTED] states that he worked only the first four months of that year. Another W-2 form in the file shows that the petitioner paid Mr. [REDACTED] \$10,175 during 2002, although he asserts that he did not work for the petitioner during that year.

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). In view of the contradictory evidence, and absent independent objective evidence of the date on which Mr. [REDACTED] ceased to work for the petitioner, if in fact, he

² Counsel is apparently withdrawing his argument pertinent to proving a negative. Other evidence that would have supported the proposition that Mr. [REDACTED] no longer works for the petitioner includes, but is not limited to, a government document, such as a W-2 form, showing that Mr. [REDACTED] is now employed elsewhere full-time or a government document, such as a W-3 transmittal, showing the names of all of the petitioner's employees, assuming that it did not include Mr. [REDACTED] name. Many other types of evidence might also have been submitted to support the proposition that the petitioner no longer employs Mr. [REDACTED]

³ Because Mr. [REDACTED] was the owner of the petitioning business when it employed him, his duties may have included, or entirely consisted of, managerial duties.

ceased to work for the petitioner, this office does not find the affidavit convincing evidence, even at the preponderance of evidence standard of proof. The wages paid to Mr. [REDACTED] during 2001 and 2002 will not be considered in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

If counsel had demonstrated by a preponderance of the evidence that Mr. [REDACTED] duties were solely those of the proffered position, and that he no longer works for the petitioner, then all of those wages would be considered a fund available to pay the proffered wage. Because the petitioner paid Mr. [REDACTED] \$48,100 during 2001 and \$10,175 during 2002, those wages would then have demonstrated the petitioner's ability to pay the proffered wage during 2001, when Mr. [REDACTED] wages exceeded the proffered wage, but not during 2002, when they did not.

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 a given 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 total 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 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 \$38,480 per year. The priority date is April 3, 2001.

During 2001 the petitioner reported ordinary income of \$205. That amount is insufficient to pay the proffered wage. Counsel did not submit the corresponding Schedule L or any other evidence from which the petitioner's 2001 end-of-year net current assets could be calculated. Counsel submitted no reliable evidence of any other funds available to the petitioner with which it could have paid the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The Request for Evidence in this matter was issued on August 22, 2003. In that Request for Evidence the Service Center requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date, the petitioner's 2002 tax return should have been available. Counsel did not submit that return, did not state any reason for that omission, and did not submit any other reliable evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

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

An additional issue exists in this case that was not addressed in the decision of denial. The October 16, 2002 letter from Ronald Feldman states that he bought the company from Giuliano Esposito. The substituted petitioner must demonstrate that it is a true successor of the original petitioner within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It 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 petitioner's new owner's letter states that he has taken over the lease, equipment, accounts, and personnel of the previous owner and intends to employ the beneficiary. It does not allege, let alone demonstrate, that no duties or obligations were extinguished⁴ in the transfer of the petitioning business from Mr. [REDACTED] to Mr. [REDACTED] and does not demonstrate that the current petitioner is the true successor within the meaning of *Dial Auto Repair Shop*. Because that issue was not cited in the decision of denial, however, and the petitioner has not been accorded an opportunity to address it, that issue forms no part of the basis of today's decision.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁴ A guarantee pertinent to work done by the original petitioner might or might not be honored by the substituted petitioner, and is an example of a duty or obligation that may or may not have been extinguished in the transfer of the petitioning company.