

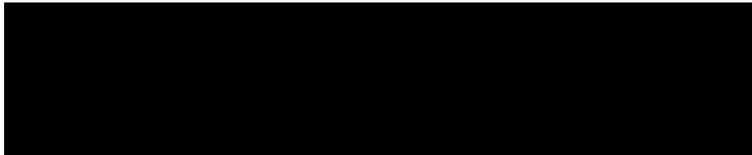
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



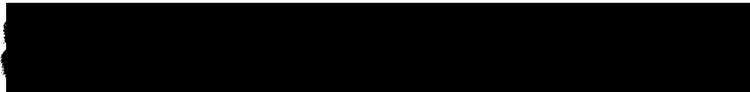
B6

FILE: 
EAC 03 043 50739

Office: VERMONT SERVICE CENTER

Date: SEP 14 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 a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 statement.

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.

Section 204(j) of the Immigration and Nationality Act (the Act) 8 U.S.C. §1154(j), states that,

A petition under subsection (a)(1)(D) of this section for an individual whose application for adjustment of status pursuant to section 1255 of this title has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

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 20, 2001. The proffered wage as stated on the Form ETA 750 is \$12.60 per hour, which equals \$26,208 per year.

The petition in this matter was submitted on October 30, 2002. On the petition, the petitioner stated that it was established on October 20, 1976 and that it employs three workers. The petitioner did not state its gross annual income or its net annual income in the spaces provided for that purpose. 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 Boston, Massachusetts.

In support of the petition, counsel submitted a copy of 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 a fiscal year beginning on October 1 of the nominal year and ending on September 30 of the following year.

The return further shows that during the 2000 fiscal year, which ran from October 1, 2000 to September 30, 2001, the petitioner reported a loss of \$574 as its taxable income before net operating loss deduction and special deductions. At the end of that fiscal year, the petitioner had current assets of \$22,232 and current liabilities of \$5,113, which yields net current assets of \$17,119.

Because that tax return was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on October 14, 2003, requested, *inter alia*, 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 to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a letter, dated January 5, 2004, in which he stated that the beneficiary no longer wishes to work for the petitioner but now works for Ristorante Marsala. Counsel did not state when the beneficiary had changed employers.

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 20, 2004, denied the petition.

On appeal, counsel argues that pursuant to the American Competitiveness in the Twenty-First Century Act (Pub. Law 106-313) (AC21) the petition should be approved notwithstanding that the original petitioner never demonstrated that it was able to pay the proffered wage.

AC21 permits beneficiaries of certain employment-based immigrant visa petitions with pending applications for adjustment of status (Form I-485) to change jobs under certain circumstances. An otherwise approvable Form I-485, Application for Permanent Residence or Adjustment of Status is no longer necessarily deniable merely because the beneficiary changed jobs during its pendency.

AC21 provides that the petition for an individual whose application for adjustment of status pursuant to section 245 of the Act has remained unadjudicated for 180 days or more shall "remain valid" with respect to a new offer of employment if the individual changes employment or employers if the new job is in the same or a similar occupational classification as the job for which the immigrant visa petition was filed.

The instant case concerns, not the Form I-485¹, but the I-140 petition. Counsel asserts that there is no provision that the underlying petition must be approved in order for the beneficiary to utilize the provisions of AC21. The AAO does not agree. The statutory language of section 204(j) of the Act states that the petition will “remain valid....” The plain meaning of the phrase “remain valid” conveys that the petition was *previously* valid. We are expected to give the words used in the statute their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

When AC21 was enacted, October 17, 2000, the regulations did not permit the concurrent filing of Forms I-140 and I-485. Rather, the beneficiary was precluded from filing Form I-485 until the Form I-140 was approved. In other words, the only possible scenario where an alien’s employment-based Form I-485 might have been pending for more than 180 days is one in which the Form I-485 was approved prior to the filing of the Form I-140. Thus, at the time the statute was enacted, the only possible meaning of the term “valid” in the phrase “remain valid” as it related to the Form I-140 is “approved.” The legislature is presumed to be familiar with the background of existing law when it legislates. *Cannon v Univ. of Chicago*, 441 U.S. 677 (1979); *Valansi v. Ashcroft*, 278 F.3d 203, 212 (3d Cir. 2002); *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 964 n. 3 (BIA 1995); “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.” *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). That Congress chose not to alter the existing regulatory requirements suggests that Congress was aware that its use of the phrase “remain valid” would mean “approved.” In the instant case, the petition has never been approved, and therefore, AC21 cannot affect the adjudication of the appeal of the denial.

Further, counsel has not demonstrated that any provision of AC21 obviates the need to demonstrate, pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner’s ability to pay the proffered wage. As discussed above, AC21 cannot affect the instant petition because the instant petition has not been approved. The issue in this case is with the petitioner’s ability 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).

¹ Because AC21 allows a qualified alien to proceed with his or her application for adjustment of status despite him or her lacking the (previously requisite) intent to work for the petitioning employer, the proper venue for such a claim is before the CIS official with jurisdiction over the beneficiary’s Form I-485 application.

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 \$26,208 per year. The priority date is April 20, 2001.

The priority date falls within the petitioner's fiscal year 2000. During that fiscal year the petitioner declared a loss. The petitioner is unable to demonstrate the ability to pay any portion of the proffered wage out of its profits during that fiscal year. The petitioner ended the year with net current assets of \$17,119. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during its 2000 fiscal year with which it could have paid the proffered wage.

The petitioner has not demonstrated the ability to pay the proffered wage during its 2000 fiscal year. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.