



U.S. Citizenship
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FILE:



Office: VERMONT SERVICE CENTER

Date: APR 25 2006

EAC-04-008-51495

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (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 construction company. It seeks to employ the beneficiary permanently in the United States as a cement mason. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, counsel submits a brief statement and additional evidence.¹

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 nature, for which qualified workers are not available in the United States.

The regulation 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, 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 U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$18.44 per hour (\$38,355.20 per year). On the petition, the petitioner claimed to have been established on July 23, 2001, to have a gross annual income of \$97,329, and to have a net income of \$(1,100). The petitioner did not claim any number of employees. According to the tax return in the record, the petitioner was structured as an S corporation and the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 9, 2001, the beneficiary did not claim to have worked for the petitioner.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The petitioner submitted the petition with Form 1120S tax return for 2001 filed by the petitioner, the beneficiary's individual tax returns and W-2 forms for 1999 through 2002 and three pay stubs from August and September 2003. On June 2, 2004, because the director deemed the tax return for 2001 insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence (RFE) pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and continuing to the present. The director specifically requested the petitioner's 2002 and 2003 federal tax returns with all schedules and attachments, and all W-2 and Form 1099 for all employees for 2001, 2002 and 2003.

In response to the director's RFE, the petitioner submitted the beneficiary's W-2 form and tax return for 2003, and its tax return for 2001 and 2002.

The director denied the petition on September 20, 2004, finding that the evidence submitted with the petition and in response to her RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the petitioner has paid the beneficiary the partial proffered wage, therefore, the difference between the wage actually paid and the proffered wage was never greater than \$16,143.16, and that depreciation expenses should be available to pay the beneficiary the prevailing wage. The petitioner submits a letter from its accountant on appeal.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 record contains copies of the beneficiary's W-2 forms for 1999 through 2003. Only the W-2 forms for 2001 through 2003 reflect the beneficiary's compensation from the petitioner. The beneficiary's W-2 forms for 2001 through 2003 show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$11,040.00	\$38,355.20	\$27,315.20
2002	\$22,432.75	\$38,355.20	\$15,922.45
2003	\$23,812.25	\$38,355.20	\$14,542.95

The above information shows that the petitioner did not establish that it paid the beneficiary the full proffered wage in any of the years at issue in the instant petition, however, it established that it paid the beneficiary partial wages in those years. The petitioner is still obligated to demonstrate that it had the ability to pay the difference between the wage actually paid to the beneficiary and the proffered wage in these years, which is \$27,315.20 in 2001, \$15,922.45 in 2002 and \$14,542.95 in 2003.

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, CIS will next examine the net income figure reflected on the petitioner's

federal income tax return, 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. 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). Reliance on gross receipts is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid compensation to officers in excess of the proffered wage is insufficient.

The letter submitted on appeal from the petitioner's accountant relies on the petitioner's gross income and its anticipated growth. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if eligibility is not established at the priority date, with the expectation of eligibility at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel argues on appeal that the petitioner's depreciation in 2001 and 2002 were on-hand throughout the year to pay the beneficiary the proffered wage had it been necessary. Reliance on depreciation in determining the petitioner's ability to pay the proffered wage is misplaced. 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 and 2002. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the difference between the wage actually paid and the proffered wage from the priority date.

In 2001, the Form 1120S stated net income² of \$(1,100).

In 2002, the Form 1120S stated net income of \$4,545.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the difference of \$27,315.20 in 2001 and \$15,922.45 in 2002 between the wages actually paid to the beneficiary and the proffered wage respectively.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. Contrary to counsel's reference to the petitioner's total assets in his appellate brief, the petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield that the petitioner had current assets of \$17,113 and current liabilities of \$8,870, therefore, net current assets were \$8,243 in 2001; the petitioner had current assets of \$21,294 and current liabilities of \$15,786, therefore, net current assets were \$5,508 in 2002. Therefore, the petitioner did not have sufficient net current assets to pay the difference of \$27,315.20 in 2001 and \$15,922.45 in 2002 between the wages actually paid to the beneficiary and the proffered wage respectively.

Therefore, the petitioner has not established that it had the ability to pay the beneficiary the proffered wage in 2001, the year of the priority date, and 2002 through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner had not established its continuing ability to pay the proffered wage in 2003 because it failed to submit evidence for that year. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. §1361. However, in the instant case, the record before the director closed on July 2, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 would have been due. Therefore the tax return for 2003 should be the most recent return available. In the RFE dated June 2, 2004, the director asked to "[s]ubmit additional evidence

² Ordinary income (loss) from trade or business activities as reported on Line 21.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

to establish that the employer had the ability to pay the proffered wage or salary of \$18.00[sic] an hour as of April 25, 2001, the date of filing and **continuing to the present**" (Emphasis added). The director specifically requested the petitioner's 2003 tax return. However, in response the petitioner did not submit its 2003 tax return, nor did the petitioner explain why. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for the years from the priority date to the present. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

Beyond the director's decision, the AAO notes there is another issue needed to be discussed, that is whether the petitioner established that it is a successor-in-interest of [REDACTED]. 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).

The record of proceeding shows that [REDACTED] then located at [REDACTED] Riverdale, MD 20737, the same address as the petitioner's current one, filed a labor certification application on behalf of the beneficiary on April 25, 2001, which was approved by the Department of Labor on February 3, 2003. On October 6, 2003 the petitioner filed the instant immigrant visa petition based on the certified ETA 750 filed by [REDACTED]. With the petition a letter dated February 27, 2003 from [REDACTED] the president of the petitioner was submitted. Per Mr. [REDACTED] letter, he was a stock holder with 50% ownership of [REDACTED] since May 17, 1999 to July 31, 2001, and established [REDACTED] the instant petitioning entity, on July 23, 2001. The record of proceeding contains a copy of Notice of Designation Change of Principal Office/Resident Agent [REDACTED] in which [REDACTED] c. changed its resident agent from [REDACTED] to [REDACTED] and its principal office from [REDACTED] Riverdale, MD 20737 to [REDACTED] Lanham, MD 20706. Stock Certificate in the record also shows that [REDACTED] sold his 50% of shares of [REDACTED] to [REDACTED] on July 31, 2001. However, the record contains no evidence that the petitioner, [REDACTED] qualifies as a successor-in-interest to [REDACTED]. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. Whether or not the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The petitioner did not submit such documentary evidence. The petitioner did not establish that it qualifies as a successor-in-interest to [REDACTED].

The petition will be denied for the above stated reasons, with each 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.