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FILE: [Redacted]
EAC-04-056-53275

Office: VERMONT SERVICE CENTER

Date: APR 25 2006

IN RE: Petitioner:
Beneficiary:



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:

SELF-REPRESENTED

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 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 director determined that the petitioner had not sufficiently established that the beneficiary possessed the required past work experience and denied the petition accordingly.

On the Form I-290B, signed by the petitioner on October 12, 2004, the petitioner checked the block indicating that it would be sending a brief and/or evidence to the AAO within 30 days. As of this date, more than 16 months later, the AAO has received nothing further. The record of proceeding contains a Form G-28, Notice of Entry of Appearance as Attorney or Representative, for a new counsel signed by Agim Djenci. However, the record does not contain any evidence showing that Agim Djenci is an authorized representative for the petitioner. Therefore, AAO treats the instant appeal as self-represented.

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.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date 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 February 28, 2001.

CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The certified Form ETA 750 in the instant case states that the position of cook requires two (2) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on February 22, 2001, the beneficiary set forth his work experience. He listed his experience as working 40 hours a week as a "Sub Chef" at a restaurant in Staten Island, New York without indicating the restaurant's name from February 1997 to the present (i.e., the date of the preparation of the Form ETA 750B which was dated February 22, 2001), and working 40-50 hours a week as a "Kitchen Worker" at Golden Dove Restaurant in Staten Island, New York from March 1997 to September 1999.

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) or 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.

See also 8 C.F.R. § 204.5(1)(3).

The instant I-140 petition was submitted on December 18, 2003 with a letter from the beneficiary describing his employment experience. On February 6, 2004 the director issued a request for evidence (RFE). Because submitted documents were insufficient to establish the beneficiary's qualifications for the proffered position, the director requested that the petitioner submit evidence to establish that the beneficiary possessed the required 2 years of past experience as a cook as of February 28, 2001, the date of filing. The director noted that the evidence should conform to the regulation at 8 C.F.R. § 204.5(g)(1).

In response to the director's RFE, the petitioner submitted the same letter from the beneficiary again. On September 13, 2004, the director determined that the letter from the beneficiary was self-serving as the beneficiary stood to benefit from the approval of the petition, and therefore, the petitioner had not sufficiently established that the beneficiary possessed the required work experience, and denied the petition accordingly.

On appeal, the petitioner asserts that the director's decision is unreasonable, arbitrary and capacious because they followed Labor Department regulations and obtain a labor certification with the beneficiary's letter.

The beneficiary's letter states in pertinent part that:

I was working for a period of two and a half years at the Golden Dove Restaurant, Richmond Avenue, Staten Island, New York 10307.

This employment was in the kitchen, where I worked preparing meals and salads, and cooking under the directdion[sic] of the head cook. It was between the periods of March 1997 to Septmber[sic] 1999.

I have requested the owner of this Restaurant to provide me a written verification of this employment, but he has refused, as you must understand I was not authorized to work in the United States. For this reason, I have stated these above facts in the form of this affidavit.

The beneficiary's letter is clearly not a letter required by the regulation at 8 C.F.R. § 204.5(g)(1). It is not from a current or former employer or trainer. However, it indicates that the required letter is not available because the employer refused to provide such a letter. The regulation allows to consider other documentation in the circumstance the required letter is unavailable.

Although 8 C.F.R. § 204.5(g)(1) permits the consideration of other documentation of the beneficiary's qualifying experience in the circumstances that the required evidence is not available, it still requires other documentation to meet certain evidentiary standards. The regulation at 8 C.F.R. § 103.2(b)(2)(i) states in pertinent parts that: "If a required document ... does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence ... If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and

relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances.” The beneficiary’s letter is notarized with a simple stamp and signature from a notary public, however, it does not contain any language typically set forth by a notary, such as oaths or affirmations. It is not an affidavit. The letter also contains inconsistencies. The letter does not indicate how many hours per week the beneficiary worked for the restaurant during his employment. However, on the Form ETA 750B the beneficiary claimed that he worked 40-50 hours per week for Golden Dove Restaurant from March 1997 to September 1999. The beneficiary also claimed to have worked 40 hours per week for the petitioner since February 1997. The beneficiary’s letter does not explain how he managed to work 80-90 hours per week for both the petitioner and the Golden Dove Restaurant from March 1997 to September 1999. Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record of proceeding does not contain any evidence to substantiate that the beneficiary worked for Golden Dove Restaurant as a full-time cook from March 1997 to September 1999 except the statement from the beneficiary himself. 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)).

For the reasons discussed above, the appeal and the evidence submitted fail to overcome the decision of the director.

Beyond the director’s decision, the AAO will discuss whether the petitioner demonstrated its continuing ability to pay the proffered wage as of the priority date. 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 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 February 28, 2001. The proffered wage as stated on the Form ETA 750 is \$15.12 per hour (\$31,449.60 per year). On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income in excess of \$1 million, to have a net income in excess of \$250,000, and to currently employ 35-50 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 22, 2001, the beneficiary claimed to have worked for the petitioner since February 1997.

The petitioner submitted the petition without any evidence of the petitioner's ability to pay the proffered wage. Therefore, the director issued a RFE on February 6, 2004, requesting evidence of the petitioner's ability to pay the proffered wage or salary of \$31,449.60 per year as of February 28, 2001, the date of filing and continuing to the present in the form of tax returns, the beneficiary's W-2 wage and tax statements, and Form 941. In response the petitioner submitted its Form 1065 U.S. Return of Partnership Income for 2000 and 2001.

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, counsel claimed that the beneficiary had been employed either on a part-time or full time basis since 1997 but was not issued a W-2 form as he did not possess a social security number. Therefore, the petitioner did not submit a W-2 form or any other documentation of the beneficiary's compensation from the petitioner during the years in question. 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)). Therefore, the petitioner did not establish that it paid the beneficiary the proffered wage from the priority date through the present.

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). 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 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 a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else. An investor's liability is limited to his or her initial investment. As the owners and others only are obliged to pay a certain portion of those debts should they come due, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

The record contains copies of the petitioner's Form 1065 U.S. Return of Partnership Income for 2000 and 2001. The priority date in the instant case is February 28, 2001, therefore, the tax return for 2000 covering January 1, 2000 to December 31, 2000 is not necessarily dispositive. The record before the director closed on March 29, 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 was not yet due. Therefore the petitioner's tax return for 2002 should be the most recent return available. However, the record does not contain the petitioner's tax returns for 2002. The AAO will consider the 2001 tax return in the record only.

The petitioner's 2001 tax return demonstrates that the petitioner had net income of \$8,625¹ in 2001, the year of the priority date, which is insufficient to pay the beneficiary the proffered wage that year.

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. 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.² A LLC's year-end current assets are shown on Schedule L of Form 1065, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. 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.

¹ Ordinary income (loss) from trade or business activities as reported on Line 22 of Form 1065.

²According 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.

Calculations based on the Schedule L's attached to the petitioner's tax return yield the amounts for net current assets as follows: current assets were \$24,268 and current liabilities were \$63,157, therefore, the net current assets in 2001 were \$(38,889). Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in 2001, the year of the priority date.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor in 2001, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage as of the priority date through an examination of wage paid to the beneficiary, or its net income, or net current assets.

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.