



U.S. Citizenship  
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

**AUG 29 2006**

WAC 03 228 50125

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:

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 Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a law firm. It seeks to employ the beneficiary permanently in the United States as a legal secretary. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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, and, that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

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 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 regulation at 8 CFR § 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 U.S. 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 June 18, 1996.<sup>1</sup> The proffered wage as stated on the Form ETA 750 is \$27,500.00 per year. The Form ETA 750 states that the position requires two years of experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor with ETA Part B for the substitute beneficiary; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on December 19, 2003, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures and dates, and audited financial statements for 1996, 1997, 1998, 1999, 2000, 2001, 2002, and 2003. As the Form ETA 750 stated that the petitioner employed the beneficiary since October 1994, the director requested that the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statements for that date until 1993.

Also, the director requested the petitioner submit copies of California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees with job titles and duties of each employee.

In response to the request for evidence, counsel submitted copies of the following documents: the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns (first pages only) for years 1996, 1997, 1998, 1999, 2000, 2001, and 2002.

The director made a second request for evidence on February 25, 2004, requesting copies of complete tax returns, and the petitioner was again requested to provide copies of the beneficiary's W-2 Wage and Tax Statements.

In response to the request for evidence, counsel submitted copies of the following documents: U.S. federal tax returns with signatures and dates, and audited financial statements for 1996, 1997, 1998, 1999, 2000, 2001, and 2002; two checks payable to the beneficiary dated December 31, 2003 and February 2, 2004 for \$3,369.70

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<sup>1</sup> It has been approximately twelve years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." Also, there is in the record of proceeding a letter from the petitioner dated June 21, 2003, offering the substitute beneficiary permanent employment as a Legal Secretary at the salary of \$2,115.00 per month (\$25,380.00 per year). This salary offer is less than the proffered wage established twelve years ago. *An amended employment letter is required to conform to the labor certification terms.*

respectively; and, three W-2 Wage and Tax Statements, one stating wages paid to the beneficiary in the amount of \$4,000.00.

The director denied the petition on December 13, 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 petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

On appeal, counsel asserts “[The CIS] ..has erred in calculation of time; interpreting the law of “portability;” Missed or overlooked certain documents and its Decision is not only grossly unjust, but also arbitrary, capricious and discriminatory ....”

Counsel has submitted the following documents to accompany the appeal statement: a brief dated December 23, 2004; three complete U.S. federal income tax returns for 2001, 2003 and 2003; a letter from petitioner’s accountant; two pages entitled “Cumulative General Ledger” showing a year-to-date loss (1/1/03-12/31/03) for an apparent client; eight unsigned or dated computer generated sheets marked EDD DE6, State of California; three pages entitled “Cumulative General Ledger” all dated 1/1/03 to 12/31/03; four Forms 1096; 18 Form 1099-MISC statements; Forms W-3; three W-2 Wage and Tax Statements for 2003 (one of which states wages paid to the beneficiary in 2003 of \$4,000.00); three W-2 Wage and Tax Statements for 2002; two W-2 Wage and Tax Statements for 2002; two W-2 Wage and Tax Statements for 2002; and, six W-2 Wage and Tax Statements for 2002.

In determining the petitioner’s ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary since October 1994. The petitioner paid the paid to the beneficiary \$4,000.00 in 2003. There is a letter in the record of proceeding from the petitioner’s accountant that states in part, “This is also to confirm that, estimated payroll expense for year ending December 31, 2004 is \$86,623, including \$49,823 payroll of [REDACTED] from January 2004 to December 31, 2004.”

The petitioner sent additional information relating to his appeal as received September 19, 2005. In that transmittal he provided a W-2 Wage and Tax Statement for 2004 stating wages paid the beneficiary of \$49,823.64, and seven checks to the beneficiary in 2005 in equal amounts of \$3,369.70.

Again by transmittal received November 30, 2005, the petitioner transmitted a cover letter with a self-prepared schedule listing all wage payments to the beneficiary totaling \$92,000.00 since December 15, 2003, with monthly wage payments consistently paid each month from January 15, 2004 through October 15, 2005 of \$4,000.00 indicating a yearly wage of \$48,000.00.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. 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 v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$27,500.00 per year from the priority date of June 18, 1996:

- In 1996, the Form 1120S stated taxable income<sup>2</sup> of \$44,625.00.
- In 1997, the Form 1120S stated taxable income of \$31,757.00.
- In 1998, the Form 1120S stated taxable income of \$41,953.00.
- In 1999, the Form 1120S stated taxable income of \$28,452.00.
- In 2000, the Form 1120S stated taxable income of \$41,541.00.
- In 2001, the Form 1120S stated taxable income of \$34,987.00.
- In 2002, the Form 1120S stated taxable income of \$18,100.00.
- In 2003, the Form 1120S stated taxable income of \$33,692.00.

Therefore the petitioner had sufficient funds to pay the proffered wage for seven out of the last eight years. Presently the petitioner is paying the beneficiary much more than the proffered wage.

There is in the record of proceeding a letter from the petitioner dated June 21, 2003, offering the substitute beneficiary permanent employment as a *Legal Secretary* at the salary of \$2,115.00 per month (\$25,380.00 per year). This salary offer is less than the proffered wage established twelve years ago. An amended employment letter is required to conform to the labor certification terms.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner has demonstrated its ability to 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.

A second issue to be discussed below is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is March 3, 2000. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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.

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<sup>2</sup> IRS Form 1120S. Line 21

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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of legal secretary.

In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education .....	
Grade School	<u>C [completed?]</u>
High School	<u>C</u>
College	<u>C</u>
College Degree Required	<u>Blank</u>
Major Field of Study	<u>Blank</u>
Training	<u>Blank</u>
Experience .....	
Job Offered - Years/Mos.	<u>2/0</u>
Related Occupation	<u>N/A</u>
Years/Mos.	<u>0/0</u>

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, sets forth work experience for the position of legal secretary:

15. WORK EXPERIENCE

(a)

NAME AND ADDRESS OF EMPLOYER

[redacted] [no address given]

NAME OF JOB

Legal secretary

DATE STARTED

Month - 01 [January] Year 1996

DATE LEFT

Month - 12 [December] Year 1998

KIND OF BUSINESS

Law Firm

DESCRIBE IN DETAIL DUTIES..

Prepared and organized case files ...

NO. OF HOURS PER WEEK

40

Pertinent to the issue above, a request for evidence was issued by December 19, 2003 and February 25, 2004 by the director. Consistent with the requirements of 8 C.F.R. 204.5 § (1)(3)(ii), the Director requested, *inter alia*, that evidence of the beneficiary's employment experience with the petitioner including W-2 statements and the start date of employment, all the beneficiary's W-2 statements from 1994 to 2003; evidence that the beneficiary has completed a high school education, and evidence of two years of experience according to the regulation already cited herein.

Counsel submitted the beneficiary's W-2 statement for 2003 and her paychecks received by her in 2004 already recited and set forth above as well as the other evidence requested.

To recount here, the evidence presented in the record of proceeding, evidence was submitted to show that the petitioner employed the beneficiary since October 1994. The petitioner paid the beneficiary \$4,000.00 in 2003. There is a letter in the record of proceeding from the petitioner's accountant that states in part, "This is also to confirm that estimated payroll expense for year ending December 31, 2004 is \$86,623, including \$49,823 payroll of [REDACTED] from January 2004 to December 31, 2004."

The petitioner sent additional information relating to his appeal as received September 19, 2005. In that transmittal he provided a W-2 Wage and Tax Statement for 2004 stating wages paid the beneficiary of \$49,823.64, and seven checks to the beneficiary in 2005 in equal amounts of \$3,369.70.

Again by transmittal received November 30, 2005, the petitioner transmitted a cover letter with a self-prepared schedule listing all wage payments to the beneficiary totaling \$92,000.00 since December 15, 2003, with monthly wage payments consistently paid each month from January 15, 2004 through October 15, 2005 of \$4,000.00 indicating a yearly wage of \$48,000.00.

Therefore, pay stub or other evidence of wages paid contained in the record of proceeding establish that the beneficiary was employed for two years in an employment capacity of the proffered position. Further, the AAO does find mention the beneficiary's work experience to be credible as there is evidence of prior experience or training. According to the certified Form ETA 750 Part B, the beneficiary has two law degrees, a Bachelor of Arts in private law received in July 1978 and a Masters Degree in private law received July 1980 both degrees received from the University De Droit D'Economie, Paris, France. According to the statement of the petitioner, supported by the payroll data, the beneficiary was employed by [REDACTED] and he during the period stated in the above wage payment schedule.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does demonstrate credibly that the beneficiary had the requisite two years of experience. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

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 met that burden.

**ORDER:** The appeal is sustained.