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FILE:



Office: VERMONT SERVICE CENTER

Date: **JAN 24 2006**

EAC-04-048-50046

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, Director
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 landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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 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, the petitioner¹ submits a brief statement and/or additional evidence².

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 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 May 18, 2001. The proffered wage as stated on the Form ETA 750 is \$26,998 per year. The Form ETA 750

¹ The petition and the instant appeal were filed by [REDACTED] of Immigration Solutions & Systems, Inc. with a Form G-28 as representative. However, a review of recognized organizations and accredited representatives reported in October 2005 by the Executive Office for Immigration Review, does not mention [REDACTED] or Immigration Solutions & Systems, Inc. Under 8 C.F.R. § 292.1, persons entitled to represent individuals in matters before the Department of Homeland Security (“DHS”), and the Immigration Courts and Board of Immigration Appeals (“Board”), or the DHS alone, include, among others, accredited representatives. Any such representatives must be designated by a qualified organization, as recognized by the Board. A recognized organization must apply to the Board for accreditation of such a representative or representatives. Therefore, the AAO considers the instant petitioner as self-represented.

² 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).

states that the position requires 2 years experience. On the Form ETA 750B, signed by the beneficiary on June 18, 2002, the beneficiary did not claim to have worked for the petitioner.³

On the petition, the petitioner claimed to have been established in 1998 as Clean Cut Property, to have a gross annual income of \$201,000, and to currently employ 25 maintenance workers. The petition was filed with Form 1040 US Individual Income Tax Return filed by the owner of Clean Cut Property Maintenance for 2001 pertinent to the ability to pay the proffered wage.

On August 18, 2004, the director determined that the petitioner had not demonstrated the ability to pay the proffered wage since the priority date without taxable income, with a loss of \$19,828 from his business and without evidence that the previous employees retired or quit although he spent \$42,390 in labor in that year.

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 beneficiary did not claim to have worked for the petitioner.⁴ The brief statement dated September 18, 2004 states that the beneficiary has become an employee of the petitioner pursuant to his USCIS employment authorization, but does not mention when he became an employee. CIS record shows that the beneficiary's employment authorization was approved on April 20, 2004. The petitioner did not submit W-2 forms for the beneficiary for any period since the priority date, however, submits a copy of 2001 Form 1099-misc issued by Clean Cut Property Maintenance which shows that Clean Cut Property Maintenance compensated the beneficiary in the amount of \$19,550 in 2001. That amount is \$7,448 less than the proffered wage in 2001.

The petitioner also submits a copy of 2001 Form 1099-misc showing Clean Cut Property Maintenance paid Freedom Tree Service (with federal identification number: [REDACTED]) in the amount of \$11,690 in 2001 and claims that this evidences that the \$42,390 paid for labor costs in 2001 are available for consideration of the petitioner's ability to pay. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the services Freedom Tree Service provided involve the same duties as those set forth in the Form ETA 750 or that Freedom Tree Service employed or was owned by the beneficiary. The petitioner has not documented the positions, duties, and termination of the service who performed the duties of the proffered position. If that company performed other kinds of work, then the beneficiary could not have replaced the employees of Freedom Tree Service.

The record of proceeding does not contain any evidence that Clean Cut Property Maintenance employed and paid the beneficiary in 2002 through the present.

Therefore, the petitioner has established that Clean Cut Property Maintenance paid partial wages to the beneficiary in 2001. However, it is still obligated to demonstrate that it could pay the difference between the

³ On Form ETA 750B signed by the beneficiary on June 18, 2002, he claimed that he had worked for various odd jobs since December 2000.

⁴ On Form ETA 750B signed by the beneficiary on June 18, 2002, he claimed that he had worked for various odd jobs since December 2000; on Form G-325A signed on November 10, 2003, he claimed to have worked for various odd jobs since January 2001.

wages actually paid to the beneficiary and the proffered wage in 2001. The petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from 2002 through the present.

The evidence indicates that Clean Cut Property Maintenance was operated as a sole proprietorship in 2001 despite the petitioner claimed "an S corporation in 2001" in the letter dated November 14, 2003. The record contains a copy of the Form 1040 U.S. Individual Income Tax Return of the owner for 2001. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 (approximately thirty percent of the petitioner's gross income).

The 2001 Form 1040 tax return stated adjustable gross income⁵ of \$(19,828). With the negative adjusted gross income the sole proprietor failed to demonstrate his ability to pay the beneficiary the difference of \$7,448 between wages already paid to the beneficiary and the proffered wage in 2001, failed to establish that he could cover his existing business expenses as well as pay the proffered wage. In addition, he failed to show that he could sustain himself.

The petitioner argues that depreciation should be calculated in the petitioner's ability to pay, which is misplaced. CIS examines 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 the petitioner's gross receipts and wage expense is misplaced. 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. 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.

⁵ IRS Form 1040 for 2001, Line 33.

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

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. However, the AAO does not generally accept a claim that the sole proprietor relies on the value of his homes and business to show his ability to pay because it is not likely that the petitioner will liquidate such assets in order to pay a wage. Therefore, the petitioner's reliance on the sole proprietor's two trucks and house to demonstrate his ability to pay is misplaced. Furthermore, the record of proceeding does not contain any documents showing the sole proprietor's liquid assets in 2001. On appeal the petitioner cites *The Whislers*, 90-INA-569, but does not explain how BALCA decisions applies to this instant petition. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

On appeal the petitioner contends that the petition was denied without issuance of a request for evidence (RFE) misapplying the memorandum of Yates. The regulation at 8 C.F.R. § 103.2(b)(8) states in parts:

Request for evidence. If there is evidence of ineligibility in the record, an application or petitioner shall be denied on that basis notwithstanding any lack of required initial evidence.

In the instant case, the record contains a copy of Form 1040 tax return for 2001, which is among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage, shows clearly that the petitioner had no sufficient funds to pay the proffered wage in 2001, and therefore, is evidence of ineligibility in the record. The director correctly denied the petition without issuance of a RFE under 8 C.F.R. § 103.2(b)(8).

It is also noted that the instant petition was filed on December 3, 2003 and was denied on August 18, 2004. As of the date the director made her decision on this instant petition, even as of the date the petition was filed, the federal tax return of the petitioner for 2002 should have been available. However, the petitioner did not submit the petitioner's tax return for 2002 despite it should be available, did not explain why the 2002 tax return was not submitted. The petitioner fails again to submit related federal tax returns for 2002 and 2003 on appeal. 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 not met that burden.

The petitioner'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. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the director's decision, the AAO has the following concerns: Clean Cut Property Maintenance applied for labor certification on behalf of the beneficiary on May 18, 2001, which was approved by the Department of Labor on March 7, 2003. Based on the approved labor certification, the petitioner, Clean Cut Service LLC, filed the instant petition on December 3, 2003. With the initial filing petition, the petitioner submitted a letter dated September 5, 2003 from Sean Muldoon stating that: "Clean Cut property Maintenance was established in 1998 to provide landscaping services to Manassas[,] Virginia and surrounding communities. In June 2002, a partnership was formed and the company was reorganized as Clean Cut Services LLC. Clean Cut Services LLC continues to provide landscaping services to Manassas[,] Virginia and the surrounding communities".

On appeal the petitioner asserts that: "On December 3, 2003, an I-140, immigrant visa petitioner was filed by Clean Cut Services LLC, as successor in interest, on behalf of [REDACTED]. However, the record contains no evidence that the petitioner qualifies as a successor-in-interest to Clean Cut Property Maintenance. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In the instant case, the petitioner did not establish its status as successor-in-interest to Clean Cut Property Maintenance.

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. The petitioner must 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The certified Form ETA 750 in the instant case states that the position of landscaper requires two (2) years of experience in the job offered. On the Form ETA 750B and G-325A, the beneficiary set forth his work experience. He listed his experience as a "Landscaper" with [REDACTED] at [REDACTED] Manassas, VA [REDACTED] from March 1998 to December 2000.

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.

The petitioner submitted a letter dated July 17, 2001 from [REDACTED] as the primary evidence for the beneficiary's qualification (two years of experience). The letter states in pertinent parts that:

Please be advised that [REDACTED] was working as a Landscaper from March 1998 until December 2000.

As a Landscaper, Mr. [REDACTED] maintained grounds and landscape at my home in Clifton, Virginia. Some of Mr. [REDACTED]'s duties included mowing and trimming of the lawn (5 acres), keeping the shrubs trimmed, planting/maintaining flowers, putting down mulch, maintaining the tennis court/patio areas, cutting/trimming trees, and keeping the general area clean from debris.

The letter is on letterhead of Koons of Manassas with address of [REDACTED] Manassas, VA 20109. The letter does not verify the writer herself, does not include her title and home address although she claims that the beneficiary worked at her home in Clifton, Virginia while the beneficiary listed an different address in Manassas, Virginia as his working address. The letter does not verify whether the employment was a full-time or part-time basis. If he had worked as a part-time, the two years and nine months (from March 1998 to December 2000) could not qualify him for the position. The letter does not explain that how her home had

enough work for the beneficiary as for a full-time landscaper. Because of these defects, the letter will be given little weight in these proceedings.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

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.

The petitioner must submit independent objective evidence for the beneficiary's qualification. Without additional independent objective evidence, the letter dated July 17, 2001 from [REDACTED] cannot establish that the beneficiary possessed the required two years of experience in the job offered prior to the priority date. The burden of proof in these proceedings rests solely with the petitioner. *Id.* The petitioner has not met that burden.

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 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. *Id.* Here, that burden has not been met.

ORDER: The appeal is dismissed.