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Date: **JAN 24 2006**

EAC-04-138-50800

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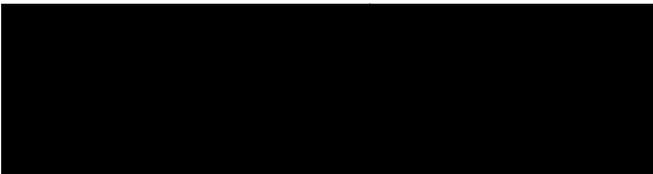
Petitioner:



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 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 construction and remodeling company. It seeks to employ the beneficiary permanently in the United States as a tile setter. 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 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$32.47 per hour (\$67,537.60 per year). The Form ETA 750 states that the position requires 4 years of experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on April 5, 2000, to have a gross annual income of

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.

\$5,322,089, and to have a net annual income of \$512,252. According to the tax return in the record, the petitioner's fiscal year lasts from April 1 to March 31. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.²

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, she issued a request for evidence (Request for Evidence) pertinent to that ability on May 13, 2004. The petitioner submitted Form 1120 U.S. Corporation Income Tax Return for 2001 as supporting documentation regarding ability to pay with the initial filing and the petitioner's tax returns for 2002 and 2003, and 2001 W-2 forms for replaced employees with response to the RFE.

The director denied the petition on September 3, 2004, finding that the evidence submitted with the petition and with response to RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 a given period to determine the petitioner's ability to pay the proffered wage 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 of proceeding contains a 2001 1099 form and a 2003 W-2 form for the beneficiary. The 1099 form was issued by Toran Construction Corp. with payer's federal identification number: ~~01350500~~ and the W-2 form was issued by Beton Construction Corporation with employer identification number: ~~00603439~~. Neither form was issued by the petitioner. Therefore, the petitioner did not establish that it employed and paid the beneficiary the proffered wage during the period from the priority date through 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).

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

² However, the petitioner's letter dated December 15, 2003 claimed that the beneficiary had been employed since 2003 and on Form G-325A signed on December 17, 2003 the beneficiary claimed to have worked for the petitioner since 2003.

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 C corporation. The record contains the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001 through 2003. The petitioner's tax returns for 2001 through 2003 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$67,537.60 per year from the priority date:

In 2001, the Form 1120 stated net income³ of \$2,790.

In 2002, the Form 1120 stated net income of \$(215,904).

In 2003, the Form 1120 stated net income of \$(5,682).

Therefore, the petitioner did not have sufficient net income to pay the proffered wage for the years 2001, 2002 or 2003.

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.⁴ 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.

The petitioner's tax returns for 2001 through 2003 show that the petitioner had net current assets of \$(31,120) in 2001, \$(250,022) in 2002 and \$(4,869) in 2003. The petitioner did not have sufficient net current assets to pay the proffered wage in the years 2001 through 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as

³ Taxable income before net operation loss deduction and special deductions as reported on Line 28 of Form 1120.

⁴ 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.

of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal counsel submits W-2 forms for some of the petitioner's employees and a letter from the president of the petitioner asserting that he can afford to pay the beneficiary the proffered wage up to the extent of his salary and that of some of the employees. The record does not, however, verify their full-time employment or provide evidence that the petitioner has replaced or will replace them with the beneficiary. 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 positions of those employees involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. In fact, the president of the petitioner states that: "[c]urrently as our business is expanding, so do my responsibilities. Due to the time limitations Mr. [REDACTED] would reinforce our team as a Tile Setter" suggesting the petitioner might not be replacing those existing employees, but rather adding the beneficiary to reinforce his manpower.

The petitioner's owner also suggests that his wages can be lessened to compensate the beneficiary. The record of proceeding does not contain a breakdown of the petitioner's owner's duties. Moreover, the petitioner's owner's compensation is greater than the proffered wage in 2001, but not in 2002 or 2003.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return 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 in the instant case. On April 30, 2001 a company named Brend Construction Corp located at [REDACTED] Brooklyn, NY [REDACTED] with federal employer identification number [REDACTED] filed a labor certification application, which was approved by the Department of Labor on November 14, 2003. On April 7, 2004 the petitioner with federal employer identification number [REDACTED] filed the instant petition. However, the record contains no evidence that the petitioner 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. 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 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. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program." In the instant petition, the petitioner did not document its status of the successor-in-interest to the predecessor for whom the individual labor certification was approved. Therefore, the petition should be denied because it has no valid individual labor certification for the petitioner supported.

In addition, CIS record shows that the petitioner (with federal employer identification number (1193542346)) filed another I-140 immigrant petition on September 7, 2004⁵ at the same wage, using the same priority date,

⁵ CIS Receipt Number EAC-04-254-53449.

reflected on a Form ETA 750. The petitioner (with federal employer identification number [REDACTED] filed the other on May 12, 2005.⁶ Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date for each of them until each beneficiary obtains the lawful permanent residency.

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. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁶ CIS Receipt Number EAC-05-161-50055.