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File: SRC-03-125-51906

Office: TEXAS SERVICE CENTER Date: JUL 27 2006

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 Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The director determined that the petitioner failed to establish its ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel indicated that he would submit a brief and/or evidence to the AAO within 30 days and stated the following: "The petitioner presented Employer's Quarterly Federal Tax Returns (Form 941) for 2001 and 2002 as evidence of ability to pay the wage. The adjudicating officer incorrectly interpreted the Form 941, and denied the petition. The adjudicating officer stated in the denial . . . That the Form 941 reflected the total amount of deposits and liabilities for the quarter, believing that the total amount of deposits and liabilities is the equivalent of the total amount of gross income for the quarter and the total amount of expenses for the quarter. The Form 941 only reflects the total amount of deposits made from the deductions taken from the wages of the employees to pay each employee's FICA and social security tax deductions. Therefore, on the Form 941 the total deposits will always be equal to the total liabilities, and these amounts have nothing to do with gross income and expenses of the company for the quarter."

Counsel dated the appeal December 20, 2004, and the appeal was received on December 21, 2004. As of this date, more than 18 months later, the AAO has received nothing further. The AAO sent a fax to counsel on May 11, 2006, informing counsel that no separate brief and/or evidence was received to confirm whether or not he would send anything else in this matter, and as a courtesy, providing him with five (5) days to respond. To date, more than one month later, no reply has been received. Accordingly, we will review the information on record.

The petitioner is a "Roofing Repair" company. The petitioner seeks to employ the beneficiary permanently in the United States as a Roofer. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. As set forth in the director's November 22, 2004, denial, the denial was based on whether or not the petitioner has the ability to pay the proffered wage. The director found that the petitioner did not demonstrate the continuing ability to pay the required wage, and the director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes an allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 CFR § 204.5(d).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on March 1, 2001. The proffered wage as stated on Form ETA 750 for the position of a Roofer is \$10.94 per hour, 40 hours per week, which is equivalent to \$22,755.20 per year.

The labor certification was approved on October 7, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on March 26, 2003. On August 28, 2004, a request for additional evidence ("RFE") was sent to the petitioner asking the petitioner to submit further evidence regarding the petitioner's ability to pay. The petition was then denied on November 22, 2004 for lack of ability to pay.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

On the I-140 petition, the petitioner listed the following information related to the petitioning entity: established 4/1986; gross annual income: \$10,000,000.00; net annual income: \$500,000.00; and that the petitioner had 40 employees. The I-140 Petition additionally listed the beneficiary's salary at \$10.94 per hour. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage other than Forms 941, Employer's Quarterly Federal Tax Return, dated ending 3/31/01, 6/30/01, 9/30/01, 12/31/01, 3/31/02, 6/30/02, 9/30/02, and 12/30/02, and a letter from the petitioner's Vice President stating that the company's 2001 gross income was over \$10,000,000 and the company's net profit in that year was \$500,000, and that the company has over 40 employees on payroll.² The Forms 941 were submitted for a company "[REDACTED]

[REDACTED] In response to the RFE, the petitioner forwarded a certificate of amendment for Pyramid Inc., showing that it formerly operated as [REDACTED]. Therefore, the Forms 941 are relevant to demonstrate Pyramid's ability to pay, however, standing alone are insufficient to demonstrate this ability. The petitioner did not forward any additional information regarding the petitioner's ability to pay pursuant to the RFE, or with the filed I-290B.

The petitioner must establish that its job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. Therefore, the petitioner must establish that the job offer was realistic as of the priority date, here, April 25, 2001, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2).

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). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The Forms 941 submitted show that the petitioner employed 28 employees as of the form filed on 4/19/2001, and on 6/24/2002.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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 petitioner has not claimed that it employed and paid the beneficiary the full proffered wage from the priority date of April 25, 2001. On Form ETA 750B, signed by the beneficiary on March 12, 2002, the beneficiary did not claim to have worked for the petitioner, but rather listed on the form that she has been a self-employed roofer since May 1996.³ The petitioner submitted no evidence, such as W-2 statements, or payroll records to show that they employed or paid the beneficiary.

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. 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).

The record contains only copies of the petitioner's Forms 941, Employer's Quarterly Federal Tax Return, dated ending 3/31/01, 6/30/01, 9/30/01, 12/31/01, 3/31/02, 6/30/02, 9/30/02, and 12/30/02. As noted on the I-290B form by the petitioner's counsel, these forms only reflect "the total amount of deposits made from the deductions taken from the wages of the employees to pay each employee's FICA and social security tax deductions . . . these amounts have nothing to do with gross income and expenses of the company for the quarter." The Forms 941 do show that the petitioner has paid substantial amounts in wages, however, this evidence does not demonstrate that they have paid the beneficiary. Further, the letter that the petitioner's Vice President provided is insufficient to document the petitioner's ability to pay the proffered wage. The petitioner's letter was unsupported by documentation to confirm the figures listed. We note that the unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. As this is the only evidence in the record, we are unable to calculate the petitioner's net income, or net current assets, and, therefore, are unable to conclude whether or not the petitioner had the ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.

Based on the evidence submitted, the petitioner has failed to demonstrate that it can pay the beneficiary the proffered wage. 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.

ORDER: The appeal is dismissed.

³ We note that on Form G-325 she listed that she was employed with the petitioner, Pyramid Waterproofing, since 1996.