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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE:



EAC 04 054 51059

Office: VERMONT 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant chain. It seeks to employ the beneficiary permanently in the United States as a cook. 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 and additional evidence.

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). 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$12.20 per hour for a 35-hour workweek (\$22,204 per year¹).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in the year 2000, to have a gross annual income of \$15,398,055, and to currently employ approximately 2,000 workers. According to the tax returns in the record, the petitioner's fiscal years lasts from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on November 18, 2003, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted, among others, the following documents:

- Counsel's G-28;
- The original certified ETA 750 for a previous beneficiary;
- An original ETA 750B for the beneficiary, substituted for the previous one;

¹ The director calculated a proffered wage of \$25,376 on a workweek of 40 hours; the ETA 750 specifies 35.

On August 4, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's federal income tax return for the year 2001.

In response, the petitioner submitted a letter dated October 11, 2004, from the petitioner's assistant comptroller stating:

We currently employ approximately 1800 individuals through our company and its sister concerns. Through this letter we wish to unequivocally state that our company has the financial ability to pay the proffered wage.

The director denied the petition on November 22, 2004, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. In particular, the decision stated:

Please note that the specific restaurant in which the beneficiary is intended to work should establish the ability to pay, which in this case is a Denny's located in Manassas, VA. This entity does not appear to employ over 100 employees, and this service must see documentation to establish its financial wherewithal.

On appeal, counsel submitted:

- The petitioner's Form 1120S for the years 2001 and 2002;² and,
- The petitioner's payroll records for 2003.

Counsel asserts the director's decision involves "clear error" in applying 8 C.F.R. § 204.5(g)(2), which specifies methods for proving ability to pay the proffered wage. Counsel maintains the regulation does not require a particular restaurant to establish that ability because it is a beneficiary's job site. Rather, counsel asserts that the regulation addresses financial responsibility for the restaurant, which in this case is a corporate chain.

At the outset, we note that the petitioner is not one restaurant but a chain of restaurants that files its Form 1120S for different restaurant outlets. The restaurant group is financially responsible for these the outlets and their approximately 1,800 employees. Counsel correctly asserts that the director should have determined the petitioner's ability to pay the proffered wage as a single entity instead of separating out the job site where the beneficiary is to work.

As such, the director had the option of accepting the financial officer's October 11, 2004 letter, certifying that the petitioner had approximately 1,800 employees in order to establish the petitioner's ability to pay the proffered wage. Had counsel submitted the petitioner's Form 1120S for the years 2001 and 2002 prior to this appeal, the director may have been in a better position to evaluate the statements in the assistant comptroller's letter.

² The return notes a date of incorporation of February 4, 2000, and a January 1, 2000 Sub-S election date.

A review of the 2001 and 2002 tax returns reveals that the petitioner incorporated in 2000 and is a viable business. In 2001, it had gross receipts of \$14,734,981, and paid salaries and wages of \$5,097,702. In 2002, it had gross receipts of \$13,113,098, and paid salaries and wages of \$4,355,825. The record does not contain any derogatory information such as to persuade CIS to doubt the credibility of the information contained in the financial officer's statement. We note that the letter is an original with an original signature and references the beneficiary by name.

While in 2001, the petitioner's second year of existence, it reports an ordinary income of only \$9,313, it also reports net current assets³ of \$32,849. The next year its Form 1120S for 2002 reflects net income of \$633,564 and net current assets of \$627,997.

Therefore, for the years 2001 and 2002, the petitioner had sufficient net income or net current assets to pay the proffered wage.

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 of the priority date through an examination of its net income and net current assets.

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. The petition is approved.

³ Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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.