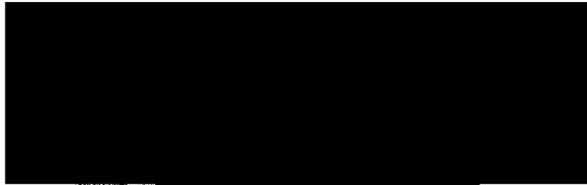


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FILE:



Office: VERMONT SERVICE CENTER

Date:

JUN 21 2006

EAC 03 199 51268

IN RE:

Petitioner:
Beneficiary



PETITION: Immigrant Petition for Other Worker pursuant to § 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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a painting contractor. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The acting 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 it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The acting director denied the petition accordingly.

On appeal, counsel submits a statement and additional evidence.

Section 203(B)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 C.F.R. § 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.

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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.02 per hour, which equals \$35,401.60 per year. The Form ETA 750 states that the position requires one year of experience in the job offered.

On the petition, the petitioner stated that it was established on June 30, 1998 and that it employs two workers. The petitioner stated that its gross income is \$180,344 and that its net income is \$10,611.

The Form ETA 750B requires the beneficiary to list all jobs related to the job offered. The beneficiary did not, however, claim to have worked for the petitioner on that form, which the beneficiary signed on April 29, 2001. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Needham, Massachusetts.

As to the beneficiary's claim of qualifying experience counsel submitted a translation of an employment verification letter from Prolincon Contractors and Labor Providers, Ltd stating that the beneficiary worked for that company as a contract painter from 1995 to 1998. Counsel did not provide the original letter.

As to the petitioner's ability to pay the proffered wage counsel provided the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner is a corporation, that it incorporated on June 29, 1998, and that it reports taxes pursuant to cash convention accounting and the calendar year. During 2001 the petitioner declared ordinary income of \$10,611. At the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date the Vermont Service Center, on May 13, 2004, requested evidence pertinent to that issues. The service center specifically requested that the petitioner provide its 2002 and 2003 tax returns. The service center also specifically requested that, if the petitioner had employed the beneficiary at any time from 2001 to 2003 it provide copies of W-2 forms showing the wages it paid to the beneficiary.

In response, counsel submitted copies of checks drawn by the petitioner to the beneficiary's order, and a letter dated August 4, 2004 from counsel.

The checks submitted are in amounts ranging from \$314.10 to \$598.31 and are dated from September 5, 2003 to June 18, 2004, generally drawn a week apart on Friday. The checks for January 2, 2004, January 23, 2004 were not included. One check was issued on Thursday, February 19, 2004, apparently in lieu of a check being issued on Friday, February 20, 2004. The amounts of the 18 2003 checks total \$9,137.56. The amounts of the 23 2004 checks total \$12,474.60.

In his August 4, 2004 letter counsel stated that the requested tax returns were not submitted because they do not demonstrate that the petitioner is able to pay the proffered wage. Counsel did not explain why the petitioner submitted no W-2 forms, which were required if the petitioner employed the beneficiary during 2001, 2002, or 2003.

The acting director denied the petition on October 19, 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 evidence submitted did not demonstrate that the beneficiary has the requisite years of salient work experience.

On appeal, counsel asked for a continuance of 90 days, stating that he would like to submit 2004 tax documents that were not yet available.

Subsequently counsel submitted the original letter from Prolincon Contractors and Labor Providers and a 2004 W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary \$39,233.08 during that year. Counsel asserts that, because the amount shown on the 2004 W-2 form exceeds the annual amount of the proffered wage the petitioner has demonstrated its ability to pay the proffered wage.

The evidence submitted demonstrates that the beneficiary has the requisite year of qualifying employment experience. The petitioner has overcome that basis for the decision of denial. The remaining issue is whether the petitioner has demonstrated its 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, CIS will examine whether the petitioner employed 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 established that it employed the beneficiary during 2003 and 2004 and paid him \$9,173.56¹ and \$39,233.08 during those years, respectively.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

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. 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 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets, as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage.

¹ That is the total of the 2003 checks issued by the petitioner to the beneficiary of which copies were submitted to CIS.

Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically² shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$35,401.60 per year. The priority date is April 30, 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 and is obliged, therefore, to show the ability to pay the entire annual amount of the proffered wage during that year. During 2001 the petitioner declared ordinary income of \$10,611. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage with its net current assets. The petitioner submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002 and is obliged, therefore, to show the ability to pay the entire annual amount of the proffered wage during that year with copies of annual reports, federal tax returns, or audited financial statements. The petitioner submitted no copies of annual reports, federal tax returns, or audited financial statements pertinent to 2002. Therefore the petitioner has not demonstrated its ability to pay the proffered wage during 2002 in accordance with 8 C.F.R. § 204.5(g)(2).

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2003 and is obliged, therefore, to show the ability to pay the entire annual amount of the proffered wage during that year with copies of annual reports, federal tax returns, or audited financial statements. The petitioner submitted no copies of annual reports, federal tax returns, or audited financial statements pertinent to 2003. Therefore the petitioner has not demonstrated its ability to pay the proffered wage during 2002 in accordance with 8 C.F.R. § 204.5(g)(2).

The petitioner demonstrated that it paid the beneficiary \$39,233.08 during 2004. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

² The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The evidence submitted does not establish that the petitioner had the ability to pay the proffered wage during 2001, 2002, or 2003. Therefore the evidence does not establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date and the petition was correctly denied on that basis.

The record contains another issue that was not mentioned in the decision of denial. In the May 13, 2004 request for evidence the service center requested the petitioner's 2002 and 2003 tax returns.³ The petitioner did not provide the requested evidence.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis. Because this issue was not raised in the decision of denial, however, and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

The petitioner also failed to submit the requested 2001, 2002, and 2003 W-2 forms. The evidence does not demonstrate conclusively whether the petitioner employed the beneficiary during some or all of 2001 or 2002. The evidence demonstrates that the petitioner employed the beneficiary during 2003. The petition should also have been denied based on the petitioner's failure to provide the requested 2003 W-2 form. Again, because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this additional issue.

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 The petitioner also failed to submit the requested 2001, 2002, and 2003 W-2 forms. If the petitioner issued W-2 forms to the beneficiary during those years then that failure is another reason to deny the petition pursuant to 8 C.F.R. § 103.2(b)(14). However, if the petitioner did not issue W-2 forms to the beneficiary during those years that failure is not contrary to the requirements of the request for evidence.