

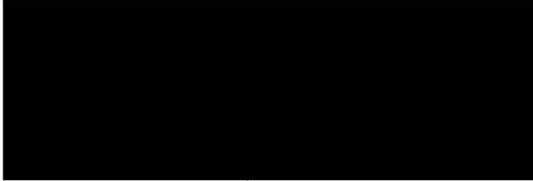
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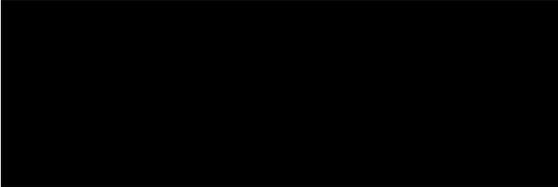
FILE: EAC 04 019 51225 Office: VERMONT SERVICE CENTER Date: NOV 01 2006

IN RE: Petitioner:
Beneficiary:



PETITION: 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.

A handwritten signature in cursive script, appearing to read "R. Wiemann".

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 dismissed.

The petitioner is a knitting mill. It seeks to employ the beneficiary permanently in the United States as a supervisor of the sewing department and apparel operation. 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 the beneficiary possessed the requisite experience, and 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.

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

As set forth in the director's November 17, 2004 decision denying the petition, this case contains two issues. The first issue is whether the evidence establishes that, as of the petition's priority date, the beneficiary met the petitioner's qualifications for the position as described on Form ETA 750. The second issue is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 not available in the United States.

The first issue in this case is whether the evidence establishes that, as of the petition's priority date, the beneficiary met the petitioner's qualifications for the position as described on Form ETA 750.

The Form ETA 750 stipulates that two years of experience as a textile factory supervisor are required for the proffered position, and according to the Form ETA 750B, the beneficiary was employed as a supervisor by the New York business DJ Knitwear Corp. from 1993 through 1997. The record, however, does not contain any corroborating evidence pertaining to this employment, such as an employment letter from an authorized representative of DJ Knitwear Corp. The record does contain a letter, dated June 12, 1998, indicating that the beneficiary was employed in a tailoring workshop in Mexico from January 10, 1987 through January 5, 1989. This letter, however, does not specify that the beneficiary performed the requisite supervisory duties or establish that the beneficiary possessed the requisite two years of related experience.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). In a request for evidence (RFE), dated June 17, 2004, the director specifically requested evidence to establish that the beneficiary possessed the requisite experience as described on the Form ETA 750. The petitioner, however, did not submit any additional evidence pertaining to the beneficiary's qualifications. On appeal, counsel submits an employment letter from the vice president of [REDACTED] Inc., asserting that the beneficiary worked as a supervisor for the said business from 1990 to 1993. If the petitioner had wanted the submitted evidence to be considered, however, it should have submitted the documents in response to the director's request for evidence. *Id.* Further, it is noted that [REDACTED] Inc. was not listed on the Form ETA 750B, which also lessens the credibility of the letter. Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the petitioner has not overcome this portion of the director objections.

The second issue is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$27.09 per hour, which amounts to \$56,347.20 annually.

The AAO reviews appeals on a *de novo* basis. *See Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, counsel submits a brief and additional evidence.

Relevant evidence submitted on appeal includes the petitioner's 1997 income tax return. Other relevant evidence in the record includes the petitioner's income tax returns from 1998, 1999, 2000, 2001, and 2002.

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 pertaining to ability to pay, newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date 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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 2, 2001, the beneficiary did not claim to have worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1997, 1998, 1999, 2000, 2001, and 2002. The record before the director closed on September 13, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date, the most recent federal tax return the petitioner had submitted was for 2002. No regulatory-prescribed evidence was submitted for 2003. Thus, CIS is able to analyze the petitioner's financial situation from 1997 through 2002 only.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1997	\$8,055.00	\$48,292.20	-\$48,292.20
1998	\$328.00	\$56,019.20	-\$56,019.20
1999	\$18,791.00	\$37,556.20	-\$37,556.20
2000	\$12,530.00	\$43,817.20	-\$43,817.20
2001	\$3,968.00	\$52,379.20	-\$52,379.20
2002	\$2,838.00	\$53,509.20	-\$53,509.20

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or deficit
1997	\$10,413.00	\$45,934.20	-\$45,934.20
1998	\$11,115.00	\$45,232.20	-\$45,232.20
1999	\$18,332.00	\$38,015.20	-\$38,015.20
2000	\$28,202.00	\$28,145.20	-\$28,145.20
2001	\$18,170.00	\$38,177.20	-\$38,177.20
2002	\$26,757.00	\$29,590.20	-\$29,590.20

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

In the instant case, the record of proceeding contains a bank statement from the petitioner's business checking account covering the period beginning on August 15, 2003 through September 15, 2003. The bank statement contains balances for only two months of 2003. The record contains no explanation for the absence of any bank statements for the remainder of 2003 and for 1998 through 2002. Therefore, even if the petitioner's evidence concerning its bank statement met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 1998 through 2003.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director correctly stated that the petitioner's net income in 1998, 1999, 2000, 2001, and 2002 was less than the proffered salary, and that the difference between the current assets and current liabilities on these returns was also less than the proffered salary. The director found that the amounts reflected on these returns failed to establish the petitioner's ability to pay the proffered wage in those years. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.