

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY



U.S. Citizenship
and Immigration
Services

B6

[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: NOV 13 2006
SRC 05 056 51695

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

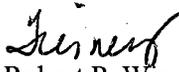
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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.

for 
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The matter will be remanded for further consideration and action.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a store manager. 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 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.

On appeal counsel submitted a brief and additional evidence.

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 granting 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 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day 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). Here, the Form ETA 750 was accepted for processing on April 6, 2001. The proffered wage as stated on the Form ETA 750 is \$16.74 per hour, which equals \$34,819.20 per year.

The Form ETA 750 also indicates that the proffered position is “evening manager” or “retail store manager.” It further indicates that the beneficiary’s duties would be to plan and prepare a work schedule and to assign employees to specific job duties.

The Form I-140 petition in this matter was submitted on December 20, 2004. On the petition, the petitioner stated that it was established on November 5, 1999 and that it employs three workers. The petition states that the petitioner’s gross annual income is \$391,003 and that its net annual income is “unknown.” On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since September 2000. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Houston, Texas.

In support of the petition, counsel submitted (1) copies of the petitioner's 2001, 2002, and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) copies of the petitioner's 2002 and 2003 W-3 transmittals, (3) copies of the petitioner's 2002 and 2003 W-2 Wage and Tax Statements, (4) a copy of the petitioner's 2003 Form 940-EZ Unemployment (FUTA) Tax Return, (5) copies of the petitioner's Form 941 quarterly returns for all four quarters of 2002 and all four quarters of 2003, and (6) a copy of a certificate of deposit (CD).

The tax returns submitted indicate that the petitioner is a corporation, that it incorporated on October 18, 1999, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2001 the petitioner declared ordinary income of \$18,786. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$44,286 and current liabilities of \$1,988, which yields net current assets of \$42,298.

During 2002 the petitioner declared ordinary income of \$17,222. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$36,813 and current liabilities of \$2,322, which yields net current assets of \$34,491.

During 2003 the petitioner declared ordinary income of \$18,221. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$37,181 and current liabilities of \$3,178, which yields net current assets of \$34,003.

A Schedule K-1 submitted with the 2001 return shows that the beneficiary owned 25% of the petitioner during that year. A Schedule K-1 submitted with the 2002 return shows that the beneficiary owned 25% of the petitioner during that year. A Schedule K-1 submitted with the 2003 return shows that Faisal Momin then owned 100% of the petitioner.

The 2002 W-3 transmittal shows that the petitioner paid total wages of \$36,000 during that year. The 2002 W-2 forms show that the petitioner paid those wages to the beneficiary and to another employee, both of whom earned \$18,000 during that year. The other employee has the same family name as the beneficiary. The 2002 Form 941 quarterly returns show that the petitioner paid \$9,000 during each of the four quarters of 2002, thus confirming that the petitioner paid total wages of \$36,000 during that year.

The 2003 Form 940-EZ shows that the petitioner again paid total wages of \$36,000 during that year. The 2003 W-3 transmittal confirms that amount. The 2003 W-2 forms show that amount the petitioner paid that amount to the beneficiary and two other employees, all three of whom earned \$12,000 during that year. Both of the other employees have the same family name as the beneficiary. The 2003 Form 941 quarterly returns show that the petitioner paid \$9,000 during each of the four quarters of 2003, thus confirming that the petitioner paid total wages of \$36,000 during that year.

The certificate of deposit shows that the petitioner deposited \$30,000 on October 28, 2004 into a CD that would mature on June 28, 2005.

On February 8, 2005 the Director, Texas Service Center, issued a notice of intent to deny in this matter. The director stated that the evidence provided does not indicate that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date. The director also noted that the petitioner had failed to provide an employment verification letter showing that the beneficiary has the requisite two years of qualifying experience. Finally, the director noted that the number of workers the petitioner has historically employed does not appear to be sufficient that the beneficiary could supervise employees on the evening shift while leaving sufficient employees to work on the day shift.

In response, counsel submitted additional copies of evidence previously submitted in support of the petition, an employment verification letter dated March 2, 2000, and counsel's own letter dated March 7, 2005.

The March 2, 2000 employment verification letter is from Enlight Corporation Incorporated [sic] dba Metro Market and states that the beneficiary worked there as a store manager from April 1997 to August 2000. This office notes that a letter verifying employment through August 2000 could not be dated March 2, 2000.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

In his March 7, 2004 letter counsel acknowledged that the "labor certification states that the [beneficiary would] supervise two employees." Counsel asserts, however, that whether the petitioner actually has two employees for the beneficiary to supervise is irrelevant to the approvability of the petition. Counsel stated that the petitioner, in stating that the beneficiary would supervise two people, was only trying to provide "a simple guidance for the Department of Labor to be able to determine the correct wage level of the alien and . . . [supervision of other employees] is not a job requirement." Counsel noted that, in any event, the petitioner now has three employees, including the beneficiary, and the beneficiary will therefore have two employees to supervise.

Counsel further noted that the petitioner is not obliged to pay the beneficiary the proffered wage until after permanent residency is granted to him and stated that the amount of the proffered wage that the petitioner is required to demonstrate the ability to pay during 2001 should be prorated to reflect that only 38 weeks of that year remained as of the priority date. Counsel also asserted that both the wages paid to the beneficiary during 2001 and his share of the petitioner's ordinary income were funds available to pay the beneficiary the proffered wage during 2001. Finally counsel asserted that the petitioner's CD should be considered a net current asset.

The director determined 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, on April 29, 2005, denied the petition. The director noted that counsel's explanation for the inclusion on the labor certification of the requirement that the beneficiary be able to supervise two employees was unclear. The director further noted that, although the petitioner now employs three workers, if the beneficiary were to supervise both of the other employees on the evening shift this would leave no employees available to work the day shift.

On appeal, counsel submitted monthly statements pertinent to the petitioner's bank account and a brief.

In the brief counsel stated, as to the issue of the number of employees the beneficiary will supervise, that the petitioner need not employ the requisite number of employees until permanent resident status is granted. Further, counsel cited an unpublished decision of this office for the proposition that the amounts shown on the petitioner's checking account statements should be considered. Counsel also reiterates the proposition that the shareholder dividends paid to the beneficiary during 2001 represent funds available to pay the proffered wage.

Counsel's assertion that the amount of the proffered wage should be prorated during 2001 is unconvincing. We will not consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income towards paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.¹ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

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 demonstrated that it employed the beneficiary and paid him \$18,000 during 2002 and \$12,000 during 2003. The petitioner is obliged to show the ability to pay the balance of the proffered wage during those years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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*

¹ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 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 that 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. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or 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 minus 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.

Counsel asserts that the amount of the eight-month CD in evidence should be considered an additional current asset available to pay wages. The CD was purchased for \$30,000 on October 28, 2004 and was due to mature on June 28, 2005. This does apparently represent a current asset, and should likely have been reported as such on the petitioner's 2005 Schedule L. As was noted above, however, a petitioner's current assets cannot be considered without reference to counterbalancing current liabilities. Further, that the petitioner had this current asset during 2005 does not demonstrate that it had the ability to pay additional wages, beyond those shown with its copies of annual reports, federal tax returns, or audited financial statements, during previous years.

The proffered wage is \$34,819.20 per year. The priority date is April 6, 2001.

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

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 and must show the ability to pay the entire proffered wage during that year. During that year the petitioner declared net income or ordinary income of \$18,786. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$42,298. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2001.

The petitioner paid the beneficiary \$18,000 during 2002 and must show the ability to pay the remaining \$16,289.30 balance of the proffered wage during that year. During that year the petitioner declared ordinary income of \$17,222. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner paid the beneficiary \$12,000 during 2003 and must show the ability to pay the remaining \$22,819.20 of the proffered wage during that year. During that year the petitioner declared ordinary income of \$18,221. That amount is insufficient to pay the balance of the proffered wage. At the end of that year, however, the petitioner had net current assets of \$34,003. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The Texas Service Center issued a notice of intent to deny in this matter on February 8, 2005. On that date the petitioner's 2004 tax return may not have been available. The petitioner was not obliged, therefore, to provide evidence pertinent to 2004 and subsequent years.

The petitioner demonstrated the ability to pay the proffered wage during each of the salient years. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record suggests additional issues, however, that were not addressed in the decision of denial.

All three of the petitioner's employees have the same family name. The record contains a marriage certificate showing that the beneficiary married Rukhsana Momin on October 22, 1996. The petitioner's wife and the petitioner's owner, Fisal Momin, share the same family name. Finally, the record contains 2001 and 2002 Schedules K-1 that indicate that the beneficiary owned 25% of the petitioner during both of those years. These factors suggest that the beneficiary has some relationship to the petitioner or the petitioner's owner other than the employer/employee relationship.

Pursuant to 20 C.F.R. §656.20(c)(8) the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship." *See Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000). Where the beneficiary owns the petitioner, the job offer is not *bona fide*. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992).

In this case, given the evidence cited above, the relationship of the beneficiary to the petitioner, and whether the proffered position was truly open to qualified U.S. workers, were insufficiently investigated. Because these issues were not addressed in the decision of denial, and the petitioner was not accorded an opportunity to address them, this office does not rely on these issues, even in part, as a basis for today's decision. On remand, however, the director may request additional related evidence or require the petitioner to address these issues.

Further, as was noted above, the employment verification letter submitted is flawed in that it purports to verify employment that occurred after the date of the letter. Again, because that issue was not addressed in the decision of denial, and the petitioner was not accorded an opportunity to address it, this office does not rely on that issue, even in part, as a basis for today's decision. On remand, however, the director may require the petitioner to address this issue.³

Counsel has asserted that the amount of the CD in evidence should be considered to have been a current asset during 2005. If the amount of that CD is reflected as a current asset on the petitioner's 2005 tax return then it should, of course, be considered. If that amount is not reflected in that return then the petitioner should address why it is not and why it should then be considered as a current asset of the petitioner during that year.

This office notes that the Form ETA 750 does not explicitly state that the beneficiary will supervise two employees. Rather, it states that the beneficiary will "plan and prepare work schedule and assign employees to specific job duties," thus implying that the beneficiary will supervise two or more.

The director does not appear to have based the denial, even in part, on this perceived discrepancy, but only to have mentioned it. Although it is not made clear the director appears to have considered that if the petitioner had insufficient employees to require a night manager then it did not have a legitimate need to fill the proffered position and the job offer was not *bona fide*.

In response, counsel appears to state that even though the duties of the proffered position as stated on the Form ETA 750 specify that the beneficiary would assign job duties to more than one employee, the petitioner is not required to demonstrate that it has the need, at the time of the priority date or at any time prior to the approval of the petition, for a "retail store manager" or "evening manager" who would oversee two or more employees. Counsel indicates that the petitioner need only have more than one employee for the beneficiary to supervise subsequent to the approval of the petition. Counsel asserts that the only reason that the petitioner specified that the beneficiary would supervise more than one employee on the Form ETA 750 was to allow the Department of Labor to correctly calculate the proffered wage. Counsel further notes that the petitioner now has three employees, including the beneficiary, and that the beneficiary therefore has two other employees to supervise.

Counsel's response is unconvincing. The petitioner has the burden of establishing that it will employ the beneficiary in a position that complies with the terms of the Form ETA 750 as certified by the Department of Labor. See *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966). Consequently, the director was correct to examine whether the petitioner's business had sufficient employees to need a "retail store manager" as defined on

³ Pursuant on *Matter of Ho*, supra, the director may require contemporaneous evidence of that claimed employment.

the Form ETA 750. Further, as the proffered position is "evening manager" or "retail store manager", the director was correct to question the assertion that the beneficiary will supervise both of the petitioner's two other current employees, assuming that the petitioning convenience store is also open during the day.

The director does not appear to have based the denial on this issue, and neither does this office base today's decision, even in part, on this issue. On remand, however, the director may further explore this issue.

The matter will be remanded for further consideration and action. On remand the director may consider the additional issues noted above or any other issues material to the approvability of the petition. The director may also request evidence salient to those or any relevant issues, including the petitioner's ability to pay the proffered wage during the years since 2003.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's decision is withdrawn. The matter is remanded for further consideration and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.