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FILE:



Office: VERMONT SERVICE CENTER

Date: OCT 10 2006

EAC-04-036-52649

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<sup>1</sup> was denied by the Acting Center Director (Director), Vermont Service Center. After granting a motion to reconsider, the director affirmed the decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a meat processing company. It seeks to employ the beneficiary permanently in the United States as a cured meat packing supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification application or Form ETA 750), approved by the Department of Labor. The director determined that the record did not establish that the petitioner had the ability to pay the proffered wage at the time of filing. The director denied the petition and motion to reconsider accordingly.

On appeal counsel submits a brief. 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 newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will make its decision based on evidence already submitted and kept in the record only.

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 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 \$26.55 per hour (\$55,224 per year). On the Form ETA 750B signed by the beneficiary on April 27,

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<sup>1</sup> The instant petition is the second petition filed by the petitioner on behalf of the beneficiary based on the same approved labor certification. Through the same counsel the petitioner filed a previous petition (EAC-02-241-51815) on July 15, 2002, which was denied on August 6, 2003 because the petitioner did not establish its ability to pay the proffered wage at the time of filing. The petitioner did not appeal from the denial.

2001, the beneficiary claimed to have worked for the petitioner since December 1996. On the petition, the petitioner claimed to have been established in 1967, to have a gross annual income of \$1,450,000, to have a net annual income of \$300,000, and to currently employ 8 workers.

With the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for its fiscal years 2000 (July 1, 2000 to June 30, 2001) and 2002 (July 1, 2002 to June 30, 2003) and a letter from Accountant [REDACTED] to pertinent to its ability to pay the proffered wage.

The director denied the petition on July 28, 2004, finding that the evidence submitted with the petition did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director affirmed the denial on December 23, 2004 after considering the petitioner's motion to reconsider.

On appeal, counsel asserts that based upon the generally accepted standard accounting practices and principles, the petitioner clearly established its ability to pay the proffered wage with the combination of wages actually paid to the beneficiary, net income, depreciation and net current assets (with loans to shareholders added).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first 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 record contains the beneficiary's Form W-2, Wage and Tax Statement for 2001 and 2002 that were submitted with an earlier filing of the same petition. The beneficiary's W-2 forms show that the petitioner paid the beneficiary \$16,820 in 2001 and \$34,318.86 in 2002. Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage in 2001 and 2002. Instead the petitioner is obligated to demonstrate that it could pay the difference of \$38,404 in 2001 and \$20,905.14 in 2002 between wages actually paid to the beneficiary and the proffered wage and the proffered wage onwards to the present.

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, 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. 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). Counsel requested considering depreciation of \$10,325 in 2001 and \$7,062 in 2002 together with net income in determining the petitioner's ability to pay the proffered wage. Counsel's reliance on the petitioner's gross receipts, depreciation/amortization deduction or wage expense is misplaced. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record of proceeding contains copies of the petitioner's tax returns for 2000 through 2002<sup>2</sup>. The tax return shows that the petitioner is structured as a C corporation and the petitioner's fiscal year lasts from July 1 to June 30. The 2000 tax return covers a fiscal year from July 1, 2000 to June 30, 2001, which covers the priority date of April 27, 2001. As of November 18, 2003, the filing date of the instant petition and date the record of proceeding closed before the director, the 2003 tax return was not due yet. Therefore, the petitioner's tax returns for its fiscal years 2000 through 2002 are available and dispositive tax returns in the instant case. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage from the priority date to the present.

In the fiscal year 2000 (7/1/00-6/30/01), the Form 1120 stated net income<sup>3</sup> of \$4,700.

In the fiscal year 2001 (7/1/01-6/30/02), the Form 1120 stated net income of \$13,835.

In the fiscal year 2002 (7/1/02-6/30/03), the Form 1120 stated net income of \$27,489.

Therefore, for the fiscal year 2000, the petitioner did not have sufficient net income to pay the difference of \$38,404 in the calendar year 2001 between wages actually paid to the beneficiary and the proffered wage; for the fiscal year 2001, the petitioner did not have sufficient net income to pay the difference of \$20,905.14 in the calendar year 2002 between wages actually paid to the beneficiary and the proffered wage; and for the fiscal year 2002, the petitioner did not have sufficient net income to pay the proffered wage of \$55,224 in the calendar year 2003.

Alternatively, the petitioner's net income for the calendar year 2001 could be calculated as \$9,267.50 by adding half of the net income from its fiscal year 2000 as the net income for a period from January 1, 2001 to June 30, 2001 and half of the income from its fiscal year 2001 as the net income for a period from July 1, 2001 to December 31, 2001. Similarly, the petitioner's net income for the calendar year 2002 would be \$20,662. Therefore, the petitioner did not have sufficient net income to pay the difference of \$38,404 between wages actually paid to the beneficiary and the proffered wage in calendar year 2001; and the petitioner did not have sufficient net income to pay the difference of \$20,905.14 between wages actually paid to the beneficiary and the proffered wage in calendar year 2002.

Therefore, in either calculation method, the petitioner failed to establish its ability to pay the proffered wage with its net income for 2001 and 2002.

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<sup>2</sup> The petitioner's 2001 tax return was submitted with the first filing.

<sup>3</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The AAO, however, rejects the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> 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. The schedule Ls of the 1120 tax returns show that the petitioner had current assets of \$32,891, and current liabilities of \$79,400, and thus its net current assets at the end of its fiscal year 2000 were \$(46,509); the petitioner had current assets of \$42,140, and current liabilities of \$85,926, and thus its net current assets at the end of its fiscal year 2001 were \$(43,786); and the petitioner had current assets of \$51,466, and current liabilities of \$90,391, and thus its net current assets at the end of its fiscal year 2002 were \$(38,925). Therefore, the petitioner had insufficient net current assets to pay the difference between wages paid to the beneficiary and the proffered wage in its fiscal years 2000 and 2001, and the petitioner had insufficient net current assets to pay the proffered wage in its fiscal year 2002.

Counsel submitted a letter from Accountant Thomas J. Satalino arguing that "loans to shareholders" of \$50,416 in the fiscal year 2000, \$62,179 in the fiscal year 2001 and \$81,251 in the fiscal year 2002 should be added to the petitioner's current assets. The assertion is misplaced. As discussed above, "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses according to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000). The tax return form clearly shows that current assets be reported on lines 1 through 6 in the schedule L. The accountant's assertion that Line 7 Loans to shareholders should be added to the current assets is misplaced. In addition, the AAO notes that the petitioner could not have established its ability to pay the proffered wage with sufficient net current assets even if the loans to shareholders counsel argued for were added to the petitioner's current assets. As previously noted, the petitioner's net current assets would be \$3,907 for the fiscal year 2000, however, this figure could not be sufficient to pay the difference of \$38,404 between wages actually paid to the beneficiary and the proffered wage for that period. The petitioner's net current assets would be \$18,393 at the end of its fiscal year 2001 while the difference between wages actually paid to the beneficiary and the proffered wage in that year was \$20,905.14. The petitioner's net current assets would be \$42,326, and this figure obviously was not sufficient to cover the proffered wage of \$55,224 in the fiscal year 2002.

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<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 difference between the wage paid and the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel urged that a combination of the petitioner's net income, depreciation and net current assets with loans to shareholders added should be considered in calculating the funds available to the petitioner to pay the proffered wage. Combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage is also unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that all its three fiscal years 2000, 2001 and 2002 were uncharacteristically unprofitable years for the petitioner in a framework of profitable or successful years.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

Beyond the director's decision and counsel's argument, the AAO notes there is another issue need to be discussed, that is whether the instant petitioner demonstrates that the beneficiary is qualified for the proffered position. An application or petition that fails to comply with the technical requirements of the law may be

denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The certified Form ETA 750 in the instant case states that the position of cured meat packing supervisor requires two (2) years of experience in the job offered. On the Form ETA 750A, Item 15, Other Special Requirements set forth the special requirement of "two (2) years experience in supervising cutting and boning and production of processed polish style meat products, including smoking and curing of meats." On the Form ETA 750B signed by the beneficiary on April 27, 2001, the beneficiary set forth his work experience. He listed his experience as a "Supervisor" at the petitioner from December 1996 to the present, and as a "Supervisor" from February 1990 to August 1995 and as "Assistant Foreman" from November 1984 to February 1990 at [REDACTED], in Jedwabre, Poland.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The petitioner submitted an employment certificate from [REDACTED] a member of the Board of Directors and Director of Trade, Samopomoc Chlopska District Cooperative, with an English translation as evidence pertinent to the beneficiary's qualifications as required by the above regulation. The employment certificate states in pertinent part:

It is certified that [the beneficiary], the son of [REDACTED] born May 23, 1959 was employed on a full time basis at the Sampomoc Chlopska District Cooperative at 35 Sadowa Street in Jedwabne from July 10, 1989 until August 3, 1995.

During the time of his employment he was employed in the following positions:

1. Port butcher-foreman

His last position was that named above.

However, the employment certificate does not include a specific description of the duties performed by the alien or of the training received as required by the regulation. Therefore, the AAO cannot determine whether the beneficiary possesses the requisite two years of experience as described in Item 15, Other Specific Requirements. Moreover the employment certificate provides inconsistent information about the name of company, the position of the beneficiary and the duration of the employment. On the Form ETA 750B the beneficiary names the company as [REDACTED] Co., while the name of the company in the experience letter is Samopomoc Chlopska District Cooperative. The beneficiary claims that he worked as an assistant foreman from November 1984 to February 1990 and as a supervisor from February 1990 to August 1995. However, the employment certificate states that the beneficiary worked as a pork butcher-foreman from July 10, 1989 to August 3, 1995. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Therefore, the petitioner did not establish with sufficient regulatory-prescribed evidence the beneficiary's two years of experience as described on the Form ETA 750, and further failed to establish that the beneficiary is qualified for the proffered position.

In addition, the AAO notes that the Form ETA 750 indicates the beneficiary will supervise ten (10) employees, however, the petitioner claimed on both the instant and previous petitions that it employed eight (8) workers. The petitioner must establish that its job offer to the beneficiary is a realistic one. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The petitioner did not explain how a position that will supervise ten employees exists in a company with only eight employees. That causes doubt whether the job offer is a *bona fide* job offer. "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.