

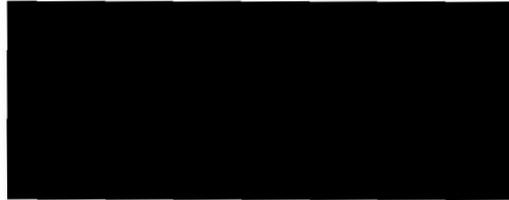
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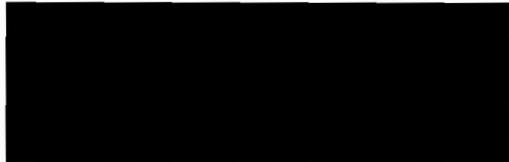
FILE: EAC 04 163 50287 Office: VERMONT SERVICE CENTER Date: SEP 01 2006

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 (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a line cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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 at 8 C.F.R. § 204.5(g)(2) provides:

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. 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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 2, 2004. The proffered wage as stated on the Form ETA 750 is \$420 per week, which amounts to \$21,840 per annum. On the Form ETA 750B, signed by the beneficiary on September 5, 2003, the beneficiary does not claim to have worked for the petitioner.

The preference petition was filed on May 7, 2004. On Part 5, the petitioner claims that it was established in 1980 and currently employs eighteen workers. In support of its ability to pay the proffered wage of \$21,840 per year, the petitioner submitted a letter, dated April 29, 2004, from [REDACTED] its president. Mr. [REDACTED] states that the petitioner's corporate name is [REDACTED]. Along with this letter, the petitioner provides copies

of its bank statements for January and March 2004, along with copies of two Wage and Tax Statements (W-2s) issued to an employee, "██████████" in 2002 and 2003. According to counsel's transmittal letter, the beneficiary is intended to replace Mr. ██████████ who retired in 2003. Mr. ██████████ earnings in 2003 were \$27,215.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. On August 25, 2004, the director requested the petitioner to submit evidence of its continuing ability to pay the proffered salary. The director specifically requested that the petitioner provide copies of the beneficiary's W-2 if it employed the beneficiary during 2002 and 2003, as well as copies of the petitioner's 2002 and 2003 federal income tax returns.

In response, counsel submitted duplicate copies of the first page of the petitioner's January and March 2004 bank statements, along with a copy of the first page of its October 2004 bank statement. Additionally, counsel resubmitted the Ward W-2s, Mr. ██████████ letter identifying the petitioner's corporate name, as well as a copy of another letter, dated November 10, 2004, from Mr. ██████████. In this letter Mr. ██████████ states that due to confidentiality concerns, he will not provide the 2002 and 2003 federal income tax returns of the petitioner, nor alternatively, 2002 and 2003 annual reports or credit line information.

The director denied the petition on December 28, 2004, acknowledging the petitioner's failure to provide copies of its federal tax returns, audited financial statements, or annual reports and determining that the petitioner had not established its continuing ability to pay the proffered wage. The director declined to accept the Ward W-2s as evidence of the petitioner's ability to pay the beneficiary.

On appeal, counsel resubmits copies of the documentation previously provided to the record. Counsel also provides a copy of minutes from a June 27, 2002, teleconference between the American Immigration Lawyers Association (AILA) and CIS/HQ and a copy of Vermont Service Center answers to AILA's liaison questions posed on March 4, 2003. Additionally, counsel submits a copy of a DOL case, *Ranchito Coletero*, 2002-INA-104 (2004 BALCA).

Counsel contends that director erroneously rejected the evidence provided establishing the petitioner's ability to pay the proffered wage. He points to the showing Mr. ██████████ salary in 2003, and claims that this amount was available to be paid to the beneficiary in 2004 and 2005. He further states that the three 2004 bank statements are credible evidence of the petitioner's ability to pay the proposed wage to the beneficiary and that their respective balances are equal to or greater than the proffered wage.

These assertions are not persuasive. It is noted that *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), primarily stands for the proposition that the entire financial circumstances of a sole proprietorship should be reviewed in evaluating its ability to pay a certified wage. The instant petitioner is a corporation. Moreover, counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The regulation at 8 C.F.R. § 204.5(g)(2) clearly indicates that the evidence of a petitioner's continuing ability to pay the proffered wage must be either be submitted in the form of audited financial statements, federal tax returns, or annual reports. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," in this case it has not been established why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable. Moreover, bank statements do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. The regulation neither states nor implies that bank statements may be substituted for one of the required forms of documentation based on a petitioner's simple election not to provide such evidence. The petitioner's three selected 2004 bank statements are not probative of a petitioner's continuing ability to pay the proffered wage *in lieu* of one of the required forms of evidence.

With regard to the 2002 or 2003 AILA/CIS/HQ/Vermont Service Center conference minutes, it is noted that these events or documents are not intended to create any right or benefit or constitute a legally binding precedent, but merely offered as guidance.¹ Binding precedents are defined within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must published in bound volumes or as interim decisions.

That said, we find no evidence that the director's decision departed from established regulatory guidelines as set forth in 8 C.F.R. § 204.5(g)(2). CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period as set forth on its tax returns or an audited financial statement, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record contains no evidence that the petitioner has employed the alien. Counsel's assertions relevant to the beneficiary's replacement of Mr. [REDACTED] and the availability of Ward's 2003 salary as payment of the beneficiary's proposed wage offer do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). While the W-2s do constitute evidence of payment of compensation to Mr. [REDACTED] in 2002 and 2003, nothing other than counsel's own statements provide any information about Mr. [REDACTED]'s duties, retirement, etc.

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 figure reflected on the petitioner's federal income tax return, or audited financial statement or annual report if provided, without consideration of depreciation or other expenses.² If it equals or exceeds the proffered wage, the petitioner is deemed to have

¹See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

² As mentioned above, CIS will also consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between a petitioner's current assets and current liabilities and represent a measure of the petitioner's liquidity during a given period. On a

established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)).

In this matter, the petitioner failed to supply either federal tax returns, audited financial statements, or annual reports as set forth in the regulation at 8 C.F.R. § 204.5(g)(2) requiring that a petitioner demonstrate its continuing ability to pay the proffered wage beginning at the priority date. The petitioner's failure to submit the documents requested by the director cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Based on the evidence contained in the underlying record and after consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered as of the priority date of the petition.

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.

corporate tax return, current assets are itemized on line(s) 1(d) through 6(d) of Schedule L and current liabilities are found on lines 16(d) through 18(d).