

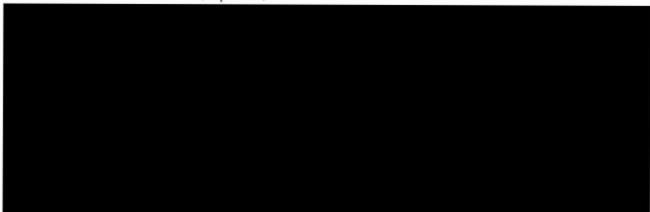
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U.S. Citizenship
and Immigration
Services

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FILE:

EAC-05-019-50076

Office: VERMONT SERVICE CENTER

Date:

SEP 29 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:

SELF-REPRESENTED

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 petition¹ was denied by Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the petitioner submits a brief statement and additional evidence.²

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 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on June 7, 2004. The proffered wage as stated on the Form ETA 750 is \$11.25 per hour (\$23,400 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered. On the Form ETA 750B, signed by the beneficiary on June 4, 2004, the

¹ An I-140 Immigrant Petition (EAC-02-168-51604) was filed by Seng Thai Food on behalf of the instant beneficiary in the position of food service supervisor with the Vermont Service Center on April 19, 2002 and was denied on February 13, 2003. A subsequent appeal was rejected on October 16, 2003.

² 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 first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

beneficiary claimed to have worked for the petitioner since June 2003. On the petition, the petitioner claimed to have been established in 2003, to have a gross annual income of \$245,000, to have a net annual income of \$85,000, and to currently employ 3 workers. According to the tax returns in the record, the petitioner was structured as an S corporation and its fiscal year is based on a calendar year.

The petitioner submitted the petition without any supporting documents pertinent to its ability to pay the proffered wage and the beneficiary's qualifications. The director issued a request for evidence (RFE) on December 13, 2004, requesting additional evidence to establish that the petitioner had the ability to pay the proffered wage or salary of \$11.25 per hour as of June 7, 2004 and continuing to the present. The director also requested the beneficiary's Form W-2 Wage and Tax Statements and evidence to establish that the beneficiary possessed the requested two years experience as of June 7, 2004. In response to the RFE, the petitioner submitted a letter from the petitioner's accountant regarding its gross sales for June 2004 through November 2004, its Form 1120S U.S. Income Tax Return for an S Corporation for 2003 and an experience letter from the beneficiary's former employer. On February 4, 2005 the director denied the petition, finding that the submitted tax return shows that the petitioner did not have sufficient net income or net current assets to pay the beneficiary's proffered wage, and therefore, did not establish that it had the ability to pay the proffered wage at the time of filing.

On appeal, the petitioner submits its 2004 tax return and argues that the combination of wages paid, depreciation and the net income should establish the petitioner's ability to pay the proffered wage in 2004.

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 petitioner did not submit the beneficiary's W-2 forms or other compensation documents, and did not claim to have employed and paid the beneficiary.

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). The petitioner's reliance on its gross receipts with depreciation and on wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid compensation to officers 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 the Service should have considered income before expenses were paid rather than net income. On appeal the petitioner claims that the depreciation expenses should be added back to net income in determining the petitioner's ability to pay the proffered wage. The petitioner's reliance on depreciation is misplaced. The court in *Chi-Feng Chang* further clearly 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 contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2003 and 2004. The priority date in the instant case is June 7, 2004, therefore, the 2003 tax return is not necessarily dispositive. The 2004 tax return demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$23,400 per year.

In 2004, the Form 1120S stated net income³ of \$10,412

Therefore, for the year 2004, the petitioner did not have sufficient net income to pay the proffered wage.

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 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.⁴ 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 petitioner submitted only two pages of its tax return for 2004 without all schedules and attachments. Without the schedule L of the Form 1120S, the AAO cannot assess its net current assets to see whether the petitioner had sufficient net current assets to pay the proffered wage and further to establish its ability to pay in 2004, the year of the priority date. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Therefore, the petitioner failed to establish its ability to pay the proffered wage through its net current assets for 2004.

³Ordinary income (loss) from trade or business activities as reported on Line 21.

⁴According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns 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 the petitioner's appeal, the AAO will discuss whether the petitioner established that the beneficiary possessed the requisite two years of experience as required by the Form ETA 750. 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 foreign food specialty cook requires two (2) years of experience in the job offered. Item 13 set forth the duties as follows:

- ¶ Preparation of the Thai sauces for both the appetizers and main dishes, Thai seafood dishes, curry dishes, the necessary preparations before the restaurant opens and the necessary help needed in cleaning and servicing the kitchen and equipment after the restaurant closes.

¶ 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 instant I-140 petition was submitted without any evidence to establish the beneficiary's qualifications. In response to the director's RFE dated December 13, 2004, the petitioner submitted a letter dated May 3, 1999

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from [REDACTED] and [REDACTED] in Bangkok, Thailand. This experience letter states in pertinent part that:

This is to confirm that [the beneficiary] has been employed at the [REDACTED] in Samui as Food and Beverage Manager from 01st November 1994 to May 1999. The [REDACTED] [REDACTED] is one of the properties managed by [REDACTED]

I have always found [the beneficiary] to be reliable, conscientious and hard working Head of Department who carried out all his assigned duties and responsibilities without delay. His pleasant manners and groomed behaviour made him well liked by guests and staff both junior and senior.

The letter does not include a job description and more important it verifies the beneficiary's work experience as Food and Beverage Manager instead of a cook or foreign food specialty cook. As previously noted the instant certified ETA 750 requires two years of experience in the job offered, i.e. foreign food specialty cook. Therefore, the experience letter from Amari cannot be accepted as a primary regulatory-prescribed evidence to establish that the beneficiary possessed the requisite two years of experience as a cook for at least two years as required by the ETA 750. The petitioner failed to establish the beneficiary's qualifications for the proffered position.

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.