



U.S. Citizenship
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Services

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File:

SRC-05-198-51848

Office: TEXAS SERVICE CENTER Date: APR 12 2007

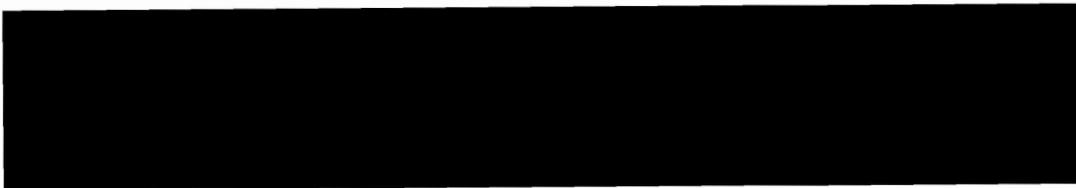
In re:

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 Acting Director, Texas Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The AAO will remand the decision back to the director for further consideration in accordance with the instructions below.

The petitioner is a Japanese restaurant and seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign food (“Japanese Chef”). The petition filed was submitted with Form ETA 750A, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”).¹ As set forth in the director’s October 22, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

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

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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

¹ A complete labor certification application consists of Forms ETA 750A and ETA 750B. The petitioner submitted Form ETA 750, which was certified as required, but failed to submit Form ETA 750B. *See* 8 C.F.R. § 204.5(l)(3)(i), and 8 C.F.R. § 204.5(g)(1).

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).

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 the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on January 15, 2003. The proffered wage as stated on Form ETA 750 for the position of cook is \$500 per week, equivalent to \$26,000 per year based on a 40 hour work week. The labor certification was approved on August 5, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on July 7, 2005. The petitioner represented the following information on the I-140 Petition: date established: January 20, 1998; gross annual income: \$1,589,000.00; net annual income: \$25,000.00; and current number of employees: 24.

On July 28, 2005, the director issued a Notice of Intent to Deny ("NOID"), requesting that the petitioner submit evidence related to the petitioner's ability to pay as the petitioner had initially submitted no evidence, including the petitioner's federal tax returns for 2003 and 2004, and W-2 Forms if the beneficiary were employed. The petitioner responded. Following consideration of the response, on October 22, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, there is no evidence that the petitioner employed the beneficiary. Both the Form ETA 750A, and Form I-140 list that the beneficiary was present in his home country, and outside the U.S.³ The petitioner provided no evidence that it employed the beneficiary, and did not claim that it employed the beneficiary. Therefore, the petitioner cannot demonstrate its ability to pay the proffered wage through wage payment.

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, Citizenship & Immigration Services ("CIS") will next examine the net income figure reflected on the petitioner's federal income 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. *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).

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.

³ As noted above, the petitioner failed to submit Form ETA 750B, which would provide the beneficiary's address, educational background, and employment history.

The petitioner is structured as an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). Line 21 shows the following income:

<u>Tax year</u>	<u>Net income or (loss)</u>	<u>"Filed Return"</u>
2004	\$14,561 ("Draft")	\$94,561
2003	\$151,240	

In response to the NOID, the petitioner provided a letter from the petitioner's accountant, dated August 11, 2005, which stated that the petitioner had filed to obtain an extension to file its 2004 federal tax return. The petitioner's 2004 tax return would be due on September 15, 2005. Additionally, the accountant attached a signed copy of the request for an extension to file the petitioner's return. On appeal, the petitioner contends that the initial 2004 federal tax return submitted was a draft copy, and submitted what the petitioner asserted was the "filed" 2004 return. The petitioner also submitted a letter dated November 8, 2005 from its accountant addressed to counsel, which provided that "the 2004 corporate tax return that I sent you back in August of 2005 was a draft copy. Since that time, I have made additional journal entries and filed the returns with the federal and state agencies on October 15, 2005."

The petitioner's net income would allow for payment of the beneficiary's proffered wage in 2003. Based on the 2004 federal tax return submitted on appeal, the petitioner would be able to demonstrate that it could pay the proffered wage based on the reported net income. However, the petitioner should be required to provide an IRS certified copy of the 2004 tax return as proof of filing. Further, the petitioner should account for the substantial difference in the "draft tax return's" net income, and the tax return that the petitioner asserts it filed.

The petition will be remanded to the director. The director may issue a Request for Additional Evidence, which should request documentation regarding the petitioner's ability to pay in 2004, including a certified copy of the 2004 tax return.

Further, although not raised in the director's denial, the petitioner has failed to show that the beneficiary meets the requirements of the certified 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).

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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). 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).

On the Form ETA 750A, the "job offer" position description provides: "Prepare meats, soups, specialty sauces, vegetables and other Japanese foods. Season and cook foods according to prescribed methods. Portion and garnish food and serve food to waiters on order." Further, the job offered listed that the position required two years of experience in the job offered, Japanese Chef, or two years experience in the related occupation of preparing and cooking authentic Japanese foods. The petitioner did not list any other special requirements.

The petitioner would then need to demonstrate that the beneficiary had the required two years of experience. The petitioner, however, did not submit Form ETA 750B, signed by the beneficiary as required to allow the director to determine whether the beneficiary meets the experience requirements listed, or if the supporting documents match the represented qualifications.

The petitioner did submit letters to document the beneficiary's prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner submitted two "career certificates." The first certificate provided that the beneficiary worked from September 30, 1993 to November 30, 1995 at [REDACTED] Japanese Restaurant in Seoul, Korea. The certificate further provides, "I prove that the person written above has worked in my office as Japanese Cook." The second certificate provided that the beneficiary worked as a "Military Cooker" from February 13, 1996 to May 1, 1998 for the [REDACTED].

While the certificates would be relevant, first, we note that both certificates lack a description of the job duties performed, or the training received. The second certificate related to the beneficiary's work as a "Military Cooker" is deficient in that it does not list the name or position of the person who issued the certificate, or the address of the employer (if the Army is permitted to list the address). Further, the petitioner did not submit a certified translation in accordance with 8 C.F.R. § 103.2(b)(3), which provides, "*Translations*. Any document

containing foreign language submitted to [CIS] shall be accompanied by a full English language translation, which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." The certificates were deficient in that the petitioner provided a copy of the certificate in Korean, and English translation, but failed to submit the translator's certification that the document is accurate and that the translator is competent to translate the language. Further, as noted above, the petitioner has failed to provide Form ETA 750B to compare the certificates provided to the experience listed on the certified ETA 750B.

As the director did not raise this issue in the NOID, or in the decision, the petitioner should have an opportunity to address this point on remand. In accordance with the foregoing, we will remand the petition to the director to issue an RFE related to the above points. The petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Following issuance of the RFE and upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.