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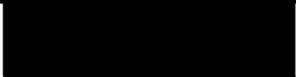
U.S. Citizenship
and Immigration
Services

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FILE:



EAC-05-089-50765

Office: VERMONT SERVICE CENTER

AUG 06 2007
Date:

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 Acting Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, and the petition will be approved.

The petitioner is a billiard recreation facility. It seeks to employ the beneficiary permanently in the United States as a recreation facility manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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.

As set forth in the director's February 27, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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). 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).

The instant petition is for a substituted beneficiary.¹ The original Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$39,562 per year. The Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B signed by the original beneficiary, he claimed to have worked for the petitioner as a recreation facility manager since May 2001. The I-140 petition was submitted on February 4, 2005. On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$615,189, to have a net annual income \$14,986, and to currently employ 10 workers. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. The new beneficiary did not claim to have worked for the petitioner on his Form ETA 750B.

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 appeal². On appeal counsel submits a brief, a letter from the petitioner's accountant, and copies of documents submitted previously. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2001 through 2003, the petitioner's financial statements for 2001 through 2003, bank statements for the petitioner's checking accounts for 2004 and 2005, and W-2 forms for the original beneficiary for 2001 through 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that with the petitioner's net income reported on line 28 of the Form 1120 tax returns and wages already paid to the original beneficiary of the labor certification reflected on the W-2 forms for 2001 through 2003, the petitioner has met the burden of proving that it has financial capacity to offer the proffered wage to the new beneficiary.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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

¹ An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

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).

instant case, the beneficiary did not claim to have worked for the petitioner and the petitioner did not submit any evidence showing that it hired and paid the beneficiary. However, the petitioner filed the instant petition for the substituted beneficiary, the new beneficiary will replace the original beneficiary, Moon Bum Heo, in the proffered position. The Form ETA 750B for the original beneficiary indicates that the original beneficiary worked for the petitioner from 2001 as a recreation facility manager. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner submitted W-2 forms the petitioner issued to the original beneficiary. These W-2 forms show that the petitioner paid the original beneficiary \$21,500 in 2001, \$26,000 in 2002 and \$26,000 in 2003. The petitioner is obligated to demonstrate that it could pay the difference of between wages already paid to the original beneficiary and the proffered wage in 2001 through 2003.

Counsel submitted the petitioner's financial statements for 2001 through 2003. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel also submitted bank statements for the petitioner's business accounts for 2004 and 2005. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, 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," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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). Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service 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 contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001 through 2003. The evidence shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The petitioner's tax returns for 2001 through 2003 demonstrate the following financial information concerning the petitioner's ability to pay the difference of \$18,062 in 2001, \$13,562 in 2002 and 2003 respectively between wages paid to the original beneficiary and the proffered wage:

- In 2001, the Form 1120 stated a net income³ of \$36,675.
- In 2002, the Form 1120 stated a net income of \$33,877.
- In 2003, the Form 1120 stated a net income of \$16,866.

For the year 2001, the petitioner's net income of \$36,675 was greater than the difference of \$18,062 between wages already paid to the original beneficiary and the proffered wage that year; for the year 2002, the petitioner's net income of \$33,877 was greater than the difference of \$13,562 between wages already paid to the original beneficiary and the proffered wage that year; and for the year 2003, the petitioner's net income of \$16,866 was also sufficient to pay the difference of \$13,562 between wages already paid to the original beneficiary and the proffered wage that year.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor to 2003, the petitioner has 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 and its net income. Accordingly, the ground of the director's denial that the petitioner failed to establish its ability to pay in 2001 through 2003 is withdrawn.

³ The AAO considers the taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120 as a corporation's net income instead of the taxable income as reported on Line 30 of the Form 1120. The director erred in considering the taxable income as reported on Line 30 of the Form 1120 as net income when determining the petitioner's ability to pay the proffered wage.

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 met that burden.

ORDER: The appeal is sustained. The decision of the director is withdrawn. The petition is approved.