



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER
SRC 06 182 50406

Date: DEC 27 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

The petitioner is a cattle/livestock breeding company.¹ It seeks to employ the beneficiary permanently in the United States as an Executive Housekeeper. 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 2001 priority date of the visa petition based on the petitioner's non-submission of requested federal tax returns, audited or reviewed financial statements or annual reports for any of the tax years from the 2001 priority date and continuing to 2005. 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 September 25, 2006 denial, the primary 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

¹ On the Form ETA 750 and the I-140 petition, the petitioner identifies itself as "agriculture." On the financial statements submitted to the record in response to the director's request for further evidence dated June 24, 2006, the petitioner's accountants identify it as a division of Sugar Hill Farms, Inc. On its corporate tax returns, submitted on appeal, the petitioner identifies itself as Sugar Hill Farms, Inc and Sub, involved in livestock breeding, cattle, and identifies a subsidiary, Canary Airlines.

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 March 14, 2001. The proffered wage as stated on the Form ETA 750 is \$8.66 an hour, or \$18,012.80 per year. The Form ETA 750 states that the position requires four years of work experience in the job offered of housekeeping supervisor.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². On appeal, counsel submits its IRS Forms 1120, U.S. Corporation Income Tax Return for tax years 2001 to 2005. Counsel also submits copies of the petitioner's balance sheets for tax years 2001 and 2002, previously submitted to the record in response to the director's request for further evidence, in addition to a final version of the petitioner's accountants' compilation report for tax year 2005 dated August 8, 2006. Counsel also resubmits the petitioner's accountants' compilation reports for tax years 2003 and 2004. Finally counsel submits a letter from [REDACTED] IV, the petitioner's president, dated October 18, 2006. Mr. [REDACTED] states he is submitting the petitioner's tax returns as requested, and that he is also including statements prepared by the petitioner's accountants, showing the financial performance of the parent company and the intended employer, Sugar Hill Farm, as well as its subsidiary operations which stand on their own. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in December 21, 1973, to have a gross annual income of \$1,000,000, a net annual income of \$200,000 and to currently employ ten workers. On the Form ETA 750B, signed by the beneficiary on March 12, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel states that the petitioner had not included any primary forms of evidentiary documentation as to the petitioner's ability to pay the proffered wage, and submits the petitioner's IRS Forms 1120, for tax years 2001 to 2005. Counsel also requests that the beneficiary's Form I-485 be reconsidered in light of the additional evidence submitted on appeal.

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

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).

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.

The AAO notes that on appeal the petitioner submits its corporate income tax returns for tax years 2001 to 2005 to the record. 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). However, in the instant matter, the record reflects that the director in her request for further evidence dated June 24, 2006, pursuant to 8 C.F.R. § 204.5(g)(2), specifically requested copies of the petitioner's annual federal income tax returns, including copies of all schedules, or audited or reviewed financial statements, or the petitioner's annual reports for tax years 2001 to 2005. In response, the petitioner submitted balance sheets, and accountants' compilation reports for the years 2001 to 2005, none of which were audited or reviewed. The petitioner did not submit its federal income tax returns as requested by the director. On appeal, the petitioner provides no explanation for the non-submission of its income tax returns, either with the initial petition or in response to the director's request for further evidence. Further, with the exception of the petitioner's 2005 corporate tax return which is dated September 11, 2006, all the tax returns submitted on appeal appear to have been available as of May 19, 2006, the date the I-140 petition was received by Citizenship and Immigration Services (CIS).

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

The AAO, for illustrative purposes, will review how CIS determines at the appellate level the petitioner's ability to pay the proffered wage during a given period of time.

CIS first examines 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. If the petitioner does not establish that it employed and paid the beneficiary during the relevant period of time, the petitioner has to establish its ability to pay the entire proffered wage in tax years in question.

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).

Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 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 Chang* at 537.

As stated previously, the AAO will not accept the petitioner's corporate income tax returns submitted on appeal. Therefore the AAO will not analyze the petitioner's ability to pay the proffered wage based on its net income.

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.³ 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. As stated previously, the AAO does not accept the petitioner's corporate income tax returns submitted on appeal. Therefore the AAO will not analyze the petitioner's ability to pay the proffered wage based on its net current assets.

³According 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.

If the petitioner fails to establish its ability to pay the proffered wage based on the beneficiary's wages, or the petitioner's net income or net current assets, as stated previously, the AAO may also consider the totality of the petitioner's circumstances, if such an examination is warranted. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner has submitted no further evidence that would warrant an examination of the petitioner's overall circumstances.

As correctly noted by the director, in the instant matter, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on 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. The petitioner has not met that burden.

ORDER: The appeal is dismissed.