



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: JAN 23 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 preference visa petition was denied by the Acting Center 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 cruise ship development company. It seeks to employ the beneficiary permanently in the United States as an office 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 October 26, 2005 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$850.00 per week (\$44,200 per year). The Form ETA 750 states that the petitioner desires applicants to have two years of college studies in business or commerce and requires applicants to have two years of experience in the job offered¹. The evidence in the record of proceeding shows that the petitioner is

¹ The beneficiary's qualifications are not an issue of this appeal.

structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the petition, the petitioner claimed to have been established in 1988, to have a net annual income of over \$10,000,000, and to currently employ three workers. The beneficiary claimed to have worked for the petitioner since March 1998.²

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 appeal³. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 1991 through 2004, ██████████ Project Development Disbursements, bank statements for the petitioner's business account covering January to December 2001, a stock certificate demonstrating that 10% of shares were issued by ██████████ Inc. to the beneficiary, and the petitioner's business plan. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner had adequate finances available with which to compensate the beneficiary as of the priority date of the petition and continuing to the present.

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 Sonegawa*, 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 instant case, the petitioner submitted a copy of a stock certificate issued to the beneficiary and asserted that the assets of the petitioner's stock should be considered as compensation to the beneficiary. However, the petitioner did not submit any objective evidence of the value of the petitioner's stock or the amount of dividends from a distribution of ten percent of its stock. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*,

² On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to have worked for the petitioner from March 1998 to July 2000. However, the record of proceeding also contains a Form G-325, Biographic Information sheet signed by the beneficiary on March 28, 2005 and submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's employment last five years, she represented that she had worked for the petitioner from March 1998 to the present date.

³ 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).

22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, the regulation at 20 C.F.R. § 656.20(c)(3) states that the proffered wage may not include commissions, bonuses or other incentives, except in an amount guaranteed by the petitioner. The record contains no evidence that the petitioner guaranteed any certain amount of dividends to the beneficiary. The record of proceeding also contains no evidence that the petitioner guaranteed any certain amount of dividends to applicants as additional or alternative compensation for the proffered position during the recruitment phase of the labor certification's application before DOL's review process⁴. The petitioner may not, therefore, count any portion of the stock the beneficiary received during the salient years as evidence of its ability to pay the proffered wage. Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

The record also contains copies of bank statements for the petitioner's business checking account for 2001. Counsel's reliance on the balance in the petitioner's bank account 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). Reliance on the petitioner's total income and wage expense is misplaced. 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. 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:

⁴ CIS must look to the job offer portion of the labor certification to determine the required qualifications or terms of 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).

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 1991 through 2004. Since the priority date in the instant case is April 30, 2001, the tax returns for 1991 through 2000 are not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The record before the director closed on August 30, 2005 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence dated June 3, 2005. As of that date the petitioner's federal tax return for 2005 was not yet due. Therefore the petitioner's tax return for 2004 is the most recent return available.

The petitioner's tax returns for 2001 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$44,200 per year from the priority date:

- In 2001, the Form 1120X stated a net income⁵ of \$54,761
- In 2002, the Form 1120 stated a net income of \$214,296.
- In 2003, the Form 1120 stated a net income of \$125,874.
- In 2004, the Form 1120 stated a net income of \$61,905.

The petitioner's net income is greater than the proffered wage in each year under examination. Therefore, for the years 2001 through 2004, the petitioner had sufficient net income to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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 its net income.

Counsel's assertions on appeal overcome the director's decision and the tax returns submitted by the petitioner on appeal demonstrate that the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

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 been met.

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

⁵ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.