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U.S. Citizenship
and Immigration
Services

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PUBLIC COPY



FILE:

SRC 03 152 50758

Office: TEXAS SERVICE CENTER

Date:

JAN 30 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, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration.

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

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

As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 at 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, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 15, 2001. The proffered wage as stated on the Form ETA 750 is \$10.49 per hour for a forty-hour workweek, which equals \$21,819.20 per year.

The Form I-140 petition in this matter was submitted on May 1, 2003. On the petition, the petitioner stated that it was established during 1999 and that it employs five workers. The petition states that the petitioner's gross annual income is \$123,593 and that its net annual income is \$21,076. On the Form ETA 750, Part B, signed by the beneficiary on October 29, 2001, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Coconut Grove, Florida.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.

In the instant case the record contains (1) two different copies of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) copies of the petitioner's 2002 and 2003 tax returns, (3) a copy of a 2004 Form W-2 Wage and Tax Statement the petitioner issued to the beneficiary, (4) a copy of a paycheck and pay stub the petitioner issued to the beneficiary, (5) Form W-2 Wage and Tax Statements issued by the petitioner to its employees during 2001, 2002, and 2003, and (6) "Employee History Summary Report[s]" for the petitioner covering 2001, 2002, and 2003. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on September 13, 1996, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

Both versions of the petitioner's 2001 return show that at the end of that year the petitioner's current liabilities exceeded its current assets and that it paid salaries and wages of \$14,927. The original 2001 tax return dated March 13, 2003 shows that the petitioner declared ordinary income of \$21,076.¹ That version was submitted with the petition in this matter. That amount of ordinary income is less than the annual amount of the proffered wage.

The other version of the petitioner's 2001 return is dated March 15, 2005 and was submitted in response to a request for additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Although a box checked on that form indicates that it is an amended return, counsel did not provide the additional Form 1120X or similar form that would indicated that the amended return was submitted to IRS. Counsel submitted no other evidence that the return was submitted to IRS. The amended return purports to show that the petitioner declared ordinary income of \$22,076 during that same year.² That amount is greater than the annual amount of the proffered wage.

Whether either or both of those discrepant returns were submitted to the Internal Revenue Service (IRS) is unknown to this office.

The petitioner's 2002 tax return shows that during that year the petitioner declared ordinary income of \$22,800. At the end of that year the petitioner's current liabilities exceeded its current assets. During that year the petitioner paid \$62,471 in salaries and wages.

¹ This matches the amount that the petitioner claimed, on the Form I-140 petition, as its annual net income.

² The difference in ordinary income is attributable to different figures for cost of goods sold on the two returns. One states that the petitioner had costs of goods sold of \$76,574 during 2001, whereas the other states that cost of goods sold was \$77,574 during the same year.

The petitioner's 2003 tax return shows that during that year the petitioner declared ordinary income of \$24,054. At the end of that year the petitioner had \$20,587 in current assets and \$8,300 in current liabilities, which yields \$12,287 in net current assets. During that year the petitioner paid \$81,219 in salaries and wages.

The W-2 forms provided show amounts the petitioner paid to its employees during 2001, 2002, and 2003. None of those W-2 forms was issued to the beneficiary. The 2001 W-2 forms submitted show that the petitioner paid a total of \$26,096.12 in "wages, tips, other compensation" during that year. The 2002 and 2003 W-2 forms show total "wages, tips, other compensation" of \$62,470.87 and \$81,219.32, respectively.

The pay stub submitted indicates that it covers the pay period ending February 11, 2005. The starting date of that pay period is unknown to this office. That pay stub indicates that the petitioner paid the beneficiary gross pay of \$450 for that pay period. The 2004 W-2 form submitted shows that the petitioner paid the beneficiary \$6,975 during that year.

The 2001 employee history summary report submitted shows that the petitioner employed 11 workers during that year, to whom it paid annual amounts ranging from \$231.90 to \$10,500. The petitioner paid those 11 workers a total of \$26,816.82 during 2001, which yields a mean annual wage of \$2,437.83.

The 2002 employee history summary report submitted shows that the petitioner employed eight workers during that year, to whom it paid annual amounts ranging from \$2,456.26 to \$19,223.67. The petitioner paid those eight workers a total of \$62,470 during 2001, which yields a mean annual wage of \$7,808.75.

The 2003 employee history summary report submitted shows that the petitioner employed eight workers during that year, to whom it paid annual amounts ranging from \$1,200 to \$16,944.60. The petitioner paid those eight workers a total of \$81,219, during 2001, which yields a mean annual wage of \$10,152.42.

The employee history summaries provided identify the petitioner's employees by name but do not show that the petitioner employed the beneficiary during 2001, 2002, or 2003.

The acting director denied the petition on April 25, 2005. In that denial the acting director noted that although the petitioner's 2001, 2002, and 2003 tax returns indicated that it paid wages of \$14,927, \$62,471,³ and \$81,219 during those years, respectively, whereas its employee history summary reports indicated that it has paid \$26,816.12, \$62,470.87, and \$81,219.32⁴ in wages during those same years. The director noted that the difference between \$26,816.12 (the actual amount paid in wages paid during 2001) and \$14,927 (the amount listed on the tax return as having been paid in wages) is \$11,889. If that amount is deducted from the petitioner's net income for the year, (to cover the balance paid in wages, but not properly deducted on the tax return), it leaves an amount that is insufficient to cover the proffered wage. That is, \$22,076-\$11,889=

³ Actually, the acting director mistakenly asserted that the 2002 return shows that the petitioner paid wages of \$28,877.87. The figure shown above, \$62,471, is the amount the petitioner actually claimed, on the 2002 return, to have paid in wages.

⁴ The acting director mistakenly asserted that the 2003 payroll forms submitted show that the petitioner paid \$18,667.35 in salaries during that year. In fact, the payroll forms indicate that the petitioner paid \$81,219.32 in during 2003, as do the 2003 W-2 forms submitted.

\$10,187, an amount that is less than the proffered wage. As such, the record fails to demonstrate that the petitioner had the ability to pay the proffered wage during 2001. In turn, the director concludes that the petitioner has failed to demonstrate an ability to pay the proffered wage from the priority date onwards.

On appeal, counsel asserted

[CIS] erred in concluding that Petitioner does not have the ability to pay the proffered wage.⁵ [CIS] miscalculated the payroll records of wages bu [sic] adding the tips from customers.

Because of this material error on the part of [CIS], a reversal of decision is requested as well as immediate approval of the petition. At all times the petitioner met the Regularoty [sic] standard of ability to pay.

In a subsequent brief counsel stated that the petitioner's ordinary income during each of the salient years exceeded the annual amount of the proffered wage. Counsel also asserted that the wages and salaries shown on the petitioner's tax returns represented only that amount paid by the petitioner to his employees, whereas the gross amounts shown on the wage summaries included tips paid to the petitioner's staff by its customers. This office notes that tips can form a large portion of the income of some restaurant workers, most notably the wait staff.

In the decision of denial the acting director appeared to accord considerable weight to the difference between the total wages shown on the 2001 tax return and those shown on the 2001 wage summaries. This office agrees that an apparent discrepancy does exist between the 2001 payroll records and the petitioner's 2001 tax return. However, the director erred in asserting that the additional amount of wages actually paid must be deducted from the petitioner's net income as it is an additional expense to which the petitioner did not admit when entering figures on his tax return.

The petitioner's explanation of the apparent discrepancy, however, supplies this office with as many questions as answers. If the amounts shown on the wage summaries included tips and wages and the amounts shown on the income tax returns did not, that would account for a large difference between the amounts shown on those two sets of documents. Absent some change in reporting, it would not explain why, other than rounding to the nearest dollar on the tax returns, the figures for 2002 and 2003 on the tax returns are identical to the figures on the wage summaries for those same years.

Further, this office notes that the figures from the wage summaries and W-2 forms submitted, which ostensibly include both wages and tips, should show the same amount of total gross pay for each of the three years they cover. The payments shown on the 2001 W-2 forms, however, total \$26,096.12, whereas the total gross pay shown on the wage summary for the same year is \$26,816.82, a difference of \$720.70. Why those amounts do not match is unexplained.

⁵ This office notes that counsel has inverted the burden of proof. The director did not find that the petitioner was unable to pay the proffered wage, but, rather, that it had not sustained its burden of affirmatively demonstrating that ability in accordance with the regulations.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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. (Reg. Comm.1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it paid the beneficiary \$6,974 during that year 2004. It did not show that it employed him during any other year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. *See also Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities

projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁶ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$21,819.20 per year. The priority date is February 15, 2001.

As was noted above, the record contains two different versions of the petitioner's 2001 return. Neither of those returns shows net current assets in an amount sufficient to pay the proffered wage. As was noted above, one of those returns shows ordinary income slightly less than the proffered wage, the other shows ordinary income slightly greater than the proffered wage. Whether the petitioner has shown the ability to pay the proffered wage during 2001 depends, therefore, on which, if either, of those tax returns is believed to be authentic.

Although the circumstances of its submission suggest that the second version of the tax return was falsified in an attempt to show the ability to pay the proffered wage in this case, that inference was not mentioned in the decision of denial and apparently played no part in that decision. Under these circumstances this office is uncomfortable relying on that discrepancy as the basis of the decision in this matter, without giving the petitioner an opportunity to address it. This office notes that if the petitioner is able to establish that the second 2001 tax return was properly filed with the Internal Revenue Service (IRS), and if the petitioner is able to provide a credible explanation for the discrepancy between its 2001 payroll records and 2001 tax return, then it may be found that the petitioner has demonstrated the ability to pay the proffered wage during 2001.

The 2002 tax return shows that during that year the petitioner declared ordinary income of \$22,800. That amount is greater than the annual amount of the proffered wage. If the 2002 tax return is assumed to be accurate, then the petitioner has demonstrated the ability to pay the proffered wage during 2002.

The 2003 tax return shows that during that year the petitioner declared ordinary income of \$24,054. That amount is greater than the annual amount of the proffered wage. If the 2003 tax return is assumed to be accurate, then the petitioner has demonstrated the ability to pay the proffered wage during 2003.

The 2004 W-2 form submitted shows that the petitioner paid the beneficiary \$6,974 during that year. Ordinarily the petitioner would be obliged to show the ability to pay the balance of the proffered wage during that same year.

⁶ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petition in this matter, however, was submitted on May 1, 2003. On that date the petitioner's 2004 tax return was unavailable. A request for evidence, issued in this matter on January 11, 2005, asked the petitioner to provide that return. On that date, however, the petitioner's 2004 tax return may still have been unavailable, as counsel appeared to imply in her response. The petitioner is excused from providing evidence of its ability to pay the proffered wage during 2004 unless the service center should have occasion to renew its request. The petitioner is excused from demonstrating its ability to pay the proffered wage during subsequent years unless the director decides to request such evidence.

If the petitioner establishes that the more favorable version of the 2001 tax return, and the 2002 and 2003 tax returns, were properly submitted to the IRS, then the petitioner has demonstrated its ability to pay the proffered wage during each of the salient years. The petitioner may, therefore, have overcome the basis of the decision of denial, that is, that its tax returns did not show that it was able to pay the proffered wage.

The record, however, suggests additional issues that were not addressed in the decision of denial.

On the Form ETA 750, Part B submitted in this matter the beneficiary claimed that from June 1996 to November 1996 she was unemployed in the United Kingdom. In conjunction with another alien worker petition a different petitioner submitted an approved Form 9089 on which the beneficiary claimed that she had worked as a self-employed caterer in Karachi, Pakistan from January 1, 1996 to September 14, 1997. This office is unable to reconcile those two apparently disparate claims.

Further, on that Form 9089 the beneficiary stated that she worked for the instant petitioner from July 18, 2002 to December 31, 2005. The wage summaries and W-2 forms submitted, however, appear to show that the beneficiary did not work for the petitioner during either 2002 or 2003.

Numerous discrepancies have appeared in the evidence presented. Because the decision of denial did not discuss these issues and the petitioner has not been accorded the opportunity to address them, this office is not inclined to dismiss based on the discrepancies. Doubt cast on any aspect of the petitioner's proof, however, may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The matter will be remanded so that the acting director may require that the petitioner clarify each of the discrepancies listed in this decision, or any others she may note, with the independent objective evidence required by *Matter of Ho*. The acting director may, for instance require an explanation of the discrepant amounts shown on the 2001 tax returns submitted and request whatever evidence she deems necessary to determine which, if either, of those returns is an authentic copy of the return the petitioner submitted to IRS. The acting director may also request any other evidence that she desires if that evidence is relevant to an issue material to the approvability of the instant visa petition.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The matter is remanded for further consideration and action consistent with this decision. If the petition is denied again the decision shall be certified to this office.