

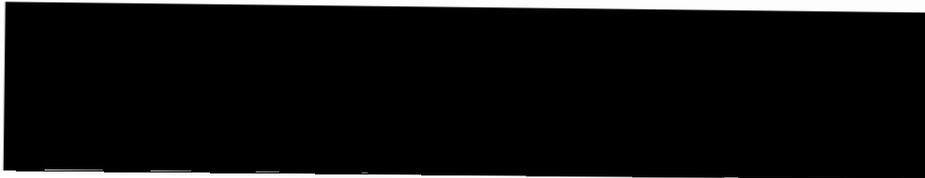
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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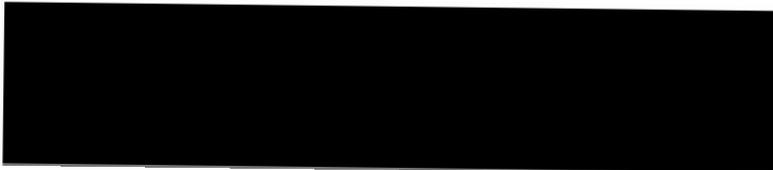
FILE: LIN 05 261 52026 Office: NEBRASKA SERVICE CENTER Date: JUN 05 2007

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, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a night manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting director found 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The acting director 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 issues in this case are whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and whether the petitioner has demonstrated that the beneficiary has the qualifications that the Form ETA 750 stated as necessary qualifications.

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 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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 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 Department of Labor. 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$31,500 per year. The Form ETA 750 states that the position requires two years in the job offered or two years as the manager of a hotel or guesthouse.¹

The Form I-140 petition in this matter was submitted on September 12, 2005. On the petition, the petitioner stated that it was established during 1999 and that it employs four workers. The petition states that the petitioner's gross annual income is \$881,275 and that its net annual income is -\$27,399. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Portage, Indiana.

On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner. The beneficiary claimed to have been employed (1) as a guest house manager in Mehsana, India from June 1992 to February 1998, (2) as a hotel manager in Ahmedabad, India from March 1998 to March 1999, and (3) as a general manager of a hotel in Chicago, Illinois from June 1999 until the date he signed that form.

The Form ETA 750B instructs the beneficiary to,

List all jobs held during the last three (3) years [and] any other jobs related to the occupation for which the alien is seeking certification

The beneficiary listed no other employment.

¹ In evaluating the beneficiary's qualifications, CIS must look to the portion of the labor certification, Form ETA 750 part 14, which defines the minimum education, training and experience needed for a worker to perform the job duties described at part 13 to determine the qualifications required for the position. CIS may not ignore a term of the labor certification, Form ETA 750 part 14, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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.²

In the instant case the record contains (1) the petitioner's 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) monthly statements pertinent to the petitioner's bank accounts, and (3) a letter dated August 22, 2005 from a Chicago bank. 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 record also contains (1) a letter dated March 11, 1998 from the owner of the guesthouse in Mehsana, India, and (2) a letter dated April 21, 1999 from the owner of the hotel in Ahmedabad, India. The record does not contain any additional evidence pertinent to the beneficiary's claim of qualifying employment experience.

The tax returns submitted show that the petitioner is a corporation, that it incorporated on September 9, 1999, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

The petitioner's 2001 tax return shows that during that year the petitioner declared ordinary income of \$15,529. The corresponding Schedule L shows that at the end of that year the petitioner had \$99,966 in current assets and \$33,689 in current liabilities, which yields \$66,277 in net current assets.

The petitioner's 2002 tax return shows that during that year the petitioner declared a loss of \$20,393 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had \$134,399 in current assets and \$28,726 in current liabilities, which yields \$105,673 in net current assets.

The petitioner's 2003 tax return shows that during that year the petitioner declared a loss of \$3,008 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had \$119,526 in current assets and \$34,312 in current liabilities, which yields \$85,214 in net current assets.

The petitioner's 2004 tax return shows that during that year the petitioner declared a loss of \$27,399 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had \$146,003 in current assets and \$35,860 in current liabilities, which yields \$110,143 in net current assets.

The Chicago bank's August 22, 2005 letter indicates that the petitioner had a \$100,000 credit line from January 2001 through December 2006. What portion of that credit line had been borrowed against and what portion remained were not indicated.

The Mehsana, India guesthouse's owner's March 11, 1998 letter states that the beneficiary worked at that guest house from June 1992 to February 1998 as a manager.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The Ahmedabad, India hotel's owner's April 21, 1999 letter states that the beneficiary worked at that hotel from March 15, 1998 through March 31, 1999 as a manager.

The acting director denied the petition on December 12, 2005, finding that the petitioner had not demonstrated its continuing ability to pay the proffered wage beginning on the priority date and that the evidence in support of the beneficiary's claim of qualifying experience was insufficient. In finding the employment verification letters insufficient the acting director noted that the service center issued a request for evidence on October 14, 2005 requesting certified originals of the beneficiary's employment verification letters, and that the copies provided are not certified.

On appeal, counsel asserted that the petitioner's outstanding line of credit demonstrates its ability to pay the proffered wage during the salient years.

Counsel cited a non-precedent decision of the Vermont Service Center for the proposition that the petitioner's credit line should be considered in the determination of its ability to pay the proffered wage. Although counsel admits that it is not controlling precedent, counsel argues that the logic of the decision is compelling and should be extended.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.³ 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 reported on its tax returns.

Counsel's reliance on the petitioner's credit line is similarly misplaced. Counsel noted that in precedent cases pledges to a church and promises by a national parent organization have been found to be worthy of consideration and that a line of credit, being at least as dependable as pledges and promises should, by extension, also be considered.

However, a line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

³ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

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. 612 (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 did not establish that it employed and paid the beneficiary.

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, 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).

Showing that the petitioner's gross receipts 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 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, however, 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 the 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, those expected to be 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 net of 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 typically⁴ 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 31,500 per year. The priority date is April 26, 2001.

During 2001 the petitioner declared ordinary income of \$15,529. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had \$66,277 in net current assets. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year, however, the petitioner had \$105,673 in net current assets. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year, however, the petitioner had \$85,214 in net current assets. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year, however, the petitioner had \$110,143 in net current assets.⁵ That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on September 12, 2005. On that date the petitioner's 2005 tax return was unavailable. On October 14, 2005 the service center issued a request for evidence in this matter,

⁴ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁵ This office notes that, during each of the salient years, the petitioner demonstrated its ability to pay the proffered wage with its net current assets. The reasoning behind the CIS policy that a petitioner may show its ability to pay the proffered wage during a given year with its net current assets is that the petitioner could, as those net current assets were converted to cash or cash equivalent, have used them to pay wages. A petitioner showing its ability to pay the proffered wage with its net current assets during several consecutive years, however, appears to rely on the additional assumption that the petitioner could have paid additional wages out of its net current assets during each of those years without reducing its net current assets. Although this assumption is manifestly questionable this office does not purport to decide this issue in today's decision.

requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. The petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2005 and later years at this point in the proceedings.

The petitioner has demonstrated the ability to pay the proffered wage during each of the salient years. Therefore the petitioner has sufficiently demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The petitioner has overcome that basis for the decision of denial.

The remaining issue is the adequacy of the evidence submitted in support of the beneficiary's claim of qualifying employment.

Counsel cited 8 C.F.R. § 204.5(g)(1) for the proposition that the beneficiary's employment verification letters need not have been certified, and noted that what the acting director meant by "certified" in this context is unclear. Counsel observed that 8 C.F.R. § 204.5(g)(1) indicates that the acting director is free to request original employment verification letters, but stated that as the acting director had made no such request in the instant case the copies provided were sufficient.

The office concurs with counsel's assertion that the acting director's use of the word "certified" was unclear. The acting director did not indicate who should certify those documents, or what about those documents they should certify. This office is unaware of any body that certifies documents in general. The petitioner has overcome that alleged flaw in the evidence.

The regulation at 8 C.F.R. § 204.5(g)(1) states, in pertinent part,

Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval. However, at the discretion of the [acting] director, original documents may be required in individual cases.

Counsel is correct that the acting director is able to require a petitioner to provide original employment verification letters. Counsel is incorrect, however, that the acting director made no such request in this case. As to the employment verification letters attesting to the beneficiary's qualifying employment, the October 14, 2005 request for evidence requested that the petitioner, "Submit certified copies of the original documents." The employment verification letters in the record appear to be copies, and counsel confirms that they are.

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). Because the petitioner failed to comply with the acting director's direct request for originals the beneficiary's employment verification letters are insufficient evidence of the beneficiary's qualifying employment claim. The petition was correctly denied on this basis, which has not been overcome on appeal.

Because the acting director requested the originals of the beneficiary's employment verification letters and those documents were not provided, the evidence submitted is insufficient, pursuant to 8 C.F.R. § 204.5(g)(1), to demonstrate that the beneficiary is qualified for the proffered position. Therefore, the petition may not be approved.

An additional issue exists in this case that was not mentioned in the decision of denial.⁶ Pursuant to 20 C.F.R. §626.20(c) (8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship." *See Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000).

In the instant case, the beneficiary shares the family name of the petitioner's owner. This creates the suspicion, at least, that the beneficiary and the petitioner's owner might be related, which would cast suspicion on the assertion that the petitioner is hiring the beneficiary because it was unable to locate suitable U.S. workers for the proffered position. Because this issue was not raised by the Service Center, however, and the petitioner has not been accorded an opportunity to respond, this office does not base today's decision, in whole or in part, on that issue. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue. Specifically, if a relationship exists between the petitioner's owner and the beneficiary, the petitioner's owner should demonstrate that DOL was aware of that relationship during the certification process.

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.

⁶ 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).