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U.S. Citizenship
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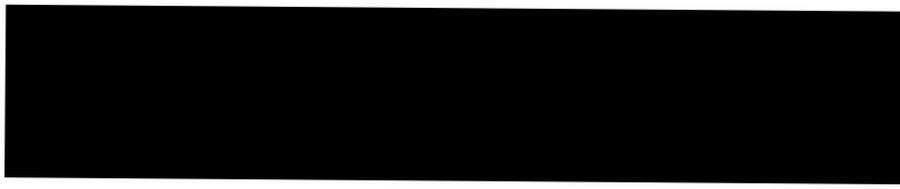


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUN 05 2007
EAC 05 200 50158

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. 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 Employment 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 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.

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 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. 8 C.F.R. § 204.5(g)(2). 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 23, 2001. The proffered wage as stated on the Form ETA 750 is \$12.12 per hour, which equals \$25,209.60 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

The Form I-140 petition in this matter was submitted on June 30, 2005 and indicates that the petitioner would employ the beneficiary in Franklin, New Jersey. The Form ETA 750 indicates that the petitioner would employ the beneficiary in Somerset, New Jersey. Because the street address on both documents is the same, however, this office does not believe that those are two different locations.

On the petition, the petitioner stated that it was established during 2001. The petitioner left blank the spaces reserved on that form for it to report the number of workers it employs, its net annual income, and its gross annual income. On the Form ETA 750B, signed by the beneficiary on July 11, 2004, the beneficiary did not claim to have worked for the petitioner. The beneficiary claimed to have worked as a cook's helper from May 1996 to January 1998 at the Ashoka Indian Restaurant in Edison, New Jersey; and as head cook at the Taj Mahal Restaurant in Lancaster, Pennsylvania from February 1998 to January 2001.

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, however, listed no other employment.

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.¹

In the instant case the record contains (1) copies of the petitioner's 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) Form W-2 Wage and Tax Statements, (3) Form 1099 Miscellaneous Income statements, (4) Paycheck stubs, (5) Form 941 quarterly unemployment returns, (6) Form 940-Z annual unemployment returns, (7) letters dated June 29, 2005 and October 25, 2005 from the petitioner's president, and (8) an affidavit dated December 27, 2005 from the petitioner's president. The

¹ 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).

record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

As to the beneficiary's qualifying experience, the record contains the petitioner's president's June 29, 2005 and October 25, 2005 letters. The record does not contain any other evidence pertinent to the beneficiary's claim of qualifying employment experience.

The petitioner's tax returns show that the petitioner is a corporation, that it incorporated on September 2, 2001, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2001 the petitioner declared a loss of \$4,253. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner reported ordinary income of \$968. At the end of that year the petitioner had current assets of \$11,284 and current liabilities of \$5,980, which yields net current assets of \$5,304.

During 2003 the petitioner reported ordinary income of \$8,978. At the end of that year the petitioner had current assets of \$17,973 and current liabilities of \$8,069, which yields net current assets of \$9,904.

A 2001 W-2 form provided shows that the petitioner paid the beneficiary \$3,780 during that year. The quarterly return for the last quarter of 2001 shows that the petitioner paid total wages of \$4,380 during that quarter, \$3,780 of which it paid to the beneficiary. A 2001 W-3 transmittal shows that the petitioner paid total wages of \$4,380 during that year.

A 2002 W-2 form provided shows that the petitioner paid the beneficiary wages of \$21,840 during that year. Form 941 quarterly returns for the four quarters of 2002 show that the petitioner paid total wages of \$7,020 during each of those quarters, for a total of \$28,080. Of that amount, \$5,460 was paid to the beneficiary during each of those quarters, for a total of \$21,840, thus confirming the amount shown on the W-2 form. A 2002 W-3 transmittal confirms that the petitioner paid total wages of \$28,080 during that year, as does a Form 940-EZ annual unemployment return.

A 2003 Form 1099 shows that the petitioner paid the beneficiary non-wage compensation of \$7,280 during that year. A 2003 W-2 form shows that the petitioner paid the beneficiary wages of \$17,940, for a total of \$25,550 in combined wage and non-wage payments during that year.

A 2004 Form 1099 shows that the petitioner paid the beneficiary \$18,970 in non-wage compensation during that year. A 2004 W-2 form shows that the petitioner paid the beneficiary wages of \$6,240, for a total of \$25,210 in combined wage and non-wage payments during that year.

A Form 941 quarterly return for the second quarter of 2005 shows that the petitioner paid total wages of \$7,669 during that quarter, of which \$5,719.20 was paid to the beneficiary. An "Employee Detail" printout generated by the petitioner confirms that amount. The paycheck stubs provided show that the petitioner paid the beneficiary gross pay of \$484.80 on June 11, June 18, and June 25, 2005. The beneficiary's year-to-date gross pay on June 25, 2005 was \$7,669.20.

The petitioner's president's June 29, 2005 letter states that the proffered position requires two years of experience and that the beneficiary has that experience. The petitioner's president's basis for that assertion is not stated. That letter states that the petitioner has employed the beneficiary since April of 2001.

The petitioner's president's October 25, 2005 letter states that the petitioner is able to pay the proffered wage and that the beneficiary has two years of experience and is fully qualified for the proffered position. The petitioner's president's basis for the assertion pertinent to the beneficiary's employment history is not stated. That letter states that the petitioner's opening was delayed and the beneficiary did not begin working for the petitioner as early as expected. It did not, however, state when the petitioner opened or when the beneficiary began working for it.

The petitioner's president's December 27, 2005 affidavit states that the business opened later than planned and that business was depressed by the events of September 11, 2001, but that, "We always considered that the business would be more than satisfactory in future years." Again, that letter does not state when the petitioner opened for business.

The acting director denied the petition on November 29, 2005, finding both that the evidence does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and that the evidence does not demonstrate, pursuant to the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), that the beneficiary has the requisite qualifying employment experience as stated on the approved labor certification.

On appeal, counsel asserted that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel made no representation pertinent to the evidence in support of the beneficiary's claim of qualifying employment experience.

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 established that it paid the beneficiary \$3,780 during 2001, \$21,840 during 2002, \$25,550 during 2003, \$25,210 during 2004, and year-to-date wages of \$7,669.20 by June 25, 2005.

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 typically² 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 \$25,209.60 per year. The priority date is April 23, 2001.

The petitioner paid the beneficiary \$3,780 during 2001 and is obliged to demonstrate the ability to pay the remaining \$21,429.60 balance of the proffered wage during that year.³ During 2001 the petitioner declared a

² The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

³ Some confusion exists pertinent to the date upon which the petitioner incorporated, the date it commenced business, and the date the beneficiary began to work for it. This confusion is addressed further, in another

loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner's 2001 tax return is insufficient, in itself, to demonstrate that the petitioner was able to pay the proffered wage during 2001.

The petitioner paid the beneficiary \$21,840 during 2002 and is obliged to demonstrate the ability to pay the remaining \$3,369.60 balance of the proffered wage during that year. During 2002 the petitioner declared ordinary income of \$968. That amount is insufficient to pay the remaining balance of the proffered wage. At the end of that year, however, the petitioner had net current assets of \$5,304. That amount is sufficient to pay the remaining balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner paid the beneficiary \$25,550 during 2003. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The petitioner paid the beneficiary \$25,210 during 2004. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

The petitioner demonstrated that it paid the beneficiary year-to-date wages of \$7,669.20 by June 25, 2005. Ordinarily the petitioner would be obliged to show the ability to pay the remaining \$17,540.40 balance of the proffered wage.

The petition in this matter, however, was submitted on June 30, 2005. On that date the petitioner's 2005 tax return was unavailable. On August 2, 2005 the service center issued a request for evidence in this matter, 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. Evidence pertinent to 2005 was never subsequently requested. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner's 2001 tax return does not, in itself, demonstrate that the petitioner was able to pay the proffered wage during that year. However, the petitioner apparently opened for business during that year, even though on what date is not clear. Further, the petitioner has been able to pay the proffered wage during each of the subsequent salient years. Pursuant to the reasoning in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), this office finds that the totality of the circumstances in this case demonstrate that the petitioner was able to pay the proffered wage during 2001.

context, below. For the purpose of demonstrating the ability to pay the proffered wage during 2001, however, the petitioner has not satisfactorily demonstrated when it opened for business and when it first employed the beneficiary. Under these circumstances the amount of the proffered wage the petitioner is obliged to show the ability to pay cannot be prorated to reflect some period shorter than a year. The petitioner is obliged to show the ability to pay the proffered wage during all of 2001.

The petitioner has demonstrated that it was able to pay the proffered wage during each of the salient years and has overcome that basis for denial.

The remaining basis cited in the decision of denial is the acting director's finding that the petitioner had not demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification.

8 C.F.R. § 204.5(l)(3)(ii)(A) states that,

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.

The record does not contain any letters from the beneficiary's previous employers. The record contains two letters from the petitioner stating that the beneficiary has the requisite experience, but not stating the basis for that assertion. The petitioner has not demonstrated, consistent with the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), that the beneficiary is qualified for the proffered position. The petition was correctly denied on this basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

The petitioner, [REDACTED], filed the Form ETA 750 labor certification in this matter on April 23, 2001. In the Form ETA 750B, signed July 11, 2004, the beneficiary did not claim to have worked for the petitioner. In his June 29, 2005 letter the petitioner's president stated that the petitioner has employed the beneficiary since April of 2001. The petitioner's president's October 25, 2005 letter states that the petitioner's opening was delayed and the beneficiary did not begin working for the petitioner as early as expected, but does not state when the petitioner opened or when the beneficiary began working for it. The petitioner's tax returns state that it was incorporated on September 2, 2001.

The chronology described is confusing. Because the decision of denial did not discuss this chronology and the petitioner has not been accorded the opportunity to address it, today's decision does not rely on issues related to that apparently contradictory chronology. If the petitioner attempts to pursue the matter further, however, it should state when the petitioner came into existence, when it commenced operations, and when it hired the beneficiary. If the labor certification application was filed before the petitioner, Bangalore Express Incorporated, actually came into existence, the petitioner should address the propriety of the timing of that filing. If the petitioner did not open until September of 2001, it should explain its president's assertion, made on June 29, 2005, that the petitioner had employed the beneficiary beginning in April of 2001.⁴

⁴ Doubt cast on any aspect of the petitioner's proof 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).

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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.