



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

B6



FILE: [REDACTED]
SRC 03 111 54436

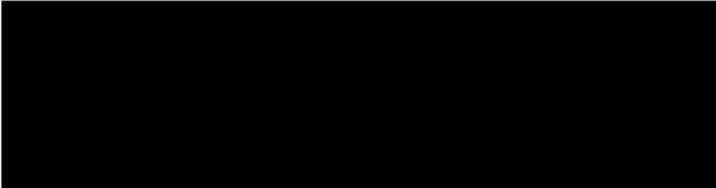
Office: TEXAS SERVICE CENTER Date: MAR 21 2007

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 Director, Texas 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 gas station/convenience store. It seeks to employ the beneficiary permanently in the United States as a retail store 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 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 director also noted that the petitioner had failed to provide requested evidence.

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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$32,000 per year.

The Form I-140 petition in this matter was submitted on March 10, 2003. On the petition, the petitioner did not state, in the spaces provided for this purpose, the date upon which it was established or the number of workers it employs. On the Form ETA 750, Part B, signed by the beneficiary on March 3, 2003, 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 Clermont, Georgia.

The AAO reviews *de novo* issues raised 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 the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation and the petitioner's unaudited 2002 financial statements.

The petitioner's tax return shows that it is a corporation, that it incorporated on April 6, 2001,¹ and that it reports taxes pursuant to cash convention accounting and the calendar year. The 2001 return covers the period from the petitioner's incorporation on April 6, 2001 to the end of that calendar year. During that period the petitioner declared a loss of \$3,154 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$24,603 and current liabilities of \$3,600, which yields net current assets of \$21,003.

That return also showed that the petitioner paid no wages during that year, no Schedule A, Line 3 Cost of labor, and only \$5,220 in officer compensation, although the Form ETA 750 indicates that the beneficiary's duties in the proffered position, retail store manager, will be to supervise two to four other employees.

On August 22, 2005 the Texas Service Center issued a Notice of Intent to Deny in this matter. The service center noted the discrepancy between the asserted duties of the proffered position and the information on the tax return and the Form ETA 750. The service center requested that the petitioner report the date it was established and the number of employees it has. The service center also noted that the petitioner's tax return appeared to be insufficient to show the ability to pay the proffered wage during 2001. Finally, the service center requested that the petitioner provide its 2002 tax return and its 2001 and 2002 Form W-2 Wage and Tax Statements.

The record does not contain a timely response to that notice of intent to deny. On October 6, 2005 the director issued a decision in this matter. The director stated that the petitioner had not provided information and evidence requested in the notice of intent to deny and had not demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The director denied the visa petition.

On appeal, counsel provided evidence that the petitioner had submitted a response to the notice of intent to deny and that the response had been returned to it by CIS. Counsel also stated, "I am attaching . . . the original NOID reply . . ."

The only evidence submitted with that response, however, was one page of a Georgia state income tax return that confirms that during 2001 the petitioner declared a loss of \$3,154 as its ordinary income. The petitioner did not submit the requested 2002 tax return or the requested 2001 and 2002 W-2 forms or any explanation of those omissions. The petitioner also did not reveal the number of workers it employs or the date it was established.

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). The petition was correctly denied on this basis, which has not been

¹ This date of incorporation, if it corresponds with the date the petitioner was established, indicates that, within a few weeks of its establishment, the petitioner had already determined that because no U.S. workers were available to fill its managerial position it needed to employ an alien in that position, and had filed a Form ETA 750 Labor Certification Application.

overcome on appeal. The remaining issue is whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

Counsel's reliance on unaudited financial records to show the petitioner's ability to pay the proffered wage is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

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 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 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 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 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 \$32,000 per year. The priority date is April 30, 2001.

The petitioner declared a loss during 2001. 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 net current assets of \$21,003. That amount is insufficient to pay the proffered wage. 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 has failed to demonstrate its ability to pay the proffered wage during 2001.

The service center requested, on August 22, 2005, that the petitioner submit its 2002 tax return. The petitioner did not submit that return or any other reliable evidence of its ability to pay the proffered wage during 2002. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

The visa petition was submitted on March 10, 2003. On that date the petitioner's 2003 and 2004 tax returns were unavailable. Those returns could have been requested when the service center issued the notice of intent to deny in this matter on August 22, 2005 but, for reasons unknown to this office, they were not. The petitioner's failure to demonstrate its ability to pay the proffered wage during 2003 and subsequent years will form no part of the basis of today's decision.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this additional basis, which has not been overcome on appeal.

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

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 appeal is dismissed.