



U.S. Citizenship
and Immigration
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FILE:

EAC-04-185-50254

Office: VERMONT SERVICE CENTER

Date: **MAY 24 2007**

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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 first-line supervisor/manager of housekeeping (maintenance manager). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the petitioner had not established that the beneficiary had the required experience to qualify for the classification sought. The director denied the petition accordingly.

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

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 AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal counsel submits an experience letter from [REDACTED] for the beneficiary and the petitioner's corporate tax returns for 2000 and 2003. Other relevant evidence in the record includes experience letters from [REDACTED] and [REDACTED], and the petitioner's corporate federal tax return for 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage and the beneficiary's qualifications for the proffered position.

As set forth in the director's March 25, 2005 denial, the first issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on September 27, 2002. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour (\$27,040 per year). The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1977, to have a gross annual income of \$124,936, to have a net annual loss of \$19,265, and to currently employ 4 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B signed by the beneficiary on September 26, 2002, he did not claim to have worked for the petitioner. However, the petitioner claimed in a letter dated February 19, 2004 that the beneficiary worked for the petitioner from March 20, 2003 to April 30, 2003.

On appeal, counsel asserts that additional evidence submitted on appeal shows that the petitioner has continuously maintained the ability to pay the proffered wage of \$13.00 per hour.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of 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 first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary did not claim to have worked for the petitioner and the petitioner did not submit any evidence for the beneficiary's compensation from the petitioner although the petitioner's letter indicates that the beneficiary worked for the petitioner for 40 days from March 20, 2003 to April 30, 2003. Thus, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 2002 onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng*

Chang v. Thornburgh, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on its gross income and gross profit on appeal is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000, 2002 and 2003. Since the priority date in the instant case is September 27, 2002, the tax return for 2000 is not necessarily dispositive. The petitioner's tax returns for 2002 and 2003 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$27,040 per year from the priority date:

- In 2002, the Form 1120S stated a net income² of \$(19,265).
- In 2003, the Form 1120S stated a net income of \$(38,847).

Therefore, for the years 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS

² Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 or line 23 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See Internal Revenue Service, Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>; Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>.*

will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2002 were \$240.
The petitioner's net current assets during 2003 were \$7,392.

Therefore, for the years 2002 and 2003 the petitioner did not have sufficient net current assets to pay the proffered wage of \$27,040 per year.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage as of the year of the priority date 2002 and 2003 through an examination of wages paid to the beneficiary, its net income or its net current assets.

As set forth in the director's denial, the second issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petitioner must 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience requirements for the proffered position as follows:

³According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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|-----|--------------------|------------------------------------|
| 14. | Experience | |
| | Job offered | Blank |
| | Related Occupation | 2 years |
| | Related Occupation | Maintenance Engineer or Supervisor |

Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he had worked as a maintenance engineer for [REDACTED] from April 2001 to the present (the form was signed on September 26, 2002). He did not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(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.

With the initial filing, the petitioner submitted two experience letters from former employers pertinent to the beneficiary's qualification as required by the above regulation. One experience letter dated January 29, 2004 is from [REDACTED], Human Resources of [REDACTED] (s letter), which verifies that the beneficiary was employed by the hotel and restaurant business as a maintenance engineer from April 1, 2001 to March 10, 2003. The priority date in the instant case is September 27, 2002, therefore, only the 18 months of experience from April 1, 2001 to September 27, 2002 can be considered. 18 months of experience cannot be considered to meet the requisite two years (24 months) of experience for the proffered wage. In addition, [REDACTED]'s letter does not verify the beneficiary's full-time employment. If the employment is a part-time job, 18 months of part-time experience can only be considered 9 months of full-time experience. Therefore, [REDACTED]'s letter does not establish that the beneficiary has the required two years of full-time experience at the time of filing.

The second letter dated February 19, 2004 is from [REDACTED], Human Resources of the petitioner (the petitioner's letter), verifying that the beneficiary worked for the petitioner doing painting, snow removal and general maintenance work from March 20, 2003 to April 30, 2003. The 40 days of experience was after the priority date and cannot be considered in determining whether the beneficiary possessed the requisite two years of experience prior to the priority date. Therefore, the petitioner's letter does not establish that that the beneficiary has the required two years of full-time experience at the time of filing.

On appeal, counsel submits a third experience letter dated April 6, 2005 from [redacted] Manager of [redacted] (s letter). This letter states in pertinent part that: “[the beneficiary] worked for my establishment from October 1999 until March 2001 as a Maintenance Manager. His responsibilities at our company included supervision of construction, painting, plumbing and landscaping.” [redacted] s letter verifies the beneficiary’s 17 months of experience as a maintenance manager. However, again this letter does not verify the beneficiary’s full-time employment for the 17 months. The letter does not describe the size of the business and number of employees, however, it is doubtful how a restaurant has sufficient work for a maintenance manager on a full-time basis.⁴ If the employment was a part-time job, the 17 months of experience can only be considered 8 months of full-time. The 8 months of full-time experience with [redacted] plus the 9 months of full-time experience with [redacted], totaling 17 months of full-time experience, cannot establish that that the beneficiary had the required two years of full-time experience prior to the priority date.

Therefore, the petitioner failed to establish that the beneficiary possessed the requisite two full-time years of experience as a maintenance engineer or manager with a regulatory-prescribed evidence. Counsel’s assertion on appeal cannot overcome this ground of the director’s denial.

Beyond the director’s decision and counsel’s assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner misrepresented the job to DOL in the labor certification process. 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Section 212(a)(6)(C)(i) of the Act provides that “[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.”

In the instant case, the Form ETA-750A describes the job opportunity in details. The job offer consists of the name of job title “maintenance manager” set forth at Item 9, the duties of “supervise maintenance staff. Perform and oversee general maintenance of four buildings (interiors and exteriors). Perform and oversee groundskeeping” set forth at Item 13, the minimum requirements that an applicant must have two years of experience in the related occupation of maintenance engineer or supervisor set forth at Item 14 and that the beneficiary will supervise four employees set forth at Item 17.

⁴ If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

It is noted that while Item 17 of the Form ETA 750A indicates that the beneficiary will supervise four employees, the petitioner claimed to currently employ four workers. The record also shows that [REDACTED] signed the Form ETA 750A as an owner, but [REDACTED] provided a letter as the petitioner's human resources, and Item 16 of the Form ETA 750A indicates that a general manager will be the beneficiary's immediate supervisor. It is not clear whether or not these three people are included the four current employees count. If they are included, then obviously the beneficiary would not have four employees to supervise and further the position of maintenance manager who will supervise four employees does not exist at the time of filing. Therefore, the petitioner failed to demonstrate that the job offer is a *bona fide* one and realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The petitioner's tax returns show that the petitioner paid salaries and wages of \$12,850 in 2002 and \$14,200 in 2003 respectively. These figures are not sufficient for one single employee. The petitioner actually failed to establish that it has four employees for the beneficiary to supervise.

The labor certification in the instant case is certified for a full time manager position. A manager's main duties are to supervise other employees. It is most unlikely that a manager could perform his supervisory duties on a full time basis without employees. The number of employees the beneficiary will supervise on the Form ETA 750 is not just an estimate or prediction. Although the petitioner claimed to have four employees, it seems unlikely that the beneficiary would supervise the owner, human resources and general manager. This representation is a material part of the terms and condition of the job opportunity.

It therefore appears that the job offer in this case may involve a willful misrepresentation of a material fact. The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "After issuance labor certifications are subject to invalidation by the [CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application." If the matter is pursued, the petitioner must address this issue.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.