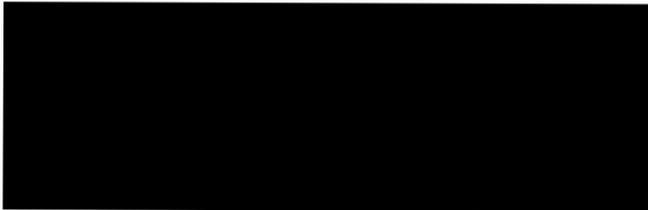


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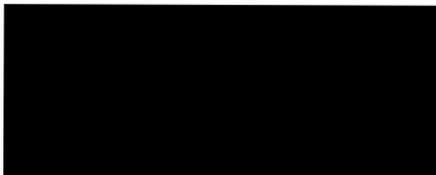
OCT 24 2007

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

Counsel represented the petitioner when it filed the petition. The record contains a Form G-28 Notice of Entry of Appearance in which the petitioner's representative executed recognizing counsel. Subsequently, the beneficiary submitted a Form G-28 recognizing a different attorney as his counsel. The interested party in this case, however, is the petitioner. The beneficiary has no standing in this appeal. All representations will be considered, but the decision will be furnished only to the petitioner and its counsel of record.

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.¹ 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The 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 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

¹ Actually, Part B of Form ETA 750, which would have listed the beneficiary's previous employment, is not in the record. The beneficiary is not the original beneficiary for whom the petitioner filed. The record contains a Form ETA 750B pertinent to the original beneficiary.

An employer initiates the substitution process by filing a Form I-140 petition on behalf of the alien to be substituted. An employer must submit Part B of the Form ETA 750, signed by the substituted alien. Memorandum From Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96_28-96a.pdf (March 7, 1996).

In the instant case, the petitioner did not file a new Form ETA 750 for the substituted beneficiary. The service center should have requested that the petitioner file a new Form ETA 750 as required by the memorandum.

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 either 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$2,418.54 per month, which equals \$29,022.48 per year. The Form ETA 750 states that the position requires four years of experience in the job offered.

The Form I-140 petition in this matter was submitted on September 13, 2005. On the petition, the petitioner stated that it was established on January 26, 1998 and that it employs three workers. The petition states that the petitioner's gross annual income is \$126,787 and that its net annual income is a loss of \$11,269. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Aiea, Hawaii.

Ordinarily the record would contain a Form ETA 750B, which would list the beneficiary's employment history. In the instant case the petitioner did not submit that required form.² That form would have shown, among other things, whether the beneficiary claims to have worked for the petitioner.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. 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.³ In the instant case the record contains the petitioner's 2001, 2002, 2003, 2004, and 2005 Form 1120, U.S. Corporation Income Tax Returns. 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.

As to the beneficiary's employment history, the record contains the beneficiary's résumé and a Certificate of Employment dated April 28, 2006 (with English translation). The record does not contain any additional evidence pertinent to the beneficiary's claim of qualifying employment experience.

The petitioner's tax returns show that it is a corporation, that it incorporated on January 26, 1998, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2001 the petitioner declared a loss of \$39,606 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner had current assets of \$4,834 and current liabilities of \$1,135, which yields net current assets of \$3,699.

During 2002 the petitioner declared a loss of \$19,274 as its taxable income before net operating loss deduction and special deductions. Because the petitioner did not complete a corresponding Schedule L for that year,⁴ no reliable figures from which its net current assets can be computed are available to this office.

During 2003 the petitioner declared a loss of \$18,318 as its taxable income before net operating loss deduction and special deductions. Because the petitioner did not complete a corresponding Schedule L, no reliable figures from which its net current assets can be computed are available to this office.

² The instant beneficiary is not the original beneficiary listed on the Form ETA 750. A Form ETA 750 describing the original beneficiary's employment history is in the record, but not a Form ETA 750B describing the beneficiary's employment history.

³ 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).

⁴ Pursuant to the instructions on the Schedule L for 2002 and later years, the taxpayer is not required to complete that schedule if its answer to Question 13 on Schedule K is "Yes," that is, if its total receipts and its total assets at the end of the year are less than \$250,000. During all of the salient years the petitioner's total receipts and its total assets were less than \$250,000.

During 2004 the petitioner declared a loss of \$35,493 as its taxable income before net operating loss deduction and special deductions. Because the petitioner did not complete a corresponding Schedule L, no reliable figures from which its net current assets can be computed are available to this office.

During 2005 the petitioner declared a loss of \$38,169 as its taxable income before net operating loss deduction and special deductions. Because the petitioner did not complete a corresponding Schedule L, no reliable figures from which its net current assets can be computed are available to this office.

On [REDACTED] beneficiary claimed to have worked (1) for [REDACTED] as a cook during January 1990, (2) for [REDACTED] of 1994, (3) as head cook for [REDACTED] during May 1996, (4) as head cook for [REDACTED] g July 1999, (5) as head cook for [REDACTED] in food during November 2001, and (6) as head cook for [REDACTED] during September of 2003. The location of those companies was not stated on the résumé. The duration of the beneficiary's employment for those companies was not stated on the résumé. No contact information for those companies was provided on the résumé.

The April 28, 2006 Certificate of Employment states that the beneficiary began working for [REDACTED] Distribution as a skills consultant on January 18, 2005 and continued through the date of that letter. [REDACTED] signed the letter. [REDACTED] position with that company is not stated.

The director denied the petition on May 10, 2006. The director noted that the only employment verification letter the petitioner provided showed that the beneficiary had worked as a skills consultant and that the employment had begun on January 18, 2005. The director observed that, in order to show that the beneficiary is qualified for the proffered position, the petitioner is obliged to show that he had four years of experience as a cook before the April 30, 2001 priority date.

On appeal, counsel stated that the director erred by assuming that the position of skill consultant is unrelated to consulting on the skills of cooking. Counsel also stated that the beneficiary's résumé shows that he has other experience as a cook that more than meets the experience requirement stated on the labor certification.

As to the petitioner's ability to pay the proffered wage, counsel asserted that declaring a loss for tax purposes does not demonstrate an inability to pay wages.

Initially, this office notes that counsel has inverted the burden of proof in this matter. The director did not find that the petitioner is unable to pay the proffered wage, nor must the director demonstrate that the petitioner is unable in order to deny the petition on 8 C.F.R. § 204.5(g)(2) grounds. Pursuant to that regulation, the burden is on the petitioner to affirmatively demonstrate its continuing ability to pay the proffered wage beginning on the priority date. *See also* section 291 of the Act. The director found that the petitioner had not affirmatively demonstrated that ability. This formed one basis for the decision of denial.

Whether or not the director assumed that the position of Skills Consultant had nothing to do with consulting on the skills of cooking is unclear and, in any event, inapposite. The director is not obliged to demonstrate that the beneficiary's experience does not qualify him for the proffered position. Rather, the petitioner is

obliged to affirmatively show that the beneficiary had the employment experience as required by the approved labor certification before the priority date.

To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is in fact qualified for the certified job. 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 *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).

In this case, the labor certification states explicitly that the requisite experience is four years as a cook. In order for the employment verification letter to show that the beneficiary is qualified for the proffered position, it would have to affirmatively demonstrate that the position that the beneficiary filled was cook, rather than skill consultant, and that the employment encompassed four years prior to the April 30, 2001 priority date. In fact, however, the letter does not show a four-year tenure, the position was not for a cook, and it began after the priority date. The sole employment verification letter submitted shows no qualifying experience.

The beneficiary's résumé is also insufficient to show that the beneficiary has the required experience. First, the length of the beneficiary's claimed employment with each of the alleged previous employers is unstated and unknown to this office. Further, the regulation at 8 C.F.R. § 204.5(l)(3)(ii), as noted above, states that any experience requirement **must be supported by letters from trainers or employers**. That the regulation does not contemplate self-certification by the self-interested beneficiary is clear.

The petitioner did not submit reliable evidence sufficient to show, pursuant to the requirements of 8 C.F.R. § 204.5(l)(3)(ii), that the beneficiary has the required employment experience. The petition was correctly denied on this basis, which has not been overcome on appeal.

Counsel's assertion that the net income shown on the petitioner's tax return is a poor indicator of the petitioner's cash position is inapposite. That assertion neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that copies of annual reports, federal tax returns, or audited financial statements are required evidence of a petitioner's ability to pay the proffered wage. If the required evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). Counsel has provided no reliable evidence of other funds, not shown on the tax returns, sufficient to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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

typically⁵ 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 \$29,022.48. The priority date is April 30, 2001.

During 2001 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 profit during that year. At the end of that year the petitioner had net current assets of \$3,699. 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 not demonstrated its 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 profit during that year. The petitioner's 2002 tax return does not demonstrate that it had any net current assets at the end of that year. 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 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated its 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 profit during that year. The petitioner's 2003 tax return does not demonstrate that it had any net current assets at the end of that year. 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 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated its 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 profit during that year. The petitioner's 2004 tax return does not demonstrate that it had any net current assets at the end of that year. 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 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2004.

During 2005 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 profit during that year. The petitioner's 2005 tax return does not demonstrate that it had any net current assets at the end of that year. 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 2005 with which it

⁵ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

could have paid the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2005.

The petition in this matter was submitted on September 13, 2005. On that date the petitioner's 2006 tax return was unavailable. On February 10, 2006 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. The petitioner responded to that notice on May 3, 2006 and the record is deemed to have closed on that date. On that date the petitioner's 2006 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2006 and later years.

The evidence does not demonstrate that the petitioner had the ability to pay the proffered wage during 2001, 2002, 2003, 2004, or 2005. Therefore the petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date as required by 8 C.F.R. § 204.5(g)(2). The petition was correctly denied on this additional basis, which has not been overcome on appeal.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petition may not be approved.

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.