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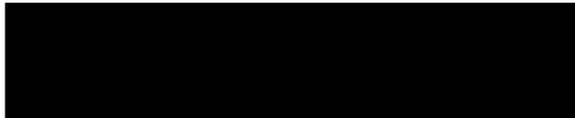


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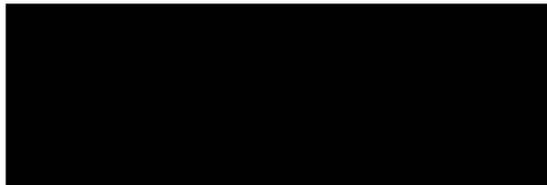
OCT 24 2007

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.

The petitioner is a land development and construction service. It seeks to employ the beneficiary permanently in the United States as a junior architect. 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 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 sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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 March 29, 2001. The proffered wage as stated on the Form ETA 750 is \$44,044.85 per year.

The Form I-140 petition in this matter was submitted on August 26, 2005. On the petition, the petitioner stated that it was established on April 15, 1999 and that it employs two workers. The petition states that the petitioner's gross annual income is \$400,000. The space provided for the petitioner to state its net annual income was left blank. On the Form ETA 750, Part B, signed by the beneficiary on March 19, 2001, 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 Garden Grove, California.

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.¹ In the instant case the record contains the petitioner's 2002 and 2003 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.

The petitioner's tax returns show that it is a corporation, that it incorporated on January 10, 1998, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2002 the petitioner declared a loss of \$481 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$5,899 and no current liabilities, which yields net current assets of \$5,899.

During 2003 the petitioner declared a loss of \$777 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of \$0.

The director denied the petition on June 5, 2006. On appeal, the petitioner² stated,

We are reforming the corporation in order to have overseas contracts. The corporation is negotiating a big contract, that will cover the salaries (sic) for over 100 professional (sic) people.

On the Form I-290 appeal, the petitioner's chief executive officer (CEO) stated that he required an additional 120 days to submit a brief and/or additional evidence. No further submissions were received. On October 2, 2007 this office attempted to contact the petitioner by facsimile transmission at the fax number in the record.³

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).

² Although the record contains a correctly executed Form G-28 recognizing counsel, the appeal in this matter was submitted by the petitioner's chief executive officer, apparently without input from counsel.

³ The letterhead of a letter dated January 18, 2002 gives the petitioner's fax number as [REDACTED] which is the number used in the attempt to contact the petitioner. The record contains no other fax number for the petitioner. Further, the website listed as the petitioner's on that letterhead is no longer active and no fax number could be found from any web source.

Further, in attempting to locate a fax number for the petitioner, this office consulted a website maintained by the California Secretary of State at <http://kepler.ss.ca.gov/corpdata/index.html>. That website, consulted on October 6, 2007, indicated that the corporate status of the petitioner, Professional Engineering Incorporated,

That phone number was found to be disconnected. The petition will be adjudicated based on the information now in the record.

The mere assertion that the petitioner is reforming, that it will attempt to obtain overseas contracts, and that it is negotiating a large contract that, if it is successfully landed, will enable the petitioner to employ over 100 additional workers is insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The record contains no evidence of the petitioner's reformation other than that statement. It contains no other evidence that foreign contracts are available or, if they are, that they would result in profits, rather than additional losses. The record contains no evidence other than the CEO's reference to the large contract for which the petitioner is negotiating or that it would be profitable if obtained. The CEO's assertions on appeal are insufficient to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Merely going on record without proof is insufficient to sustain the burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during 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

has been suspended. That the petitioner's corporate status is suspended, its fax number is disconnected, its website is no longer active, and that the petitioner's CEO and the beneficiary spoke of a reorganization, taken together, suggest that the petitioner may no longer exist.

Again, this issue was not raised in the decision of denial, and this office finds the evidence currently insufficient to justify denial of the petition on this basis. However, if the petitioner, Professional Engineering Incorporated, attempts to overcome today's decision, and intends to employ the beneficiary itself, it must show that the lapse in its corporate status was temporary and inconsequential, and that it is now in good standing and continues to be an employer within the meaning of 8 C.F.R. § 204.5(c).

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 typically⁴ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$44,044.85 per year. The priority date is March 29, 2001.

The record contains no copies of annual reports, federal tax returns, or audited financial statements for 2001 as required by 8 C.F.R. § 204.5(g)(2) or any other reliable evidence of its ability to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner

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

had net current assets of \$5,899. That amount is insufficient to pay the proffered wage. The record contains no reliable evidence of any other funds available to the petitioner during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of \$0. 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 record contains no reliable evidence of any other funds available to the petitioner during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petition in this matter was submitted on August 26, 2005. On that date the petitioner's 2004 tax return should have been available. It was not provided, nor was any reason given for this omission. The record contains no other evidence pertinent to the petitioner's ability to pay the proffered wage during 2004. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petitioner's 2005 tax return was not available on the date the petition was submitted. 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. CIS received counsel's response to that request on May 3, 2006, and the record is deemed to have closed on that date. On that date the petitioner's 2005 tax return should, absent extension, have been available.⁵ The petitioner did not submit that tax return or any reason for that omission. The record contains no audited financial statements, annual reports, or any other reliable evidence of the petitioner's ability to pay the proffered wage during 2005. The petitioner has not demonstrated its ability to pay the proffered wage during 2005.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, 2003, 2004, and 2005. 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 basis, which has not been overcome on appeal.

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

On appeal, the petitioner's CEO asserted, "We are reforming the corporation . . ." In a letter dated April 4, 2006 the beneficiary stated, "The Petitioner for my application has decided to merge with another company. As I understood, the two companies are preparing the legal documents for the new entity." From those statements, this office infers that a newly formed entity, and not the petitioner, Professional Engineering Incorporated, is the intended and anticipated employer.

⁵ Because the petitioner had previously filed Form 1120, U.S. Corporation Income Tax Returns and reported taxes pursuant to the calendar year, it is reasonable to expect that it continued to do so. Because the instructions to the Form 1120 state that it is due on the 15th day of the third month after the close of the tax year, this office apprehends that the petitioner's return was due on March 15th, prior to the submission of the response to the request for evidence.

In the event that some other entity intends to rely upon the labor certification issued to the petitioner, it must show that it is entitled to rely on that labor certification. The substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1986). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer.

The substituted petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-in-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *Matter of Dial Auto Repair Shop, Inc, Id.*

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).

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.