



U.S. Citizenship
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SEP 20 2007

File: [REDACTED]
SRC-06-055-50336

Office: TEXAS SERVICE CENTER Date:

In re: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

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 (“director”), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner operates a pet grooming business, and seeks to employ the beneficiary permanently in the United States as an animal caretaker (“Pet Groomer”). The petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s March 29, 2006 decision, the petition was denied on the basis that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage.

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

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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.²

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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

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). 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).

² The petitioner initially filed the I-140 petition for the beneficiary as a skilled worker, 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. *See* Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As the petitioner only required six months of experience on the ETA 750, the director allowed the petitioner to have the petition considered under the “other worker” category.

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on Form ETA 750 is \$12.00 per hour, based on a 40 hour work week, which is equivalent to \$24,960 per year. The labor certification was approved on September 27, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on December 9, 2005. The petitioner represented the following information on the I-140 Petition: date established: July 1, 1987; gross annual income: \$461,346; net annual income: not listed; and current number of employees: not listed.

On December 20, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit additional documentation regarding the petitioner's ability to pay for the years 2001, 2002, 2004, and 2005³ in the form of either federal tax returns, audited financial statements, or annual reports. Further, the RFE requested that the petitioner provide Forms W-2 if the petitioner employed the beneficiary. The RFE also requested that the petitioner indicate whether it sought to classify the position as a skilled worker or professional, as the Form ETA 750 indicated only six months of required work experience, which would fall into the category of "other worker." The petitioner responded. Following review, the director denied the petition on March 29, 2006 on the basis that the petitioner failed to establish its ability to pay the proffered wage. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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. On Form ETA 750B, signed by the beneficiary on March 31, 2001, the beneficiary did not list that she was employed with the petitioner. The petitioner did not provide any evidence that it employed the beneficiary. Accordingly, the petitioner cannot establish its ability to pay the beneficiary the proffered wage through prior wage payment.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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). 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 petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation

³ The petitioner had initially submitted only its 2003 federal tax return.

Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003 ⁴	-\$1,449
2002	-\$1,704
2001	\$13,441

Based on the above, the petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18, or, if filed on Form 1120-A, on Part III. 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, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2003	\$19,766
2002	\$20,843
2001	\$15,939

The petitioner cannot establish its ability to pay the beneficiary the proffered wage based on its net current assets in any year either.

On appeal, counsel contends that the petitioner can demonstrate its ability to pay the proffered wage. Counsel provides that the petitioner is structured as a "C corporation" and declares a low net income to avoid double taxation.

While this may be the petitioner's stated practice, the petitioner must still demonstrate its ability to pay the proffered wage. The petitioner has not shown its ability to pay through its net income, net current assets, or through any prior wage payment to the beneficiary.

Counsel additionally provides that the "petitioner is in dire need of experienced pet groomers and has been unable to identify a U.S. worker is qualified or willing to except [sic] the position." Additionally, he states

⁴ The petitioner indicated that it was unable to submit its 2004 and 2005 federal tax returns as the documents were in the possession of the petitioner's certified public accountant ("CPA"). The petitioner's CPA had passed away, and counsel explained that the petitioner was having difficulty obtaining copies of its taxes as a result.

⁵ According 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.

that the petitioner requires a pet groomer since one individual has retired, and asserts that the petitioner will replace the retired worker with the beneficiary.

The record does not, however, name the worker that the beneficiary will replace, state the individual's wages, or verify their full-time employment. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not documented the position, duty, and termination or departure of the specific worker who performed the duties of the proffered position.

Counsel submitted voluminous records on behalf of the petitioner, including the petitioner's 2003 Forms 1099 issued to employees. We note that the amounts paid to a number of these employees reflect relatively small amounts of pay, for example \$9,724.50 to one employee, \$1,825 to another employee, \$1,134 to another, and \$2,238 to another. It is unclear whether these would represent part-time wages, or additional payments to the employees. Counsel did not specify. As noted above, wages paid to other workers are generally not considered to show the petitioner's ability to pay the beneficiary the proffered wage.

The petitioner additionally submitted worker's compensation payment premiums. Payment of worker's compensation premiums would not exhibit the petitioner's ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner also submitted bi-monthly payroll records for the time periods: January through April 12, 2006; May through September 2005; January through August 2004; and November and December 2003. While the payroll records exhibit payments to other employees, the records do not evidence any payments to the beneficiary. As noted above, wages paid to others generally cannot be used to demonstrate the petitioner's ability to pay the proffered wage. Additionally, as noted above, the petitioner does not identify what worker retired so that the wages paid to that individual could be determined.⁶

Accordingly, based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. 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.

⁶ Given the size and volume of the records, the petitioner would have been better served through submission of Forms W-2 for all workers for the years in question. Without any indication of the payroll records' specific relevance, the records do not serve any purpose other than showing that the petitioner has paid some workers, which can already be deduced from the petitioner's tax returns.