identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 01 2007
SRC 04 168 51472

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[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.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting 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 an automobile towing and repair service. It seeks to employ the beneficiary permanently in the United States as a secretary. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 acting 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)(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 January 2, 2003. The proffered wage as stated on the Form ETA 750 is $13.68 per hour, which equals $28,454.40 per year.

The Form I-140 Immigrant Petition for Alien Worker in this matter was submitted on May 28, 2004. On the petition, the petitioner left blank the spaces reserved for it to state the date it was established, the number of workers it employs, and its gross and net annual incomes. On the Form ETA 750, Part B 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 Oakland Park, Florida.

The AAO reviews *de novo* issues raised in decisions challenged 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.[1] In the instant case the record contains no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The service center issued a request for evidence on February 1, 2005. That request noted that the petitioner is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. Counsel responded with a letter, dated April 28, 2005, stating that such evidence would be provided within a week. The acting director issued a notice of intent to deny on May 23, 2005 noting, again, that the petitioner is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements.

In response counsel provided a letter, dated June 28, 2005, from the president of [redacted] in Hallandale Beach, Florida. That letter states that [redacted] is offering the beneficiary a secretarial position. The acting director denied the petition on July 7, 2005, finding that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel referred to the provisions of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (AC21) and the William R. Yates, CIS Associate Director for Operations Interoffice Memorandum dated May 12, 2005.[2] Counsel's reliance on AC21 and the Yates memorandum is misplaced.

This office notes that AC21 allows an *application for adjustment of status* to be approved in certain instances despite the fact that the initial job offer is no longer valid. The language of AC21 states that the Form I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer from the new employer must be for position that is the "same or similar." A plain reading of the phrase "will remain valid" indicates that the immigrant petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is the same or similar. In other words, it is not possible for a petition to remain valid if it is not an approved/valid petition currently; according to the plain language of the statute, it is an approved Form I-140 that may acquire portability under AC21. Thus, the AAO shall not consider a

[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] With regard to the Yates' memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but is merely offered as guidance. It is not, therefore, binding on this office. That said, however, the AAO's decision in the instant case is consistent with the guidelines set forth in that memorandum.

petition wherein the initial petitioner has not yet demonstrated its eligibility to be a valid petition for purposes of determining portability under AC21. This position is supported by the fact that when AC21 was enacted, CIS regulations required that the underlying Form I-140 be approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the clear meaning for the term "remains valid" was that the underlying petition was approved and it would not be necessarily be invalidated by the fact that the initial job offer was no longer a valid offer.

The AAO notes further that after the enactment of AC21, CIS altered its regulations to allow for the concurrent filing of immigrant visa petitions and applications for adjustment of status, as the petitioner has done in the instant case. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, *prior* to the adjudication of his or her underlying visa petition. Guidance offered in the Yates memorandum dated May 12, 2005 provides that, in such circumstances, if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the portability provisions of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. This memorandum also specifies that where the director has already issued a request for evidence (RFE) related to the initial immigrant petition (Form I-140), as is the case here, the requested evidence must be provided otherwise portability provisions of AC21 may not be triggered. *See Id.* at 4. According to that memorandum, where, as occurred here, the petitioner's only response to the RFE [and to the subsequent notice of intent to deny] were documents which do not address all the requests made in the RFE and which simply indicate that the beneficiary no longer works for the petitioner, the petition shall be denied on the merits. *See Id.* In such circumstances, the alien's application for adjustment of status (Form I-485) shall also be denied, as shall any portability request made because "there was never an approved petition from which to port." *See Id.*

In sum, the AAO notes that, even under the guidance set forth in this memorandum, where the RFE has already been issued, the initial petition is first reviewed on its own merits, without consideration of any new job offer or the *bona fides* of the new prospective employer. Where the evidence fails to demonstrate that the initial petition is approvable, portability provisions of AC21 are never triggered.[3]

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.

[3] If this office were to adopt counsel's reading of AC21 then, under AC21, any beneficiary of a petition, which involved a petitioner who was not able to show the ability to pay, could merely switch to a new employer, who also was unable to show an ability to pay, and have the petition approved. Such a scenario is not acceptable and is not supported by the plain language of AC21. The intent of AC21 was not to allow beneficiaries and employers to avoid the requirement set forth at 8 C.F.R. § 204.5(g)(2) that a job offer be realistic and that any petitioner or substituted petitioner demonstrate an ability to pay to pay the proffered wage from the priority date onwards. *See also Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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. (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

typically[4] 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 $28,454.40 per year. The priority date is January 2, 2003. The acting director requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date in a request for evidence issued February 1, 2005 and in a notice of intent to deny dated May 23, 2005. By that date in May 2005 the petitioner's tax returns through 2004 should have been available. The petitioner is obliged to show its ability to pay the proffered wage during 2003 and 2004. The petitioner, however, submitted no evidence pertinent to its ability to pay the proffered wage during either of those years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2003 and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record as currently constituted suggests an additional issue that was not addressed in the decision of denial. The underlying basis of the instant visa category is to provide workers to fill positions for which U.S. workers are unavailable. Foreign workers are not to be given preferential treatment over qualified U.S. workers when filling positions such as the instant proffered position.

The June 28, 2005 letter from [redacted] the employer whom the beneficiary sought to substitute for the instant petitioner is signed by the president of that company, whose family name is [redacted] as is the beneficiary's. This suggests that the person purporting to offer the beneficiary a job may be related to the beneficiary by blood or marriage. This further suggests that, rather than first seeking to fill that position with a U.S. worker the new employer may have simply offered that position to the beneficiary in order to secure a relative an immigration benefit, and that the job offer is therefore invalid. *See Matter of Sunmart,* 374, 2000-INA-93 (May 15, 2000).

Because this office has found that the new employer may not be substituted for the petitioner in this matter today's decision does not rely on that issue. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

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.

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