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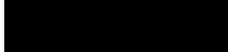
U.S. Citizenship  
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FILE:



LIN 03 186 52121

Office: NEBRASKA SERVICE CENTER

Date: **APR 01 2005**

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, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a sports uniform company. It seeks to employ the beneficiary permanently in the United States as a seamstress. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 director also found that the position's requirements set forth on the labor certification do not require a skilled worker.

On appeal, counsel submits additional evidence and contends that the director erred in reviewing the petitioner's financial information. Counsel also requests reconsideration of the petition under a different immigrant classification.

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.

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.

The alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. The educational, training, and experience requirements are set forth in Item 14 and Item 15. In this case, the only requirement listed is one year of experience in the job offered of seamstress. The petitioner, however, had requested a visa classification as a skilled worker, which, under section 203(b)(3)(A)(i) of the Act, requires a minimum of least two years training or experience.

In part, the director denied the petition because the labor certification's minimum training and experience requirements do not describe a position that would require at least two years training or experience.

On appeal, counsel requests that the beneficiary be approved as an "other worker" category under section 203(b)(3)(A)(iii) of the Act. "Other worker" means a qualified alien who is capable of performing unskilled labor (requiring less than two years training or experience). 8 C.F.R. § 204.5(l)(2).

There is, however, no provision in statute or regulation that compels the Service to re-adjudicate a petition under a different visa classification in response to a petitioner's request to change it, once a decision has been rendered. The appropriate remedy would be to file another petition with the proper fee and required documentation.

The director also denied the petition because the evidence had failed to establish the petitioner's continuing ability to pay the proffered wage.

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10.80 per hour, which amounts to \$22,464 annually. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claims to have worked for the petitioner since February 2001.

On Part 5 of the petition, filed May 20, 2003, the petitioner claims to have been established in 1982, to have a gross annual income of \$598,000, and to currently employ eleven workers.

In support of its continuing ability to pay the proffered salary, the petitioner submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and a copy of an unaudited profit and loss statement covering the period from January through December 2002. The tax return shows that the petitioner reported net income of \$26,560. Schedule L shows that the petitioner reported no assets and no liabilities. The 2002 profit and loss statement reflects that the petitioner reported \$21,102.80 in net income.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 13, 2003, denied the petition. Although the director found that the petitioner's 2001 tax return shows sufficient net income to cover the proffered wage of \$22,464, the director determined that the petitioner's unaudited financial statement submitted failed to demonstrate a continuing ability to pay the beneficiary's proposed wage offer.

On appeal, counsel maintains that the petitioner was not given previous notice to address the grounds for denial, even though a prior request for evidence was issued. The AAO finds no evidence of a request for additional evidence in the record. However, with reference to the erroneous designation of a visa classification, the Service, may, as a courtesy offer a petitioner an opportunity to amend it, but is under no obligation to do so. It remains the petitioner's burden to correctly identify a visa classification on its petition and submit the appropriate documentation. It is noted that if evidence of ineligibility is contained in the record, a petition or application shall be denied on that basis notwithstanding any lack of required initial evidence. 8 C.F.R. § 103.2(b)(8).

Counsel also claims that the director improperly disregarded the petitioner's financial statement for January through December 2002, which was submitted because the federal tax return was not yet available. The director did not ignore the petitioner's profit and loss statement for 2002, he merely determined that it was not persuasive

of the petitioner's ability to pay the proffered wage during this period. Whether its tax return was available or not, according to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. As the unsupported representations of management, unaudited financial statements are not probative of a petitioner's ability to pay the proffered wage.

It is noted that counsel offers a copy of the petitioner's 2002 corporate tax return on appeal. It shows that the petitioner reported net income of \$13,819 during 2002. Schedule L reflects that the petitioner reported no assets and no liabilities. Counsel asserts that the beneficiary has been working for the petitioner for over two years and her wages are already included in the total wages of \$213,448 reported on the petitioner's 2002 tax return. Counsel did not include any documentation of the amount of wages the petitioner has paid the beneficiary. As such, it is unclear if the petitioner has demonstrated its ability to pay the full proffered wage of \$22,464.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. To the extent that wages less than the certified salary may have been paid, consideration will also be given to those amounts. If either the petitioner's net income or its net current assets<sup>1</sup> can cover the difference between the proffered wage and the actual wages paid, then the petitioner is deemed to have demonstrated its ability to pay during a given period.

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 also 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). 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 the Service should have considered income before expenses were paid rather than net income.

As set forth above, the petitioner's net income of \$26,560, as stated on its 2001 tax return, was sufficient to cover the full proffered wage during 2001. Its reported 2002 net income of \$13,819, however, was \$8,645 short of the certified salary of \$22,464 per year. Although counsel correctly identified the beneficiary's wages as a factor to be considered, the petitioner submitted no credible evidence of the amount of wages paid to the beneficiary either to the underlying record or on appeal, therefore the petitioner failed to demonstrate its *continuing* ability to pay the

<sup>1</sup> Net current assets are the difference between current assets (line(s) 1(d) through 6(d)) and current liabilities (line(s) 16(d) through 18(d)) as shown on Schedule L of a corporate tax return. Besides net income, CIS will examine a petitioner's net current assets as an alternative method of determining a petitioner's ability to pay the proffered salary. If a corporation's end-of-year 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.

beneficiary's proposed wage offer of \$22,464 as required by 8 C.F.R. § 204.5(g)(2). The petitioner additionally failed to designate the proper visa classification. As set forth above, an available remedy may be to file another petition with the appropriate fee, visa designation, and all documentation showing that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date of April 30, 2001 and continuing until the present.

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.