



U.S. Citizenship
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FILE: EAC 02 093 53584 Office: VERMONT SERVICE CENTER

Date: JUL 29 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 immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) affirmed the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider the AAO decision. The AAO decision will be withdrawn and the petition will be approved.

The petitioner is a construction and restoration company. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and, it seeks to employ the beneficiary permanently in the United States as a stone carver. The director determined that the petitioner had not established that petitioner had the ability to pay the beneficiary on the priority date of the visa petition and denied the petition accordingly. The AAO affirmed that decision dismissing petitioner's appeal of the director's decision.

Counsel filed a motion to reopen and reconsider the AAO decision, and, he submitted additional evidence.

In support of the motion, counsel submits the following copies of documents: (Exhibit One) - copies of petitioner's business Internet website HTML¹ pages; (Exhibit Two) - Form 1120 U.S. corporation Tax Return for 2000; (Exhibit Three) - AIA² Document G702, "Application and Certificate for Payment" (Project No. [REDACTED] contract date October 15, 1999, contractor's certificate of completion, May 1, 2000; architect's certificate of payment, May 4, 2000; (Exhibit Four) - two checks in the amount of \$18,850.00 dated June 14, 1999, and, in the amount of \$19,250.00 dated July 26, 1999 payable by petitioner to [REDACTED] Corp.; (Exhibit Five) - a paid invoice to [REDACTED] Corp. by petitioner dated September 30, 2000 in the amounts of \$18,850.00 and \$3,250.00 for Project No. [REDACTED] (Exhibit Six) - AIA Document G701, "Change Order No. 2, 3, 4," Project No. [REDACTED] contract date October 13, 1999 for additional work with AIA Document [REDACTED] dated October 13, 1999; (Exhibit Seven) AIA Document G702, "Application and Certificate for Payment" (Project No. [REDACTED] contract date June 29, 2000, contractor's certificate of completion, October 18, 2000, architect's certificate of payment, October 10, 2000; (Exhibit Eight) - AIA Document G701, "Change Order No. 1, 2" Project No. 10501-[REDACTED], contract date October 16, 2000 for additional work with AIA Document A107-1977 dated June 29, 2000; (Exhibit Nine) - a check in the amount of \$14,700.00 dated December 12, 2000 by petitioner payable to [REDACTED] Corp.; (Exhibit 10) - paid invoice to [REDACTED] Corp. by petitioner dated September 30, 2000 in the amount of \$16,000.00 for Project "[REDACTED];" (Exhibit 11) - AIA Document G702, "Application and Certificate for Payment" (Project No. [REDACTED]; Application 4, contract date March 20, 2001, contractor's certificate of completion, August 1, 2001, architect's certificate of payment, August 3, 2001; Application 5, contract date March 20, 2001, contractor's certificate of completion, September 1, 2001; architect's certificate of payment, August 31, 2001; Application 6, contract date March 20, 2001, contractor's certificate of completion, October 1, 2001; architect's certificate of payment, October 11, 2001; (Exhibit 12) - check in the amount of \$65,050.00 dated October 18, 2001 payable by petitioner to [REDACTED] Corp; (Exhibit 13) - three paid invoices from [REDACTED] Inc. for [REDACTED] project repairs; (Exhibit 14) checks in the amount of \$20,000.00 dated August 18, 2003 and \$14,450.00 dated September 26, 2003 from petitioner to [REDACTED] Inc.; (Exhibit 15) an invoice marked paid from [REDACTED] Construction Inc by petitioner dated June 30, 2000 in the amounts of \$34,450.00 for 520 [REDACTED] with AIA Document G702, "Application and Certificate for Payment" (Project No. [REDACTED]); Application 8, contract date July 24, 2002, contractor's certificate of completion, July 1, 2003; architect's certificate of payment, July 9, 2003 including AIA Document G701, "Change Order No. 1, 2" Project No. 3303-002 contract date August 1, 2002 for additional

¹ Hypertext Markup Language. It is the document format language used on the World Wide Web for display in Web browsers. It is abbreviated as "HTML."

² The American Institute of Architects.

work; (Exhibit 16) - a "spreadsheet" of six projects undertaken by the petitioner between 1999 to 2004 with petitioner's and subcontractor's amounts for stone restoration indicated; (Exhibit 17) - an affidavit by petitioner's owner explaining the spreadsheet with prints of the stone craving restoration detail; (Exhibits 18 through 25) - Summary sheet of petitioner's ending monthly bank balances and statements for 2001, and 2003 through 2004.

Petitioner's counsel states, in a brief submitted, that because the petitioner was essentially self-represented, "... [t] he petitioner should be afforded every right possible to overcome the harm done by the unauthorized representation received." If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal. However, the AAO will consider the evidence presented here by counsel as the record of proceedings demonstrates the petitioner was not represented by an authorized representative.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion does not qualify as a motion to reconsider because counsel fails to identify any erroneous conclusion of law or statement of fact for the appeal, and, he asserts no precedent decisions for any position. Petitioner's counsel, in his cover letter transmitting the abovementioned documents, does not raise any issues of the incorrect application of law or Service policy.

The regulation at 8 C.F.R. § 103.5(A)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion does qualify as a motion to reopen. There are new facts presented here by counsel relate to petitioner's initial evidence accompanying the petition, and, to the issue of whether or not on the priority date of the alien labor application the petitioner had the ability to pay the beneficiary the proffered wage.

The decision of the director dated July 12, 2002, stated that the petitioner "... had been requested on March 13, 2002, to submit evidence from 2001, but you [the petitioner] submitted only a statement indicating that the beneficiary will replace outside contractors and money paid to them will be available"

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 U.S. 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 March 7, 2001. The proffered wage as stated on the Form ETA 750 is \$19.50 per hour (\$35,490.00 per year)³. The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001, a letter from the company president, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center on March 13, 2002, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$35,490 as of March 7, 2001, the date of filing and continuing to the present

Submit the 2000 United States federal income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax returns. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.

As an alternative you may submit annual reports for 2001 which are accompanied by audited or reviewed financial statements.

If the beneficiary was employed by you in 2001 submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business."

The director denied the petition on July 12, 2002, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In his brief in support of the motion, counsel asserts in pertinent part:

The ... [above enumerated evidence that is contained in Exhibits 1 through 25] demonstrates clearly that the petitioner had subcontracted to a considerable degree with outside vendors to provide stone carving and masonry work on behalf of its customers. All this stone and masonry work heretofore performed by its sub-contractors is not a "new position" as indicated by the petitioner on its I-140 immigration visa petition, the money paid out to these outside contractors will be available for payment to the beneficiary for performance of stone carving work.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a

³ Based upon a 35 hour/week

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. There is no evidence submitted that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now 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 v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to pay the proffered wage during the year 2000 for which petitioner's tax returns are offered for evidence.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the Form 1120 U.S. Income Tax Return submitted by petitioner, Schedule L found in that return indicates current assets never exceeded its current liabilities.

- In 2000, petitioner's Form 1120 return stated current assets of \$288,122.00 and \$314,348.00 in current liabilities. Therefore, the petitioner had a <\$26,226.00>⁵ in current net assets for 2000. Since the proffered wage was \$35,490.00 per year, this sum is less than the proffered wage.

⁴ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

Therefore, from 2000 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date through cash found in the company's checking account and "...the money paid out to these outside contractors ... [is] available for payment to the beneficiary for performance of stone carving work." Counsel cites no legal precedent for the assertions, and, according to regulation,⁶ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

However, counsel through documentation of work projects using cancelled checks, paid invoices, certificates of completions and their schedules, has come forward with evidence that a portion of petitioner's jobs from 1999 through 2004 have entailed stone restoration necessitating the employment of stone carver subcontractors. The documentation that counsel lays out is persuasive that subcontractors accounted for 37%⁷ of the total contract costs with stone restoration 10% of the total contract amount. Therefore for the period 1999 through 2004, stone restoration through "outside" sub-contractors approximates the proffered wage of \$35,490.00 per year. The petitioner has provided a standard for the evaluation of such savings.

The record of proceedings now does name the stone restoration sub-contractors, state their compensation, verify their contractual employment, and, provide evidence of the efficacy of the petitioner's intent to replace them with the beneficiary. The petitioner has documented the position, duty, and contract price of the subcontractors who performed the duties of the proffered position that the beneficiary would replace. Therefore, sufficient evidence has been presented to show the prospective savings that petitioner would earn by employing the beneficiary in the occupation of stone carver in lieu of the employment of sub-contractors.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

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 met that burden.

ORDER: The AAO decision will be withdrawn and the petition will be approved.

⁶ 8 C.F.R. § 204.5(g)(2), *Supra*.

⁷ The figures upon which this analysis was done are found in Exhibit 16 of counsel's brief.