



U.S. Citizenship
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

JUN 17 2004

WAC 03 106 53739

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a tile setter. 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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.

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.

8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 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 April 10, 2001. The proffered wage as stated on the Form ETA 750 is \$21.50 per hour, which equals \$44,720 per year. The Form ETA 750 states that the position requires four years of experience as a tile setter.

On the petition, the petitioner stated that it was established on May 15, 1999 and that it has no employees, but has eight contract workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The beneficiary claimed to have worked as a tile setter for ██████████ ██████████ of Phoenix, Arizona from January 1996 to October 1998, and for ██████████ ██████████ of Scottsdale, Arizona, from January 1999 to August 2000.

The Form ETA 750 indicates that the petitioner will employ the beneficiary in Scottsdale, Arizona. The petition originally stated that the petitioner would employ the beneficiary in Scottsdale, Arizona, but was amended to indicate that the petitioner would employ the beneficiary in Paradise Valley, Arizona. This office notes that both are located in Maricopa County, and that the validity of the labor certification is not affected by the amendment.

The Form ETA 750 states that the duties of the proffered position as follows:

Apply tile to walls, floors, ceilings and promenade roof decks, following design specifications. Read and analyze blueprints, measure and mark surface to be covered and lay out work. Measure and cut metal lath to size for walls and ceilings. Tack lath to wall and ceiling surface. Spread plaster base over lath and level plaster to specified thickness. Spread concrete on subfloor and level it. Spread mastic or other adhesive base on roof deck to form base for promenade tile. Cut and shape tile, position tile [sic] to affix tile to plaster or adhesive base.

With the petition, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports taxes pursuant to the calendar year and that during the 2001 calendar year the petitioner declared taxable income before net operating loss deduction and special deductions of \$89,625. The corresponding Schedule L was not provided with that return. The Service Center was unable, therefore, to compute its year-end net current assets.

As to the beneficiary's employment experience, counsel submitted two employment verification letters. Counsel submitted a letter, dated February 8, 2001, on the letterhead of ██████████ ██████████. That letter purports to have been signed by ██████████. Although ██████████ position with that company is not explicitly stated, he refers to ██████████ as "my company," thus implying that he owns the company. The letter states that ██████████ employed the petitioner as a subcontractor "for the past year." That letter does not state the number of hours the petitioner worked per week.

This office notes that ██████████ statement made on February 8, 2001, that the petitioner worked for ██████████ "for the past year" appears to contradict the beneficiary's claim, on the Form ETA 750, Part B, that he worked for ██████████ from January 1999 to August 2000.

Counsel submitted a letter, dated March 4, 2002, on the letterhead of [REDACTED]. That letter was signed by [REDACTED] the owner of that company, and states that [REDACTED] employed the beneficiary as a tile setter from 1996 through 1998. That letter does not further clarify the dates during which the beneficiary worked for [REDACTED]. The letter does not state the number of hours the beneficiary worked per week.

That letter states that the beneficiary performed as follows:

Applied tile to walls, floors, ceilings and promenade roof decks, following design specifications. Read and analyzed blueprints, measured and marked surface to be covered and laid out work. Measured and cut metal lath to size for walls and ceilings. Tacked lath to wall and ceiling surface. Spread plaster base over lath and leveled plaster to specified thickness. Spread concrete on subfloor and leveled it. Spread mastic or other adhesive base on roof deck to form base for promenade tile. Cut and shaped tile, positioned tile to affix tile to plaster or adhesive base.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary has the requisite four years work experience, the California Service Center, on July 17, 2003, requested evidence pertinent to both of those issues.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage include copies of annual reports, federal tax returns, or audited financial statements and demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center noted that the 2001 return submitted is incomplete, and requested that the petitioner submit evidence of its ability to pay the proffered wage during 2001 and 2002.

The Service Center noted that the employment verification letters submitted do not state the exact dates during which the beneficiary was allegedly employed, and that the letter from [REDACTED] does not indicate the job title of the person verifying the information, the hours the beneficiary worked, or the beneficiary's job duties. The Service Center further noted that the phone number provided for [REDACTED] had been disconnected. The Service Center requested original employment verification letters with all the salient information.

Further, the Service Center requested (1) pay statements showing that the beneficiary worked for [REDACTED] and [REDACTED] (2) a complete chronology of the beneficiary's employment since the priority date, (3) W-2 forms showing any wages the petitioner paid to the beneficiary since the priority date, (4) the beneficiary's W-2 forms for the years from 1996 through 2001, and (5) copies of the petitioner's Quarterly Wage Reports for the previous four quarters.

In response, counsel submitted the remainder of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return and a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. The 2001

Schedule L shows that at the end of that calendar year the petitioner had current assets of \$49,025 and no current liabilities, which yields net current assets of \$49,025.

The 2002 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$95,209 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$72,134 and no current liabilities, which yields net current assets of \$72,134.

Counsel submitted the beneficiary's 2000 Form 1040 U.S. Individual Income Tax Return. That return shows wages of \$4,626 and business income of \$1,563 for a total income of \$6,189.

Counsel submitted a photocopy of a 2001 Schedule C Profit or Loss from Business. That schedule indicates that the beneficiary suffered a business loss of \$2,579 during that year. Counsel did not provide any other portions of the beneficiary's 2001 tax return.

A letter, dated September 3, 2003, on the letterhead of [REDACTED] of Phoenix, Arizona. That letter states that [REDACTED] employed the beneficiary as a full-time tile setter from January 1996 through October 1999.¹ The description of the beneficiary's duties reads as follows:

Applied tile to walls, floors, ceilings and promenade roof decks, following design specifications. Read and analyzed blueprints, measured and marked surface to be covered and laid out work. Measured and cut metal lath to size for walls and ceilings. Tacked lath to wall and ceiling surface. Spread plaster base over lath and leveled plaster to specified thickness. Spread concrete on subfloor and leveled it. Spread mastic or other adhesive base on roof deck to form base for promenade tile. Cut and shaped tile, positioned tile to affix to plaster or adhesive base.

Another letter, also dated September 3, 2003, on the letterhead of [REDACTED], stating that the beneficiary worked for [REDACTED] from January 1999 through August 2000,² and that [REDACTED] went bankrupt during April 2003. That letter was signed by the same person who signed the previous letter as the owner of [REDACTED]. That letter does not state the basis of the writer's knowledge that the beneficiary worked for [REDACTED] and that [REDACTED] went bankrupt.

In a cover letter dated September 30, 2002, counsel stated that [REDACTED] changed its name [REDACTED], and that the owner of [REDACTED] was also a partner in [REDACTED]. Assertions of counsel are not evidence. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). If counsel wished to demonstrate that the owner of L&R Stone also had some relationship to the other companies that allegedly employed the

¹ That employment claim appears to conflict with the claim, on the Form ETA 750, Part B, that the beneficiary worked for CSR from January 1999 through August 2000.

² Again, this office notes that this employment claim conflicts with the contemporaneously submitted claim that the beneficiary worked for [REDACTED] from January 1996 through October 1999.

beneficiary, counsel was obliged to support that assertion with evidence. Counsel further stated that the petitioner does not have any employees and does not file a quarterly wage report.

Finally, counsel stated that the beneficiary has never worked for the petitioner, but has worked on a contract basis for the previously mentioned employers as well as for [REDACTED] from February 2002 through February 2003 and for [REDACTED] also from February 2002 through February 2003.

Counsel did not provide the requested pay statements showing that the beneficiary worked [REDACTED]

On October 14, 2003 the California Service Center issued another Request for Evidence in this matter. The Service Center noted apparent discrepancies on the petitioner's tax returns³ and requested that the petitioner provide either IRS-certified copies of its tax returns or date-stamped IRS computer printouts showing the figures from those returns.

In response counsel provided additional copies of the petitioner's 2001 and 2002 Form 1120 U.S. Corporation Income Tax Returns and stated that they were duly filed. Counsel also provided an undated letter from the petitioner's accountant acknowledging one of the discrepancies noted by the Service Center, but stating that filing a corrected tax return was unnecessary. Counsel did not provide IRS-certified copies of its tax returns or date-stamped IRS computer printouts showing the figures from those returns.

The director issued a decision in this matter on January 23, 2004. The director noted that the petitioner had failed to provide the requested evidence, IRS-certified tax returns or IRS computer printouts, showing that the tax returns submitted to CIS were submitted to IRS. The Service noted that the petitioner failed to clarify one of the discrepancies noted in the October 14, 2003 Request for Evidence as occurring on its 2001 tax return. The Service Center further noted that the petitioner did not submit the requested independent corroborating evidence to support the beneficiary's employment claims. The director denied the petition, 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 and that the evidence submitted did not demonstrate that the beneficiary has the requisite four years of salient work experience.

On appeal, counsel asserts that the tax returns submitted show the petitioner's continuing ability to pay the proffered wage beginning on the priority date and that the employment verification letters submitted demonstrate that the beneficiary has the requisite four years of experience.

With the appeal counsel submits copies of evidence previously submitted and a new letter, dated March 2, 2004, from [REDACTED]. That letter states that the beneficiary worked full-time as a tile setter for [REDACTED] from January 1996 through October 1998. Although that letter was originally typed to conform to the first letter from [REDACTED] stating that the beneficiary worked for [REDACTED] until October 1999, it was amended to show that the beneficiary's employment there ended during October 1998.

³ The discrepancies noted by the Service Center were between the portions of the 2001 Form 1120 U.S. Corporation Income Tax Return originally submitted and the 2001 Schedule L submitted in response to the first Request for Evidence. That those forms, submitted at different times, conflict raises the suspicion that they were generated at different times, and implies that they were never submitted to IRS and are not the petitioner's authentic tax returns.

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 that period, the AAO ordinarily 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).

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 the 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, those expected to be 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 net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$44,720 per year. The priority date is April 10, 2001.

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. The petitioner submitted no copies of annual reports or audited financial statements. Whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date rests, therefore, on the sufficiency of the tax returns submitted to demonstrate that ability.

In the second Request for Evidence, issued on October 14, 2003, the Service Center noted discrepancies in the petitioner's 2001 tax return. The Service Center requested, therefore, that the petitioner provide IRS certified returns or computer printouts showing that the tax returns were actually filed. The petitioner did not provide that requested evidence. The tax returns submitted are not, therefore, reliable evidence of the petitioner's ability to pay the proffered wage.

The petitioner has submitted no reliable evidence of its ability to pay the proffered wage during 2001 or its ability to pay the proffered wage during 2002. The petition was correctly denied on that ground.

The remaining issue is whether the petitioner has satisfactorily demonstrated that the beneficiary has the requisite four years of experience as stated on the approved Form ETA 750 labor petition.

Because of the inconsistencies and the information missing from of the previous employment verification letters from [REDACTED] and [REDACTED] correctly requested pay statements showing that the beneficiary worked for [REDACTED] and [REDACTED] and a complete chronology of the beneficiary's employment since the priority date. The petitioner did not provide the requested pay statements. Further, although counsel added two employers to the list of companies for whom the beneficiary claims to have worked, and provided the months during which that employment ostensibly occurred, counsel did not indicate that the various employers listed at various times during the pendency of this petition is an exhaustive list. Further still, the assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *INS v. Phinpathya, supra; Matter of Ramirez-Sanchez, supra.* The petitioner has not provided the requested detailed employment history.

Because the petitioner failed to provide the requested evidence in support of the beneficiary's claimed employment history, that employment history has not been sufficiently demonstrated. The petitioner has not demonstrated, therefore, that the beneficiary has the requisite four years of experience as a tile setter and has not, therefore, demonstrated that the beneficiary is qualified for the proffered position pursuant to the requirements stated on the approved labor certification. The petition was correctly denied on this additional ground.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petition may not be approved.

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.