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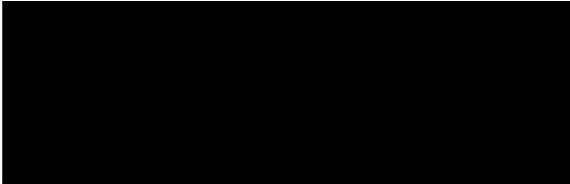
B *G*

FILE: WAC 03 111 53627 Office: CALIFORNIA SERVICE CENTER Date: MAR 28 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

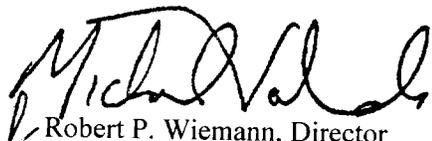
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 footwear manufacturer. It seeks to employ the beneficiary permanently in the United States as a shoemaker. 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 statement 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 February 7, 2001. The proffered wage as stated on the Form ETA 750 is \$9 per, which equals \$18,720 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

On the petition, the petitioner stated that it was established during 1988 and that it employs two workers. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Los Angeles, California.

The Form ETA 750B requested that the beneficiary list all of his relevant work experience in addition to any employment during the past three years. On that form, which was signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The beneficiary stated on that form that he was as a shoemaker from November 1988 through December 1993 for Botas y Bolsas California, at 80 Calle San Juan de Letran, in Mexico City, Mexico. The beneficiary also claimed to have worked for [REDACTED] in Los Angeles, California, from January 1994 through January 30, 2001, that form's date.

With the petition, counsel submitted (1) the petitioner's Form BOE-401 Short Form Sales and Use Tax Returns for all four quarters of 2001, showing that the petitioner had gross sales of \$14,500, \$10,200, \$9,000, and \$7,400 during those quarters, respectively, (2) the petitioner's California Form DE-6 Quarterly Wage Reports for the first three quarters in 2002, showing that the petitioner paid wages of \$6,500 during each of those quarters, including \$3,250 to the beneficiary during each of those quarters, for a total of \$9,750 during that year, (3) the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the last quarter of 2001, showing that the petitioner paid employee compensation of \$6,500 during that quarter, and (4) the petitioner's 2001 Form 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return, showing that the petitioner paid \$19,500 in wages during that year.

Other than the California Form DE-6 wage reports, counsel submitted no evidence to demonstrate that the petitioner has an experience in the proffered position.

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 two years work experience, the California Service Center, on May 15, 2003, requested, *inter alia*, 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.

Consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of 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.

The Service Center also specifically requested Form W-2 Wage and Tax Statements showing any wage the petitioner paid to the beneficiary since 1994.

In response, counsel submitted the petitioner's owner's 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns. Schedules C attached to those returns show that the petitioner's owner operated the petitioner as a sole proprietorship and that he had had two dependents during both of those years.

The 2001 Schedule C shows that the petitioner returned a profit of \$11,357 during that year. The 2001 tax return shows that the petitioner's owner declared adjusted gross income of \$10,554, including the petitioner's entire profit offset by deductions.

The 2002 Schedule C shows that the petitioner returned a profit of \$16,882 during that year. The 2002 tax return shows that the petitioner's owner declared adjusted gross income of \$15,689, including the petitioner's entire profit offset by deductions.

Counsel also submitted a letter, dated July 30, 2002, from the beneficiary stating, "I can not provide [CIS] with the requested W-2's since I have been paid in cash"

Despite the direct request in the May 15, 2003 Request for Evidence, counsel submitted no evidence that the beneficiary has the requisite employment experience as stated on the Form ETA 750.

The director denied the petition on October 1, 2003, 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 two years of salient work experience.

On appeal, counsel asserts that,

The adjudicating officer did not take into consideration the fact that the beneficiary was on payroll for the qualifying period 2001 – 2002. He was paid \$12,900.00 for 2001 and \$18,000.00 for 2002. Taking the fact into consideration, the Employer did have the necessary funds to pay the proffered wage- (See exhibit A & B). The other issue raised in the denial was the fact that the alien was unable to provide W-2 obtained from one of his previous Employer.¹ The alien is submitting evidence of previous Employer.

Counsel provides the beneficiary's 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns, apparently to demonstrate the amount the petitioner paid the beneficiary in wages during those years.

The 2001 return shows that the beneficiary received a total income of \$12,900 during that year. Of that amount, \$6,500 was profit from Jugueteria Days I, an apparently unrelated sole proprietorship the beneficiary

¹ Counsel incorrectly states the second issue. The second basis of the decision of denial was the petitioner's failure to demonstrate that the beneficiary had the requisite two years of experience in the proffered position.

owned, as declared on a Schedule C. The remaining \$6,400 is declared on Line 21 of the return, Other Income. The only explanation of that income on the return is "PAID CASH." The return gives no indication that the petitioner paid any wages to the beneficiary during that year.

The 2002 return shows that the beneficiary received a total income of \$18,000 during that year. Of that amount, \$8,500 was profit from the same unrelated business the beneficiary also owned during the previous year. Another \$6,365 was declared on Line 21 of the return, Other Income. Again, the only explanation of that income on that return is "PAID CASH." The remaining \$3,135 is shown as Line 7 Wages, salaries, tips, etc. The instructions for that line require the taxpayer to attach corresponding W-2 forms. No such forms were submitted with the photocopied form. The return gives no indication that the petitioner paid any wages to the beneficiary during that year.

As evidence of the beneficiary's qualifying employment counsel submitted an undated letter in Spanish and an English translation. That letter purports to be from Fabrica de Calzado y Bolsos "California," of [REDACTED] Colonia Centro, in Mexico City, Mexico. It states that the beneficiary worked in the construction of shoes, wallets, and handbags for that company from November 1988 through December 1993. This office notes that this claim of employment appears to conflict with the claim the beneficiary made on the ETA 750 that he worked for Botas y Bolsas California, on Calle San Juan de Letran, during that same period.

A petitioner raises questions of credibility when asserting a new claim to eligibility on appeal. No explanation accompanied the submission of a new claim of employment on appeal, which new claim contradicts the beneficiary's original claim of qualifying employment.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). The employment verification letter submitted on appeal is the only evidence that the beneficiary has the requisite employment experience, and, because it is contradicted by the beneficiary's original claim of qualifying employment, it is not credible. The petitioner has failed to demonstrate that the beneficiary has the experience that the Form ETA 750 states is a requirement of the proffered position.

The remaining issue is the petitioner's continuing ability to pay the proffered wage beginning on the priority date. 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.

Although counsel stated that the petitioner paid the beneficiary \$12,900.00 during 2001 and \$18,000.00 during 2002, he did not provide any evidence in support of that assertion or even state the source of this information. Further, the beneficiary's own tax returns appear to contradict counsel's assertion.

The petitioner's 2001 tax return states that he received gross income of \$12,900, but states the source of \$6,500 of that amount. Counsel did not reconcile his assertion that all of the \$12,900 was paid to the beneficiary by the petitioner with the beneficiary's assertion that \$6,500 of it was derived from his ownership of Jugueteria Days I, an apparently unrelated business.

The petitioner's 2002 tax return states that he received gross income of \$18,000 but states the source of \$8,500 of that amount. Counsel did not reconcile his assertion that all of the \$18,000 was paid to the beneficiary by the petitioner with the beneficiary's assertion that \$8,500 of it was derived from his ownership of Jugueteria Days I, an apparently unrelated business.

Again, that the evidence apparently contradicts counsel's assertion leads this office to reevaluate the credibility of the remaining evidence and all other assertions of counsel.

In the instant case the petitioner established with its Form DE-6 reports that it employed and paid the beneficiary \$9,750 during 2002. The record contains no reliable evidence that the petitioner paid the beneficiary any amount at any other time.

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 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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 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, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the proffered wage out of his adjusted gross income and supported himself on the amount remaining.

The proffered wage equals \$18,720 per year. The priority date is February 7, 2001.

The petitioner has not demonstrated that it paid the beneficiary any wages during 2001. During 2001 the petitioner's owner declared adjusted gross income of \$10,554, including the petitioner's profit. That amount is insufficient to pay the proffered wage. The petitioner is unable to demonstrate that it was able to pay the

proffered wage out of its income during that year. The petitioner has submitted no reliable evidence of any other funds available to it with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner paid the beneficiary \$9,750 during 2002. The petitioner must demonstrate the ability to pay the \$8,970 balance of the proffered wage. During 2002 the petitioner's owner declared adjusted gross income of \$15,689, including the petitioner's profit. That amount is greater than the proffered wage. If the petitioner was obliged to pay the proffered wage out of its owner's adjusted gross income during that year the petitioner's owner would have been left with only \$6,719 with which to support his family. Although no information was requested or provided pertinent to the petitioner's owner's monthly budget, this office notes that to expect that the petitioner's owner could support his family of three during that year on that amount is unreasonable. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its owner's adjusted gross income. The petitioner has submitted no reliable evidence of any other funds available to it with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The evidence submitted does not establish that the petitioner could have paid the proffered wage during 2001 or 2002. Therefore, the petitioner has failed to demonstrate that it had the continuing ability to pay the proffered wage beginning on the priority date. Further, the evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. For both reasons, 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.