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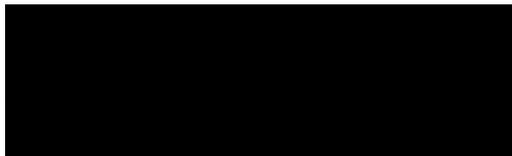
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FILE: EAC-04-154-51547 Office: VERMONT SERVICE CENTER Date: **MAY 25 2005**

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

PETITION: 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.

Handwritten signature of Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a residential construction firm. It seeks to employ the beneficiary permanently in the United States as a poured-concrete wall mason. A copy of 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is November 13, 1997. The proffered wage as stated on the Form ETA 750 is \$13.07 per hour, which amounts to \$27,185.60 annually.

The I-140 petition was submitted on April 23, 2004. In a letter dated April 19, 2004 which accompanied the I-140 petition, counsel requested that the current beneficiary be substituted for the beneficiary whose name originally appeared on the ETA 750. The same request is made in a letter dated November 17, 2003 by the petitioner's president, also submitted with the I-140 petition.

With the I-140 petition, counsel also submitted a photocopy of the ETA 750 which had been submitted on behalf of the previous beneficiary and which had been approved by the U.S. Department of Labor. Counsel also submitted a new ETA 750, Part A, signed by the petitioner's president on November 20, 2003, and a copy of a new ETA 750, Part B, signed by the new beneficiary on November 14, 2004. The copy of the ETA 750, Part B, contains the photocopied signature of the new beneficiary, but no original signature of the new beneficiary appears on that document. On the Form ETA 750B, signed by the new beneficiary on January 15, 2004, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on March 21, 1997, and to currently have 22 employees. In the items on the petition for gross annual income and for net annual income were written the words "see att."

In support of the petition, in addition to the documents mentioned above, the petitioner submitted a letter from the director of a construction company in Vitoria, Brasil, stating the experience of the current beneficiary with that company as a general assistant mason from September 1995 through October 1997; a copy of a letter dated June 12, 1998 from the petitioner's president stating the experience of the prior beneficiary with the petitioner from August 1995 to October 1997 as a cement finisher and from October 1997 to the date of the letter as a poured concrete wall mason; a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002; copies of bank statements for an account of the petitioner at Crestar bank, Richmond, Virginia dated from January through December 1997; and a copy of a Form I-797 receipt notice dated February 10, 1999 for the I-140 petition submitted by the petitioner on behalf of the prior beneficiary.

In a request for evidence (RFE) dated September 8, 1997, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested that the petitioner provide copies of its federal tax return for 1997, or annual reports for 1997 accompanied by audited or reviewed financial statements.

In response to the RFE, counsel submitted a letter dated December 2, 2004 and the following documents: copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1997, 1998, 2000, 2001 and 2002; duplicate copies of the petitioner's bank statements dated from January through December 1997, copies of which had been submitted previously; and copies of bank statements for the same account of the petitioner at Crestar bank, Richmond, Virginia, dated from March through December 1998.

In a decision dated January 21, 2005, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and a copy of a portion of an Internal Revenue Service publication containing instructions on depreciation and amortization rules, but with the title and date of that publication not included in the portion copied.

Counsel states on appeal that the director erred by limiting his analysis to the petitioner's taxable income. Counsel also states that depreciation expenses should be considered as additional financial resources of the petitioner, since they do not represent cash expenses. Counsel states that the petitioner's financial evidence shows steady and stable growth in its business, and establishes the petitioner's ability to pay the proffered wage.

The portion of the Internal Revenue Service publication submitted on appeal is not an evidentiary document, but is rather a legal authority relied upon by counsel to support counsel's assertions about the nature of depreciation. Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director, based on the evidence submitted prior to the director's decision.

The instant petition is for a substituted beneficiary. Substitution of a new beneficiary is permitted even if a previous I-140 petition based on the same labor certification was submitted and approved. CIS procedures on substitution of beneficiaries require the petitioner to submit a new I-140 petition supported by a new ETA 750B showing the new beneficiary's qualifications for the offered position. Memo. from Luis G. Crocetti, Associate

Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996). The petitioner has submitted a new I-140 petition and a new ETA 750B as required for a substitution of a beneficiary. CIS procedures also require the petitioner to submit a withdrawal of the previous petition. *Id.* In the instant case, the petitioner has submitted no explicit withdrawal of the previous petition. However, the petitioner submitted a letter from its president requesting substitution of beneficiaries on the labor certification filed on November 13, 1997 on behalf of the previous beneficiary. In that letter, the president states that the previous beneficiary “is no longer interested in pursuing his immigrant visa application on the basis of the approved I-140 Petition that we filed for him.” (Letter from petitioner’s president, November 17, 2003, at 1). The president’s letter will be deemed to be a request for a withdrawal of the previous petition. CIS electronic records indicate that the prior beneficiary has not adjusted status to permanent residence based on the previous I-140 petition approved on his behalf. For the foregoing reasons, the substitution of the current beneficiary as stated in the instant I-140 petition and supporting documents is proper.

The fact that a previous I-140 petition was approved based on the same labor certification does not require the approval of the instant petition, since each petition is a separate proceeding, based on its own record.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner’s ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the current beneficiary on January 15, 2004, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the current beneficiary has worked for the petitioner.

As another means of determining the petitioner’s ability to pay the proffered wage, CIS will next examine the petitioner’s net income figure as reflected on the petitioner’s federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were

paid rather than net income. Finally, there is no precedent that would allow the petitioner to “add back to net cash the depreciation expense charged for the year.” See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner’s tax returns show the following amounts for taxable income on line 28: -\$1,759.00 for 1997; -\$5,173.00 for 1998; \$29,651.00 for 2000; -\$943.00 for 2001; and \$78,373.00 for 2002. No federal income tax return of the petitioner for 1999 was submitted in evidence. The petitioner’s net income figures on its tax returns are greater than the proffered wage of \$27,185.60 only in 2000 and 2002. Those figures therefore fail to establish the petitioner’s ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

As an alternative means of determining the petitioner’s ability to pay the proffered wages, CIS may review the petitioner’s net current assets. Net current assets are a corporate taxpayer’s current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation’s current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner’s ability to pay.

In the instant petition, no federal tax return of the petitioner was submitted for 1999. However, the balance sheet figures for the beginning of the year on the Schedule L for 2000 are equivalent in accounting terms to those for the end of 1999. Calculations based on the Schedule L’s attached to the petitioner’s tax returns yield the following amounts for net current assets: -\$41,906.00 for the beginning of 1997; -\$36,529.00 for the end of 1997; -\$42,504.00 for the end of 1998; \$7,578.00 for the end of 1999 (calculated from the beginning-of-the-year figures on the Schedule L for 2000); -\$3,505.00 for the end of 2000; -\$65,828.00 for the end of 2001; and -\$79,468.00 for the end of 2002. Since each of those figures is either negative or is less than the proffered wage of \$27,185.60, those figures also fail to establish the ability of the petitioner to pay the proffered wage during those years.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner’s ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner’s net current assets.

In any event, in the instant petition, the bank statements in the record covered only the months of January through December of 1997 and March through December of 1998. No bank statements for the other years at issue in the instant petition were submitted for the record. Therefore, even if the petitioner’s evidence concerning its bank

statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 1999 through 2002.

Counsel cites several cases as authority in his brief, but only one of those cases is a binding precedent on the AAO, *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). However, counsel's reliance on *Matter of Sonogawa* is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that the years 1997, 1998 and 2001 were uncharacteristically unprofitable years for the petitioner. Moreover, since no federal income tax return for 1999 was submitted in evidence the record provides an insufficient basis for finding that the petitioner's financial situation has been stable throughout the period relevant to the instant petition. The petitioner's net current assets were negative in all but one of the years for which the record contains evidence. The evidence in the record does not establish facts similar to those relied upon in the decision in *Matter of Sonogawa*, 12 I&N Dec. 612.

In his decision, the director found that the evidence failed to establish the petitioner's ability to pay the proffered wage as of the year 1997, which is the year of the priority date. The director correctly analyzed the petitioner's net income and net current assets for that year. The director did not analyze the petitioner's finances for the other years at issue in the instant petition, apparently because the petitioner's failure to establish its ability to pay the proffered wage in 1997 required a denial of the petition, even if its evidence had showed the ability to pay the proffered wage in later years. The decision of the director to deny the petition was correct.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, CIS electronic records indicate that the petitioner has filed other petitions which have been pending during the time period relevant to the instant petition.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977)

(petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2).

CIS electronic records show that the petitioner has filed a total of seven I-140 petitions since 1998. One petition was filed in 1998, four were filed in 2002, one was filed in 2003 and one, the instant petition, was filed in 2004.

The I-140 petition which was filed in 1998 is the one which was submitted for the prior beneficiary of the ETA 750 which supports the instant petition. For that petition, the petitioner is deemed to have requested a withdrawal, as discussed above. But the other petitions filed by the petitioner were all pending at some point during the period relevant to the instant petition, namely from the priority date of November 13, 1997 to the present.

Even a petition already approved in a given year may still be relevant in a later year, since a beneficiary of an approved petition who does not immigrate to the United States immediately may choose to do so later. Approved employment-based immigrant petitions are valid indefinitely, unless revoked under section 203(e) or 205 of the Act. 8 C.F.R. § 204(n)(2). Therefore, any beneficiary of an approved petition who has not yet immigrated could do so in the future and then be hired by the petitioner, adding to the petitioner's proffered wage commitments for the year in which the person is hired.

Also, as discussed above, even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996); *see* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 (Mathew Bender & Company, Inc. 2004) (available at "LexisNexis" Mathew Bender Online). Therefore, the approved ETA 750's underlying any withdrawn petitions retain potential relevance to the petitioner's total proffered wage commitments for a given year.

The record in the instant case contains no information about the proffered wages for other potential beneficiaries of I-140 petitions filed by the petitioner. No information is submitted about the priority dates of any of the I-140 petitions other than the instant petition. The only information about another beneficiary is that concerning the previous beneficiary of the ETA 750 which supports the instant I-140 petition, who is said to be no longer interested in pursuing the visa petition submitted by the petitioner. No information is provided about the current immigration status of any of the beneficiaries, whether any other beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to any beneficiary. Furthermore, no information is provided about the names or the current employment status of each potential beneficiary, the dates of any hirings and the current wages of any beneficiary.

Lacking evidence about the beneficiaries of other petitions submitted by the petitioner, even if the record contained sufficient evidence about the petitioner's finances, the record in the instant petition would still fail to establish the ability of the petitioner to pay the proffered wage to each beneficiary for whom it has filed a petition, since the record fails to provide a basis for calculating the petitioner's total proffered wage obligations during the relevant period.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition during the relevant period. The record also fails to establish the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition while also paying the proffered wages to the beneficiaries of other petitions filed by the petitioner.

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.