



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 02 248 54017

Office: VERMONT SERVICE CENTER

Date:

NOV 10 2005
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IN RE: Petitioner: [REDACTED]
Beneficiary: JOAO R. FILHO

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:

[REDACTED]

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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant and sport club. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the 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.

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, 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour (\$24,960.00 per year). The Form ETA 750 states that the position requires two years experience in a related occupation.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; financial statements for 2001; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested December 23, 2002, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested the following documents for tax year 2001: the beneficiary's W-2 Wage and Tax Statement (W-2); the petitioner's U.S. federal income tax return;

a statement from petitioner's financial officer concerning petitioner's ability to pay; and, annual reports with audited or reviewed financial statements.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's financial statements; a payroll statement for petitioner's employees; a personal tax return for the beneficiary and his spouse for 2002;¹ and, a partial copy of the beneficiary's W-2 statement for 2002.

The director denied the petition on March 19, 2004, 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.

On appeal, counsel asserts that petitioner is only responsible to show its ability to pay the proffered wage from the priority date, and therefore, wages paid and the taxable income should be accordingly prorated, and further, that the petitioner does not have to pay the proffered wage until the petition is approved.

On appeal, counsel submits, W-2 statements for 2001, 2002, and 2003, and, "Year End Expense Statements" for the same years.

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 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.

Evidence was submitted to show that the petitioner employed the beneficiary. The petitioner paid the beneficiary \$16,436.00 in 2001, \$15,371.16 in 2002, and, \$15,533.82 in 2003. Since the proffered wage is \$24,960.00 per year, the petitioner has not paid the beneficiary for those years for which evidence was submitted.

Counsel asserts that since the priority date is April 27, 2001, the petitioner should be responsible for paying a pro-rated portion of the proffered wage corresponding to the remaining days of 2001 from April 27th. If this were the rule, then the beneficiary's yearly wages and the petitioner's yearly taxable income would also have to be prorated which would eliminate the presumed benefits of pro-ration. Since CIS is attempting to analyze the petitioner's ability to pay over a given period of time, it would not be logical to measure wages paid or income earned over a different and longer period of time against the wages owed for the shorter period of time.

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

¹ Counsel contends that the income stated in beneficiary's tax return, not received from the petitioner, has relevance in these proceedings. This assertion is contrary to regulation at 8 C.F.R. § 204.5(g)(20).

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 CIS should have considered income before expenses were paid rather than net income.

The petitioner did not submit tax returns as requested by the Director. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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. Counsel cites no legal precedent for the contention, and, according to regulation,² copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Petitioner has submitted financial statements entitled "Year End Expense Statements" for 2001, 2002, and 2003. The statements were not presented as either reviewed or audited statements, and, therefore they have little probative value in these matters.³

Counsel contends that the petitioner does not have to pay the proffered wage until the petition is approved. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part that "... any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the ... employer has the ability to pay the proffered wage ... [and] demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." Counsel's assertion is correct, in part, as it need not actually pay the beneficiary until he or she obtains legal permanent residence, but as stated in the regulations first recited, the petitioner must show its ability to pay the proffered wage from the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the petitioner has failed to come forward with requested evidence and it has not met that burden.

ORDER: The appeal is dismissed.

² 8 C.F.R. § 204.5(g)(2).

³ An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews.