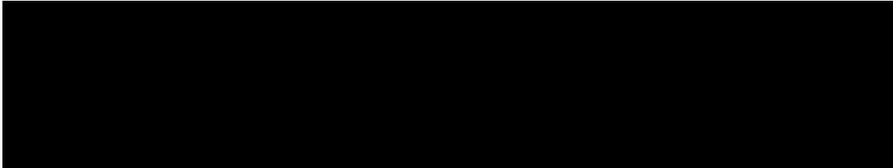


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FILE:



EAC 02 214 51611

Office: VERMONT SERVICE CENTER

Date:

OCT 26 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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The case will be remanded for further consideration

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Acting Director found 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.

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 granting 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 18, 2001. The proffered wage as stated on the Form ETA 750 is \$13.21 per hour, which equals \$27,476.80 per year.

On the petition, the petitioner stated that it was established on January 15, 2000 and that it employs 45 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since March 1999. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Falls Church, Virginia.

In support of the petition, counsel submitted a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. That return indicates that the petitioner reports taxes pursuant to the calendar year. During 2000 the petitioner declared a loss of \$13,189 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner had current assets of \$1,000 and no current liabilities, which yields net current assets of \$1,000. This office notes, however, that because the priority date of the petition is April 18, 2001, evidence pertinent to the petitioner's ability to pay the proffered

wage during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. That return indicates that the petitioner incorporated on January 15, 2000.

Because 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 September 11, 2003, requested additional evidence pertinent to that ability. The Service Center specifically requested (1) the petitioner's 2001 and 2002 Form W-3 transmittals, (2) its 2001 and 2002 Form W-2 Wage and Tax Statements, including those for the beneficiary, if the petitioner employed him during those years, and (3) the petitioner's 2002 income tax return.¹ The Service Center also noted that the petitioner had multiple petitions pending.

In response, counsel submitted a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. Counsel did not provide the requested W-3 transmittals and W-2 forms.

The 2002 return shows that that during 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$25,085. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$59,789 and current liabilities of \$0, which yields net current assets of \$59,789. That return states that the petitioner was incorporated on November 1, 2001.

The Acting Director determined 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, on March 31, 2004, denied the petition.

On appeal, counsel submits the petitioner's 2003 Form 1120 U.S. Corporation Income Tax Return, copies of monthly statements of the petitioner's bank account, and a letter, dated April 26, 2004, from the petitioner's office manager. Counsel also submits 2002 and 2003 W-2 forms showing amounts the petitioner paid to the beneficiary during those years.

Counsel states that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), establishes that W-2 forms are convincing evidence of a petitioner's ability to pay the proffered wage. Counsel also asserts that the petitioner "has been in business for money [sic] years[,] employers [sic] approximately 45 employees [and] is a substantial business with substantial revenues." Counsel argues that the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date, and that the petition should be approved.

The 2003 return shows that during 2003 the petitioner declared taxable income before net operating loss deduction and special deductions of \$15,559. At the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of \$0. That return states that the petitioner was incorporated on November 1, 2001.

The letter from the office manager states that since the company started in October of 1999 it has had sufficient work to employ twelve to fourteen full-time workers and that during 2003 it had gross receipts of over \$1.4 million.

¹ Why the Service Center did not request the petitioner's 2001 tax return is unclear.

Counsel's reliance on the bank statements is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and generally cannot show the sustainable ability to pay a proffered wage.² 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 reported on its tax returns.

The September 11, 2003 Request for Evidence specifically requested that the petitioner provide its 2001 and 2002 W-2 forms including, but not limited to, those showing wages paid to the beneficiary. Those forms were not then provided. Now, on appeal, counsel provides 2002 and 2003 W-2 forms issued by the petitioner to the beneficiary. Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988).

Under the circumstances, this office will not consider the 2002 W-2 form, previously requested but not then provided, for any purpose.³ The 2003 W-2 form, which was not previously requested, will be considered. That form shows that the petitioner paid the beneficiary \$35,440 during that year.

The Form I-140 petition states that the petitioner was established on January 15, 2000. The 2000 tax return submitted states that the petitioner incorporated on that same date. The 2002 return, however, states that the petitioner incorporated on November 11, 2001, as does the 2003 return. The April 26, 2004 letter from the petitioner's office manager states that the petitioner "started in October of 1999." Those three dates are apparently irreconcilable. Further, all three dates conflict with the beneficiary's statement, on the Form ETA 750, Part B, that he started working for the petitioner during March of 1999.

Additionally, various documents submitted show various Employer's Identification (EID) numbers for the petitioner. The Form I-140 petition shows that the petitioner's EID number is [REDACTED] as does the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return. The 2002 and 2003 W-2 forms show that the petitioner's EID [REDACTED] do the petitioner's 2002 and 2003 Form 1120, U.S. Corporation Income Tax Returns.

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

³ The basis for this rule is not punitive, but practical. If documentation and other requested evidence is submitted to the Service Center as requested, it may be subjected to investigation that the AAO is unable to undertake. Evidence not submitted to the Service Center when requested, but submitted to AAO on appeal, would escape scrutiny. On remand, therefore, the Service Center is not precluded from considering the tardily submitted W-2 form.

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).

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 has established that it paid the beneficiary \$35,440 during 2003. No other timely submitted evidence shows that the petitioner 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 a given 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 total 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 corporate 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'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 \$27,476.80 per year. The priority date is April 18, 2001.

The petitioner has submitted no copies of annual reports, federal tax returns, or audited financial statements pertinent to 2001, despite the requirements of 8 C.F.R. § 204.5(g)(2). Therefore, the petitioner has not established its ability to pay the proffered wage during 2001. That failure would ordinarily form, in itself, a sufficient basis for denial. In the instant case, however, the Service Center, in the September 11, 2003 Request for Evidence, requested only the petitioner's 2002 tax return, which may have deceived the petitioner into believing it was not obliged to demonstrate its ability to pay the proffered wage during 2001. Under these circumstances, this office declines to dismiss the appeal based on the petitioner's failure to prove its ability to pay the proffered wage during that 2001. This office notes, however, that the petitioner is obliged to demonstrate the ability to pay the proffered wage during 2001 and has not yet done so.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$25,085. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$59,789. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner paid the beneficiary \$35,440. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

An additional issue exists, however, that was not discussed in the decision of denial. On the Form I-140 petition the petitioner stated that it employs 45 workers. In her April 26, 2004 letter the petitioner's office manager stated that the petitioner has always had enough work to employ 12 to 14 full-time workers. Whether those two statements are reconcilable is unclear. If the petitioner had provided its 2001 and 2002 W-3 transmittals and 2001 and 2002 W-2 forms for all of its employees, the issue would have been resolved. Despite the direct request for those documents in the September 11, 2003 Request for Evidence, however, the petitioner did not provide them. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition could have been denied on this additional ground.

On remand, the petitioner is directed to produce that previously requested evidence.⁴ If the petitioner is unable or unwilling to provide that material evidence, that alone would constitute an ample basis for denial.

On remand, the Service Center may wish to resolve the various inconsistencies in the evidence, including the number of workers the petitioner employs, the date of its incorporation, and the date the beneficiary began to work for the petitioner. The petitioner is reminded that, pursuant to *Matter of Ho, supra*, it is obliged to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile the contradictory evidence, absent competent objective evidence sufficient to demonstrate where the truth lies will not suffice. The Service Center is also free to inquire how the facts came to be misstated in various submissions.

The Service Center may request any evidence necessary to reconcile the disparate claims of the petitioner or to resolve any other material issue, including the petitioner's ability to pay the proffered wage during each salient year, including years since the decision of denial was issued.

Further, in the Request for Evidence, the Service Center alluded to multiple petitions filed by the petitioner. The record contains no evidence of those multiple petitions. If the director wishes to rely, even in part, on

⁴ The petitioner is reminded that the Service Center requested copies of the W-2 forms it issued to all of its employees during 2001 and 2002, as well as its 2001 and 2002 W-3 transmittals.

those multiple petitions in his decision, the record must contain evidence of those multiple petitions, including, at a minimum, identifying information and the wages proffered in those other cases.

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 petition is remanded for further consideration and action in accordance with the foregoing.