



U.S. Citizenship
and Immigration
Services

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FILE:

EAC 04 132 53654

Office: VERMONT SERVICE CENTER

Date: APR 04 2006

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker 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 employment based immigrant visa petition was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an asbestos demolition firm. It seeks to employ the beneficiary permanently in the United States as an asbestos handler. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and asserts that the petitioner adequately established its continuing financial ability to pay the proffered salary.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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) also provides in pertinent part:

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)].

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is April 30, 2001. The beneficiary's salary as stated on the labor certification is \$23.15 per hour or \$48,152 per year. On the ETA 750B, signed by the beneficiary on April 30, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, filed on March 27, 2004, the corporate petitioner claims to have been established in 1994, have a gross annual income of five million dollars, a net annual income of two million dollars, and to employ more than 200 workers.

As evidence of its ability to pay the proffered wage, the petitioner initially submitted a letter, dated March 5, 2004, from [REDACTED] the petitioner's president. Mr. [REDACTED] indicates that the petitioner's financial records are confidential, but that it has been in business for over nine years, currently employs more

than 200 workers, and in the past fiscal year has generated net income of two million dollars and has the ability to pay the proffered wage to the beneficiary.

On April 27, 2004, the director requested additional evidence from the petitioner in support of its ability to pay the proffered wage. The director acknowledged that in some cases a statement from a financial officer may be accepted from a prospective employer that employs 100 or more workers, but in this case the petitioner would be required to submit additional information. The director requested the petitioner to provide copies of annual reports, federal tax returns, or audited financial statements from April 30, 2001, to the present. The director instructed the petitioner to provide 2001, 2002, and 2003 federal income tax returns, copies of the beneficiary's Wage and Tax Statements (W-2) showing actual wages paid if the petitioner had ever employed him, a statement from a financial officer which establishes the ability to pay the wage,¹ or annual reports for 2001-2003 accompanied by audited or reviewed financial statements. The director also advised the petitioner that additional evidence such as profit/loss statements, bank account records, or personnel records may be provided, but only as supplemental documentation.

In response to the director's request for additional evidence related to the petitioner's ability to pay the proffered wage, the petitioner, through counsel, resubmitted the March 5, 2004, letter from Mr. [REDACTED] along with a copy of a fifty-two page "Contractor Dispatch Report," from Local 78, a union for asbestos, lead and hazardous material laborers, identifying the petitioner as the contractor and listing member names and job site addresses for 2001-2004. Counsel's transmittal letter, dated May 13, 2004, accompanying the petitioner's response, states that the report contains the "hours worked and paid by the Company."

The director denied the petition, determining that the petitioner had failed to establish its continuing ability to pay the proffered salary beginning on the visa priority date. The director noted that the contractor dispatch report was provided in response to her request for evidence, but that although it showed that the petitioner had employed a number of people, it failed to demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel provides copies of the beneficiary's W-2s issued by the petitioner in 2002 and 2003. They show that the petitioner paid the beneficiary \$14,380 in 2002 and \$2,688 in 2003. Counsel also submitted the copies of the beneficiary's individual tax return for these years, including the 2001 return, as well as various pay stubs from 2002 and 2003. The beneficiary's 2001 tax return shows that the beneficiary reported total wages of \$7,908 in 2001, but no W-2 was provided for this year identifying his employer.

Counsel asserts that the petitioner employs more than 200 workers, that three other petitions for alien workers were already approved based on the president's letter and that the beneficiary will be replacing one of the 100+ employees. She maintains that the W-2s and pay stubs provided on appeal are proof that the company has the ability to pay the certified wage to the beneficiary

As noted above, and as referenced by the petitioner, the regulation at 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer relevant to the U.S. employer's ability to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. *See* Employment-Based Immigrants, 56 Fed. Reg. 60897,

¹ It is unclear why the director mentioned this as she had already advised the petitioner that more than a financial officer's statement would be required in this case.

60898 (Nov. 29, 1991). This alternative recognizes that large employers in some years may have net losses but remain fiscally sound and retain the ability to pay the proposed wage offer, although the director retains the discretion to reject an employer's assurances and seek corroborative evidence. 8 C.F.R. § 103.2(b)(8).

In this case, the director chose to request corroborative documentation from the petitioner beyond the claims made in the [REDACTED] letter. The petitioner responded by resubmitting a copy of the letter and the union's dispatch report. Contrary to counsel's statements in her transmittal letter accompanying the petitioner's response, the dispatch report does not present hours work and wages paid. Some of the names are duplicative and it is unclear whether the petitioner, an asbestos removal contractor, presides over a payroll of full-time permanent employees or a revolving payroll of part-time workers. In such a case, the AAO cannot disagree with the director's concern that the petitioner should further document its continuing ability to pay the beneficiary's proposed wage offer of \$48,152 for a full-time permanent position, rather than provide a letter of assurance.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during a given period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage during that period. If any shortfall between the proffered wage and any actual wages paid can be covered by either a petitioner's net taxable income or its net current assets, then the petitioner will be deemed to have demonstrated its ability to pay the proposed wage offer during a given period. In this case, we note from the W-2s provided on appeal that the petitioner employed and paid wages to the beneficiary in 2002 and 2003. Although the pay stubs indicate that he was compensated at either \$23.00 or \$24.00 per hour when he worked, he was also not employed on a full-time basis, receiving from the petitioner \$45,464 less than the proffered wage of in 2003 and \$33,772 less than the certified wage in 2002.

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, CIS will next examine the net taxable income as reflected on the petitioner's federal income tax return, audited financial statements or annual reports, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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 the Service should have considered income before expenses were paid rather than net income.

Counsel's assertion as to the beneficiary's replacement of another employee is not supported by anything in the record. There is no direct evidence specifically identifying the position, duties, and termination of the worker who performed the proffered position. Counsel's contentions in this regard do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Similarly, other petitions' approvals do not mandate an approval in this case. Each petition's filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). Even if a service center director had approved the other petitions filed by the petitioner, the AAO would not be bound to follow the contradictory decision of a service center. *See, e.g., Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As noted above, the evidence indicates that the petitioner has employed the beneficiary in 2002 and 2003, paying him \$14,380 in 2002 and \$2,688 in 2003. The evidence does not establish that the petitioner employed and paid wages to the beneficiary in 2001. No evidence was submitted to demonstrate that the petitioner either paid the full proffered wage during that period or had the ability to pay the proffered wage in 2001. Similarly, no financial documentation demonstrated that the petitioner could have paid the \$33,772 shortfall between the actual wages paid and the proffered salary in 2002 or the \$45,464 shortfall in 2003. The regulation at 8 C.F.R. § 204.5(g) (2) requires that a petitioner demonstrate its *continuing* ability to pay the proffered wage. The evidence in this case fails to establish that the petitioner had the continuing ability to pay the \$48,152 proposed wage offer in 2001, 2002, or 2003.

Accordingly, based on the evidence contained in the underlying record and after consideration of the information submitted on appeal, the AAO cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered wage as of the April 30, 2001, priority date of the petition.

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.