

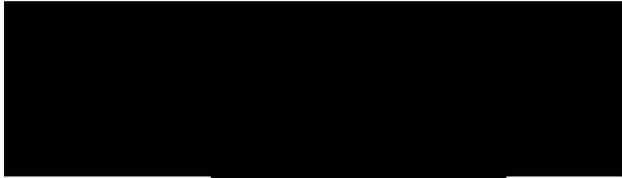


U.S. Citizenship
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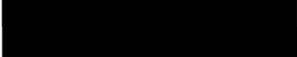
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FILE:



EAC-04-056-50825

Office: VERMONT SERVICE CENTER

Date: JUN 13 2006

IN RE:

Petitioner:

Beneficiary:



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.

Robert P. Wiemann, Chief
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 restaurant firm. It seeks to employ the beneficiary permanently in the United States as a Dinner Cook. 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 denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 18, 2004 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour, which amounts to \$21,603.40 annually.

The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and additional evidence.

Relevant evidence submitted on appeal includes a letter from the petitioner's owner and copies of a Form W-2 wage and tax statement for 2001 for a former employee of the petitioner. Other relevant evidence in the record includes a copy of the petitioner's Form 1120 corporate income tax return for its 2000 tax year.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel states that prior decisions of the AAO have allowed the consideration of depreciation expenses as additional financial resources of the petitioner. Counsel also states that prior decisions of the AAO have allowed year-end cash also to be considered as additional financial resources of the petitioner, added to the petitioner's net income. Counsel also states that evidence of payment of wages in excess of the proffered wage to a former employee is sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period.

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. 142 (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 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, an ETA 750B for the substitute beneficiary was submitted with the I-140 petition. On that Form ETA 750B, signed by the beneficiary on November 17, 2003, the beneficiary did not claim to have worked for the petitioner, and no other evidence in the record indicates that the 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 petitioner's name on the I-140 petition does not indicate what type of legal entity the petitioner is. The Internal Revenue Service tax number on the I-140 petition is a number ending in the three digits "596." (I-140 petition, Part 1. The record contains copies of a Form 1120 U.S. Corporation Income Tax Return the tax year 2000 of a corporation, the [REDACTED]. The second line of the address block on that tax return is the petitioner's name, suggesting that the petitioner's name is a trade name for that corporation. However, the employer identification number on the Form 1120 tax return is a number ending in the three digits "718," which does not match the IRS tax number on the I-140 petition.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record contains no explanation for the inconsistency in the IRS numbers between the I-140 petition and the Form 1120 tax return in the record.

The record also contains a letter dated November 13, 2004 on the petitioner's letterhead, signed by [REDACTED] who signs the letter as "Owner." On the I-140 petition, Mr. [REDACTED] also includes the title "Owner" beside his printed name in the signature block. (I-140 petition, Part 8.) Although Mr. [REDACTED] signatures on both documents are an assertion that he is the petitioner's owner, that assertion is inconsistent with information on the Form 1120 U.S. Corporation Income Tax Return of the petitioner for its 2000 tax year, which shows on Schedule E two other individuals as officers of the corporation, [REDACTED] and [REDACTED] with each of those individuals shown as owning 50% of the common stock of the corporation. No explanation for this evidentiary inconsistency is found in the record. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

It may be noted that the ETA 750 was signed on behalf of the employer by [REDACTED] who signed that document on April 12, 2001. The agent designated to represent the employer on the ETA 750 is the same counsel who is representing the petitioner in the instant I-140 petition.

Since the petitioner has a different tax identification number from the [REDACTED] and a different owner, it appears that the petitioner has changed ownership and/or is a different legal entity from that corporation. The record contains no evidence that the petitioner qualifies as a successor-in-interest to the [REDACTED]. That status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage.

Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The information on the Form 1120 for the tax year 2000 and on the ETA 750 indicates that the petitioner's name is a trade name for the [REDACTED] and that the [REDACTED] was the legal entity which filed the ETA 750. The only financial evidence in the record pertains to the [REDACTED].

Without evidence to explain the inconsistency noted above and evidence to establish that the petitioner is a successor in interest to the [REDACTED] the petition could not be approved based on the financial evidence pertaining only to the [REDACTED]

The Form 1120 U.S. Corporation Income Tax Return of the [REDACTED] for its 2000 tax year covers the period from April 1, 2000 until March 31, 2001. The record before the director closed on December 17, 2003 with the receipt by the director of the I-140 petition and supporting documents. As of that date, the corporation's federal tax return for its 2001 and 2002 tax years should have been available. The corporation's tax year for 2001 presumably covers the period from April 1, 2001 until March 31, 2002, and its tax year for 2002 presumably covers the period from April 1, 2002 until March 31, 2003. The return for the 2002 tax year would have been due three and one-half months after the tax year closed, or on July 15, 2003. That date was more than five months before the I-140 petition was submitted. Nonetheless, no copy of the corporation's Form 1120 tax return for its 2001 tax year was submitted for the record, nor of its Form 1120 tax return for its 2002 tax year.

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, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return.

The 2000 tax return for the [REDACTED] states an amount for taxable income on line 28 as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2000	\$4,193.00	\$21,603.40*	\$(17,410.40)
2001	not submitted	\$21,603.40*	no information
2002	not submitted	\$21,603.40*	no information

* The full proffered wage, since the record contains no evidence of any wage payments made by the Christian Michele Corporation or by the petitioner to the beneficiary.

The above information is insufficient to establish the ability of the [REDACTED] to pay the proffered wage in any of the years at issue in the instant petition.

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.

Calculations based on the Schedule L attached to the 2000 tax return of the [REDACTED] yield the amount for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2000	\$3,598.00	\$21,603.40*	\$(18,005.40)
2001	not submitted	\$21,603.40*	no information
2002	not submitted	\$21,603.40*	no information

* The full proffered wage, since the record contains no evidence of any wage payments made by the [REDACTED] or by the petitioner to the beneficiary.

The above information is insufficient to establish the ability of the [REDACTED] or the petitioner to pay the proffered wage in any of the years at issue in the instant petition.

In his November 13, 2004 letter, [REDACTED] states that the petitioner intended to replace a prior employee with the beneficiary, and that the prior employee was paid \$24,990.06 by the petitioner in 2001. The record also contains a copy of Form W-2 Wage and Tax Statement for that employee for 2001. The Form W-2 shows the employer as the [REDACTED] with the petitioner's name as the trade name, and with the employer identification number the same as on the Form 1120 tax return of that corporation, the number ending in the three digits "718." The amount of compensation to that employee shown on the W-2 form is \$24,990.06. That amount is greater than the proffered wage of \$21,603.40.

Nonetheless, the information in the November 13, 2004 letter is insufficient to establish that the position occupied by the employee referred to in the letter is the same position as is offered to the beneficiary. Moreover, Mr. [REDACTED] gives no explanation of how that employee was to be terminated in order to make room on the payroll for the beneficiary. If the petitioner intends to terminate the employment of an incumbent authorized U.S. worker in order in order to hire an alien worker, this would frustrate the purpose of the instant immigration classification. Finally, as noted above, the record lacks evidence to show that the petitioner is either the same legal entity as the [REDACTED] or a successor in interest to that corporation.

The record also contains copies of Form W-2 Wage and Tax Statements for thirty-five other employees of the [REDACTED] for 2001. Those Form W-2's presumably are intended to show the amount of wages paid by the corporation in 2001, though no summary figures are provided in the record. Moreover, no copy of the corporation's Form 1120 corporate tax return for 2001 was submitted in evidence, so it is not possible to compare the information on the Form W-2's with information on the corporations federal income tax return. Form W-2 Wage and Tax Statements are not a form a evidence which is one of the three alternative forms of required evidence specified by the regulation at 8 C.F.R. § 204.5(g)(2), namely copies of annual reports, federal tax returns, or audited financial statements.

In his brief, counsel refers to several decisions of the AAO as authorities in support of the instant petition. Counsel provides no published citations for those cases. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, many of the unpublished cases cited by counsel involve the issue of payments by the petitioners of compensation to beneficiaries. But the evidence in the instant petition shows no payments of compensation by the petitioner or by any predecessor to the beneficiary.

Another unpublished cases cited by counsel involves the issue of year-end cash. Counsel asserts that year-end cash should be considered as additional financial resources of the petitioner, to be added to its net income.

However, to do so could involve double counting the same funds, since net income for the year could be one of the factors affecting the amount of cash the petitioner has on hand at the end of the year.

On the notice of appeal, counsel asserts that depreciation expenses should be considered as additional financial resources of the petitioner. While it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>.

For the foregoing reason, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. See *Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements.

Counsel also cites a May 4, 2004 memorandum by William R. Yates, CIS Associate Director for Operations entitled "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), and counsel submits a copy of that memorandum in support of the petition. However, the portion of that memorandum relied on by counsel concerns cases where the evidence shows that the petitioner has paid or currently is paying the beneficiary the proffered wage. As noted above, no evidence in the record indicates that the petitioner or an predecessor has paid the beneficiary any compensation.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails 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.

In her decision, the director treated the tax return of the [REDACTED] as that of the petitioner, failing to note the inconsistency between the employer identification number on that return and the IRS tax number on the I-140 petition. The director correctly stated the net income of the [REDACTED] Corporation and correctly calculated the corporation's year-end net current assets for its 2000 tax year. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. Although the analysis of the director was incomplete, the decision of the director to deny the petition was correct, based on the evidence in the record before the director.

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, the evidence fails to establish that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of Dinner Cook. On the ETA 750A submitted with the instant petition, block 14 requires two years of experience in the offered position. No other requirements are stated in either block 14 or block 15.

The only documentation of the beneficiary's prior experience in the record is a copy of a letter dated November 12, 2003 from the manager of a restaurant in Quezon City, Philippines. That letter states that the beneficiary worked for that restaurant from March 2, 1976 to March 10, 1978, and that his last position was assistant cook. On its face, that position fails to qualify as experience in the offered position, which is dinner cook. The letter contains no description of duties that would allow CIS to compare them to those set forth in Section 13 of the ETA 750. Moreover, the November 12, 2003 letter does not state the length of time that the beneficiary held the position of assistant cook, but only that his last position was assistant cook. On the ETA 750B, the beneficiary stated experience as a cook with a diplomatic household in Athens, Greece from November 1999 until August 2002, and experience as a cook with another diplomatic household in Rockville, Maryland from October 2002 until August 2003. However the record contains no documentation establishing the beneficiary's experience in either of those positions, as required by regulation at 8 C.F.R. § 204.5(g)(1).

Therefore the evidence fails to establish that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

In summary, the evidence fails to establish that the petitioner is the same legal entity as the employer which filed the ETA 750 labor certification or a successor in interest to that employer, and fails 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. Beyond the decision of the director, the evidence fails to establish that the beneficiary had the required minimum qualifications for the offered position as of 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. The petitioner has not met that burden.

ORDER: The appeal is dismissed.