



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: MAR 27 2006

WAC-03-083-54301

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

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 and denied again after the Director, California Service Center granted a motion to reopen/reconsider, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded.

The petitioner is a Chinese restaurant and seeks to employ the beneficiary as a Chinese specialty 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 denied the petition for failure to establish that the beneficiary had met the minimum requirements at the time that the request for certification was filed.

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 instant I-140 petition was submitted January 16, 2003 without any documentation concerning the beneficiary's qualifications as required by the above regulation. After receiving responses to the director's requests for additional evidence (RFE) and a notice of intent to deny (NOID), on July 7, 2004 the director determined that the petitioner did not demonstrate that the beneficiary had the requisite experience before the priority date, and denied the petitioner accordingly. On December 2, 2004, the director denied the petition again after reviewing the case on a motion to reopen or reconsider.

On appeal, counsel submits a brief and additional evidence¹.

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 priority date 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 13, 2001.

The certified Form ETA 750 in the instant case states that the position of Chinese specialty cook requires at a minimum two (2) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary set forth his work experience. He listed his experience as a "Chinese Specialty Cook" with [REDACTED] at 604 Love Avenue, Tifton, GA 31794 from April 1998 to August 2000.

The petitioner must 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ 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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

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) of 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.

The record of proceeding contains letters from [REDACTED], the owner of [REDACTED]. The [REDACTED] letter dated June 26, 2003 verifies that the beneficiary worked as kitchen manager from May of 1998 through September of 2000 while the Form 750B states that the beneficiary worked as a Chinese Specialty Cook with [REDACTED] Restaurant from April 1998 to August 2000. The June 26, 2003 letter does not specify what the beneficiary did at [REDACTED]. It does not include his duties, responsibilities, or experience gained. The director correctly concluded that this letter is not sufficient and does not include any corroborating evidence that the beneficiary actually worked there.

The second letter from [REDACTED] dated July 20, 2004 was submitted with motion to reopen/reconsider. This letter states in part that:

This is to verify that employee [REDACTED] was hired as Chinese cook by [REDACTED] from May of year 1998 through September of year 2000. This is also to verify that [REDACTED] worked around ten hours a day and five days a week.

Nai Ang Jiang prepared and cooked all menu dishes, both Cantonese and Mandarin food. He chose our daily special ordered supplies and managed our kitchen staff.

Mr. [REDACTED] identifies himself as the beneficiary's previous employer in his experience letters using his Chinese name, [REDACTED]. Mr. [REDACTED] also signed the instant petition as the petitioner's authorized officer using his American name, [REDACTED]. Per counsel's submission letter, [REDACTED] also known as [REDACTED] sold [REDACTED] in Tifton, Georgia, moved to Phoenix, started the petitioning restaurant, and now owns it. Thus Mr. [REDACTED] was the previous employer of the beneficiary and also the owner of the instant petitioning restaurant for the beneficiary. A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000). In the future proceeding the petitioner must discuss its relationship with the beneficiary.

The third letter of [REDACTED] dated October 25, 2004 was submitted with response to the RFE issued by the director after granting the motion to reopen/reconsider. This letter verifies that the beneficiary worked from April of 1998 until August of 2000 instead of May of 1998 to September 2000, and worked 40 hours a week instead of 10 hours a day 5 days a week although counsel did not explain which letter is correct and upon what records this October 25, 2004 letter is based.

On appeal current counsel asserts in his brief that: "[t]he [b]eneficiary has been able to obtain affidavits from U.S. citizens that establish that he indeed did work at the former job in Georgia and was a cook for the former Chinese restaurant. In the U.S. judiciary system sworn statements are accepted as creditable factual evidence." The affidavits from U.S. citizens counsel claimed consist of four letters written by the following

individuals : [REDACTED] as a former co-worker, [REDACTED] as a friend, [REDACTED] as former manager of [REDACTED] and [REDACTED] as a friend of the beneficiary.

Although 8 C.F.R. § 204.5(g)(1) permits the consideration of other documentation of the beneficiary's qualifying experience in the circumstances that the required evidence is not available, it still requires other documentation to meet certain evidentiary standards.

The letter from [REDACTED] is notarized by a notary public in State of Nevada for "subscribed and sworn to before me on November 23, 2005", but without any declaration language in the affidavit itself. [REDACTED] states that in 1998 he worked with the beneficiary at a restaurant in Tifton, Georgia called [REDACTED] Chinese Restaurant.

In the letters [REDACTED] and [REDACTED] identify themselves as U.S. citizens and friends visiting the beneficiary on a weekly basis. Their letters write each of them met the beneficiary in 1998 while he was working at [REDACTED] as a specialty cook or a chef. However, both letters do not verify how long the beneficiary worked for that restaurant as a cook. Neither of these two letters contain any declaration under penalty, nor are they notarized.

According to [REDACTED]'s letter, he was the manager at [REDACTED] in Tifton, Georgia from January 1998 to May 2001. In his letter [REDACTED] states that: "[REDACTED] was employed with us from April 1998 to August 2000 as a Chinese Specialty Cook. He was so young, everyone at the restaurant would call him 'young cook'. He was being paid cash as he did not have work papers at the time." [REDACTED] letter is notarized by a notary public in State of Arizona with language that "The foregoing instrument was acknowledged before me this 19th day of Nov. 2005 by [REDACTED]. The record of proceeding indicates that the beneficiary was born on February 3, 1982. On the Form 750B the beneficiary indicated that he was in primary school and middle school from September 1988 to February 1998. [REDACTED] letter, however, does not describe the detailed duties the beneficiary performed as a Chinese specialty cook, does not mention any of the minimum requirements for the Chinese specialty cook at [REDACTED] Chinese Restaurant, nor does it explain how the beneficiary was qualified for the position at the age of 16, two months after middle school graduation. The former counsel wrote in his letter submitted with the motion to reopen/reconsider dated July 22, 2004 that: "As of the time period, Mr. [REDACTED] said he checked his employment records and found that the applicant did in fact work for him at the Golden Star from May of 1998 to September of 2000." The second verification letter of [REDACTED] the owner of Golden Star, dated July 20, 2004 states that: "This is to verify that employee [REDACTED] was hired as Chinese cook by Golden star from May of year 1998 through September of year 2000." [REDACTED] does not explain what records his statement is based on, whether he has checked the same employment records the owner rechecked or he has checked other records.

Upon consideration of all evidence in the record including these letters discussed above, it appears that it is more likely than not that the beneficiary worked as a cook for two (2) years at the Chinese restaurant prior to the filing.

However, the declarations that have been provided on motion are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Because of these defects and inconsistency, the letters submitted as affidavits will be given little weight in these proceedings.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

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.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In view of the foregoing, the ground for the director's decision will be withdrawn. The petition is remanded to the director consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision on this issue.

Beyond the director's decision, the AAO remands the petition to the director also to review and consider whether the petitioner had the continuing ability to pay the proffered wage beginning on the priority date to present.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

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 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. See 8 CFR

§ 204.5(d). 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 13, 2001. The proffered wage as stated on the Form ETA 750 is \$10.40 per hour (\$21,632 per year²). According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary claimed to have worked for the petitioner since September 2000.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the beneficiary claimed to have worked for the petitioner since September 2000. The record of proceeding contains W-2 forms for 2001 and 2002 for all employees of the petitioner, and Form 941 Quarterly Unemployment Tax and Wage Report for all four quarters of 2002 and the first three quarters of 2003, however, none of them indicates that the petitioner paid any amounts to the beneficiary. The petitioner did not establish that it employed and paid the beneficiary in 2002 through the present. The petitioner must address this issue in any future proceeding.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

² It is based on \$10.40 per hour x 40 hours per week x 52 weeks.

(Emphasis in original.) *Chi-Feng* at 537.

The record indicates that the petitioner was structured as an S corporation³ and has filed Form 1120S for its tax returns. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 1999 through 2003.⁴ The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$21,632 per year from the priority date through 2003:

In 2001, the Form 1120S stated net income⁵ of \$38,965.

In 2002, the Form 1120S stated net income of \$(14,781).

In 2003, the Form 1120S stated net income of \$3,045.

Therefore, for the years 2002 through 2003, the petitioner did not have sufficient net income to pay the proffered wage although the petitioner established that it had sufficient net income to pay the proffered wage for 2001. The petitioner must demonstrate its ability to pay the proffered wage with its net income from the priority date to the present in any future proceeding.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the years in 2002 and 2003 were \$12,126 and \$15,376 respectively. Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage for the years 2002 through 2003. The petitioner must establish that it had sufficient net current assets for those years when its net income was insufficient to pay the proffered wage or the difference between the wage actually paid to the beneficiary and the proffered wage from the priority date to the present.

³ Item D of the Form 1120S shows that the business entity was incorporated on October 1, 1999 and Item A of the Form 1120S shows that it was elected as an S corporation effective on January 1, 2000.

⁴ Since the priority date in the instant case is April 13, 2001, the tax returns prior to the priority date are not dispositive. The AAO will consider the tax returns for 2001 through 2003.

⁵ Ordinary income (loss) from trade or business activities as reported on Line 21.

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The evidence currently kept in the record of the instant case appears that from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.