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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE: WAC 02 202 50708 Office: CALIFORNIA SERVICE CENTER Date: NOV 09 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other (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: SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "RWiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the instant preference visa petition and the Administrative Appeals Office (AAO) remanded a subsequent appeal to the director for a new decision. The director denied the petition again and certified the matter to AAO. The decision of denial will be affirmed.

A Form G-28, Entry of Appearance, was filed in this matter. On that form, the petitioner's ostensible representative does not indicate that she is an attorney. Further, that ostensible representative's name does not appear on CIS's list of accredited representatives. See <http://www.usdoj.gov/eoir/statspub/accreditedreproster.pdf>. As such, the file contains no evidence that the petitioner's ostensible representative is qualified and authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner. See 8 C.F.R. § 292.1.

The petitioner is a cutting service. It seeks to employ the beneficiary permanently in the United States as a sample cutter. 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.

On appeal the petitioner submitted a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to 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 unavailable.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 17, 1998. The proffered wage as stated on the Form ETA 750 is \$10 per hour, which equals \$20,800 per year.

The Form I-140 petition in this matter was submitted on June 7, 2002. On the petition, the petitioner stated that it was established on April 25, 1995 and that it employs six workers. The petition states that the petitioner's gross annual income is \$121,530 and that its net annual income is \$30,261.

On the Form ETA 750, Part B, signed by the beneficiary on August 1, 1998, the beneficiary stated that he had began working for the petitioner during July 1997 and left during October 1997. A supplement to the Form ETA 750B states that the beneficiary worked as a sample cutter for [REDACTED] in Michoacan, Mexico from "December 1994 to Present." That supplement is dated October 7, 1999. How this employment claim can be reconciled with the claim of employment for the petitioner is unknown to this office. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Los Angeles, California.

In support of the petition, the petitioner submitted no evidence of its ability to pay the proffered wage. Therefore, on November 13, 2002 the California Service Center requested, *inter alia*, evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements. The service center also specifically requested copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters.

In response, the petitioner submitted (1) the joint 1998, 1999 2000, and 2001 Form 1040 U.S. Individual Income Tax Returns of [REDACTED] and [REDACTED]s, (2) Form 941 Employer's Quarterly Federal Tax Returns for the third and fourth quarters of 1997; all four quarters of 1998, 1999, 2000, and 2001; and the first three quarters of 2002, (3) California Form DE-6 quarterly wage reports for the all four quarters of 1998, 1999, 2000, and 2001, and the first and third quarters of 2002, (4) 1998 and 2000 California Form DE-7 reconciliations, and (5) a 2000 Form 940-EZ Employer's Annual Unemployment (FUTA) Return.

The tax returns provided show that Mr. and Mrs. [REDACTED] owned the petitioner as a sole proprietorship and had four dependents during 1998, 1999, 2000, and 2001.

During 1998 the petitioner returned net income of \$41,446. During that year the petitioner's owners declared adjusted gross income of \$55,470, including the petitioner's profit.

During 1999 the petitioner returned net income of \$12,646. During that year the petitioner's owners declared adjusted gross income of \$38,735, including the petitioner's profit.

During 2000 the petitioner returned net income of \$29,084. During that year the petitioner's owners declared adjusted gross income of \$32,442, including the petitioner's profit.

During 2001 the petitioner returned net income of \$30,261. During that year the petitioner's owners declared adjusted gross income of \$26,280, including the petitioner's profit offset by deductions.

The quarterly tax returns, Form DE-6 wage reports, Form DE-7 reconciliations, and Form 940-EZ returns show that the petitioner paid total wages of \$15,257.92 and \$16,627.78 during the third and fourth quarters of 1997; and \$18,154.56, \$33,037.24, \$28,901.98, and \$26,169.74 during the four quarters of 1998; respectively; \$19,224.59, \$28,260.95, \$20,427.89, and \$19,017.26 during the four quarters of 1999, respectively; \$12,074.75, \$16,249.59, \$10,570.27, \$11,674.87 during the four quarters of 2000, respectively; \$7,360.55, \$12,590.79, \$16,387.90, and \$4,228.28 during the four quarters of 2001, respectively, and \$5,670.74, \$20,186.47, and \$11,822.79 during the first three quarters of 2002, respectively. Those forms demonstrate

that the petitioner paid total annual wages of \$106,263.52 during 1998, \$86,930.69 during 1999, \$50,569 during 2000, and \$40,567.42 during 2001.

In addition, the quarterly wage reports show that the petitioner employed 8 to 13 workers during the quarters for which they were provided, but do not show that the petitioner employed the beneficiary.¹

The 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 July 11, 2003, denied the petition.

On appeal, the petitioner submitted (1) a closing statement, escrow instructions, a deed, and other documents showing that the petitioner's owners acquired a property on August 13, 1996 for \$155,000, (2) documents pertinent to the acquisition of two burial plots on September 18, 1998, (3) documents pertinent to the petitioner's owners acquisition of a property in Los Angeles, California on May 21, 2002 for \$255,000, (4) various unexecuted documents pertinent to a mortgage loan made to the petitioner's owners on or about January 3, 2003, (5) a deed and other documents showing that the petitioner's owners acquired the property at the petitioner's address on May 6, 2003 for \$50,000, and (6) a letter dated July 29, 2003 from the petitioner's owner.

The petitioner's owner's July 29, 2003 letter states that he is able to support his family on his savings and the amount that would have remained of his adjusted gross income after payment of the proffered wage during each of the salient years. Other than the evidence pertinent to real estate transactions the record contains no evidence pertinent to the petitioner's owners' assets.

The AAO first considered this matter on February 10, 2005. The AAO noted that evidence pertinent to the petitioner's owners' monthly expenses was never requested and was not provided. The AAO found that it was unable to determine, absent that evidence, whether the petitioner's owners were able to pay the proffered wage and retain resources sufficient to pay their household expenses. The matter was remanded to the service center with instructions to accord the petitioner sufficient time to provide the petitioner's owners' budget.

Pursuant to direction by AAO the California Service Center, on March 17, 2005, requested a statement of the petitioner's owners' monthly budget and evidence pertinent to any assets they might use to pay the proffered wage. Further, the service center again requested that the petitioner provide evidence of its continuing ability to pay the proffered wage beginning on the priority date.

The service center also noted that the petitioner claims to have employed the beneficiary and asked for W-2 forms showing the wages it paid to the beneficiary during each of the salient years. The record does not indicate that the petitioner responded to that request. On June 23, 2005 the California Service Center denied the petition in this matter again, and certified the matter to AAO.

The petitioner's reliance on the evidence in the record pertinent to real estate holdings is misplaced. The evidence submitted does not demonstrate that the petitioner's owners still own the properties described.² The

¹ Most of those reports, however, show that the petitioner employed a [REDACTED] during those quarters. Whether [REDACTED] is related to the beneficiary is unknown.

market value for each property was not demonstrated nor even alleged.³ Similarly the amounts of any mortgages by which the properties are now encumbered is neither demonstrated nor alleged.⁴

The evidence provided pertinent to the petitioner's alleged real estate holdings is unconvincing. Not only are the ownership of the properties, their value, and the amounts by which they are encumbered poorly supported, as was detailed above, but even if the information were demonstrated to be correct, it would be insufficient to render the petition approvable. The petitioner's owners' equity in real estate is insufficiently liquid to be readily available to pay wages. For all of the reasons listed, the petitioner's owner's alleged equity in real estate will not be considered.

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 did not establish that it employed and paid the beneficiary.⁵

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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 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, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with a portion of the petitioner's owner's income and liquid assets in the determination of

² Ownership of property is typically demonstrated through a professional title search.

³ A licensed real estate appraiser would ordinarily provide a disinterested estimate of value. Here, no evidence is in the record to demonstrate that any such valuation was performed.

⁴ Although some historical information was provided pertinent to mortgages on some of the properties, whether the properties may now be encumbered in some additional amounts is unknown. The amount of any encumbrances would also typically be determined by a professional title search.

⁵ Although the submissions with the Form I-140 petition appeared to indicate that the petitioner employed the beneficiary no evidence was submitted to support that assertion.

the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged to demonstrate that he could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he must show that he could still have sustained himself and his dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The proffered wage is \$20,800 per year. The priority date is August 17, 1998.

During 1998 the petitioner's owners declared adjusted gross income of \$55,470 including the petitioner's profit. If they had been obliged to pay the proffered wage out of that amount they would have been left with \$34,670 with which to support their family of six. Although the service center requested the petitioner's owners' budget it was not provided. Notwithstanding the petitioner's owners' assurance, this office is unable, absent that requested evidence, to determine that the petitioner's owners were able to support themselves and their dependents on \$34,670 during 1998.

During 1999 the petitioner's owners declared adjusted gross income of \$38,735 including the petitioner's profit. If they had been obliged to pay the proffered wage out of that amount they would have been left with \$17,935 with which to support their family of six. Although the service center requested the petitioner's owners' budget it was not provided. Notwithstanding the petitioner's owners' assurance, this office is unable, absent that requested evidence, to determine that the petitioner's owners were able to support themselves and their dependents on \$17,935 during 1999.

During 2000 the petitioner's owners declared adjusted gross income of \$32,442 including the petitioner's profit. If they had been obliged to pay the proffered wage out of that amount they would have been left with \$9,461 with which to support their family of six. Although the service center requested the petitioner's owners' budget it was not provided. Notwithstanding the petitioner's owners' assurance, this office is unable, absent that requested evidence, to determine that the petitioner's owners were able to support themselves and their dependents on \$11,642 during 2000.

During 2001 the petitioner's owners declared adjusted gross income of \$30,261 including the petitioner's profit offset by deductions. If they had been obliged to pay the proffered wage out of that amount they would have been left with \$11,642 with which to support their family of six. Although the service center requested the petitioner's owners' budget it was not provided. Notwithstanding the petitioner's owners' assurance, this office is unable, absent that requested evidence, to determine that the petitioner's owners were able to support themselves and their dependents on \$9,461 during 2001.

The second request for evidence in this matter was issued on March 17, 2005. Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements. The petitioner has not submitted any evidence pertinent to 2002 or 2003, although its tax returns for those years should have been available when the request for evidence was issued. The petitioner has not demonstrated its ability to pay the proffered wage during those years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record suggests additional issues that were not discussed in the decision of denial. In the March 17, 2005 request for evidence the service center requested a statement of the petitioner's owners' monthly personal expenses. No such document was ever provided.

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 should have been denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

Further, the beneficiary in this case is Juan C. Cazares Macias and the petitioner's owners' names are [REDACTED] and [REDACTED]. Pursuant to 20 C.F.R. §626.20(c) (8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship." *See Matter of Summart*, 374, 00-INA-93 (BALCA May 15, 2000).

That the beneficiary shares the family name of the petitioner's owner creates the suspicion, at least, that the beneficiary and the petitioner's owners might have an undisclosed familial relationship, which would, in turn, cast suspicion on the assertion that the petitioner is hiring the beneficiary because it was unable to locate suitable U.S. workers for the proffered position. Because this issue was not raised by the Service Center, however, and the petitioner has not been accorded an opportunity to respond, this office does not base today's decision, in whole or in part, on that issue. If the petitioner seeks to overcome today's decision on motion, however, it should address this issue.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. The decision of denial will be affirmed.

ORDER: The decision of denial is affirmed.