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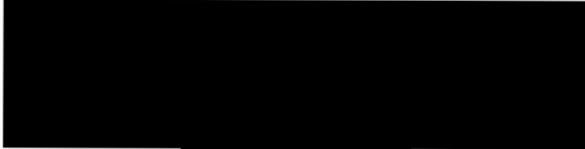
U.S. Department of Homeland Security
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Washington, DC 20529



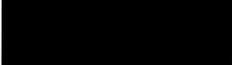
U.S. Citizenship
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FILE:



Office: NEBRASKA SERVICE CENTER

Date: OCT 10 2006

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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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen or reconsider. The motion will be granted. The previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a construction and remodeling company. It seeks to employ the beneficiary permanently in the United States as a tile setter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's September 15, 2003 decision, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with legal authorization to work in the United States. The director denied the petition accordingly. The AAO affirmed the director's decision on February 1, 2005 and noted that the petitioner had not established its ability to pay the proffered wage as of the priority date.

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 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 DOL 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 30, 2001.

On motion, counsel submits a brief. Relevant evidence in the record includes application filing instructions issued by the Washington State Employment Security Department regarding alien employment certification and an employment verification letter dated April 23, 2001 from Cantibarro de Morelos. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On motion, counsel asserts that the petitioner has all the requisite experience in the job offered. Counsel further states:

The term "must have legal authorization to work in USA" is a general language used by employers to emphasize that ONLY LEGAL WORKERS ARE RECRUITED and this is not a job requirement for the position. This term is a standard recruitment language required by WA State ESD and USDOL and this requirement does not apply to the alien.

[Emphasis in the original.]

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.



8 C.F.R. § 103.5(a)(2). The content of counsel's motion does not satisfy the requirements of a motion to reconsider under 8 C.F.R. § 103.5(a)(3) because counsel fails to assert that the director and the AAO made an erroneous decision through misapplication of CIS law or policy or based upon evidence of record at the time of the director's decision. Counsel simply references precedent that he cited previously relating to the beneficiary's qualifications for the proffered job. However, the content of counsel's motion does satisfy the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2) because new facts have been asserted and new documentary evidence has been submitted relating to the petitioner's ability to pay the proffered wage.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of tile setter. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School blank
 - High School blank
 - College blank
 - College Degree Required blank
 - Major Field of Study blank

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A states that the applicant must have two years of experience in the job offered, and proof of legal authorization to work in the USA.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for the petitioner as a tile setter from September 2000 to the date he signed the Form ETA 750B. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner has provided no new evidence on motion to support its assertion that the beneficiary is qualified to perform the duties of the proffered position with legal authorization to work in the United States. As noted by the AAO in our previous decision, the record contains no indication that the beneficiary had the right to work in the United States on the priority date as is required by the Form ETA 750. The application filing instructions issued by the Washington State Employment Security Department contained in the record do not require the petitioner to include the requirement of legal authorization to work in the United States on its ETA 750. As noted by the AAO in our previous decision, the instructions do not even pertain to the completion of Form ETA 750. Also, as noted by the AAO in our previous decision, counsel's assertion that the requirement of legal authorization to work in the United States is required by the Washington State Employment Security Department and DOL is unsupported by the evidence and the law. Thus, the preponderance of the evidence does not demonstrate that the beneficiary is qualified to perform the duties of the proffered position with legal authorization to work in the United States.

The AAO noted in our previous decision that the petitioner had not established its ability to pay the proffered wage as of the priority date. 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 DOL. See 8 C.F.R. § 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The proffered wage as stated on the Form ETA 750 is \$15.75 per hour (\$32,760.00 per year based on a 40-hour work week). On motion, counsel submits a brief and the beneficiary's IRS Forms W-2, Wage and Tax Statements, issued by the petitioner for 2001, 2002 and 2003. Other relevant evidence in the record includes the petitioner's IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 1999, 2000, 2001 and 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1985 and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On motion,

counsel asserts that based on the beneficiary's IRS Forms W-2 issued by the petitioner for 2001, 2002 and 2003, the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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 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's IRS Forms W-2 for 2001, 2002 and 2003 show compensation received from the petitioner, as shown in the table below.

- In 2001, the Form W-2 stated compensation of \$30,987.45.
- In 2002, the Form W-2 stated compensation of \$35,397.00.
- In 2003, the Form W-2 stated compensation of \$34,980.36.

Therefore, for the years 2002 and 2003, the petitioner has established that it employed and paid the beneficiary the full proffered wage of \$32,760.00. For 2001, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages that year. Since the proffered wage is \$32,760.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$1,772.55 in 2001.

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).

The record before the director closed on August 29, 2003 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2002 federal income tax return is the most recent return available. The petitioner's 2001 Form 1120S stated net income of -\$53,230.00.¹ Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

¹ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits,

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² 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 did not submit Schedule L to its 2001 federal income tax return. Therefore, the petitioner's net current assets may not be analyzed against the difference between the wages actually paid to the beneficiary and the proffered wage in 2001.

Thus, for 2001, 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 motion to reopen is granted and the decision of the AAO dated February 1, 2005 is affirmed. The petition is denied.

deductions or other adjustments, net income is found on line 23 of Schedule K. Because the petitioner had additional income shown on its Schedule K for 2001, the petitioner's net income is found on line 23 of Schedule K of its tax return.

² 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.