

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

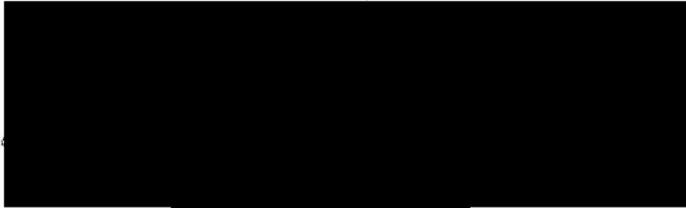
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE:

EAC-04-168-51385

Office: VERMONT SERVICE CENTER

Date: **OCT 31 2006**

IN RE:

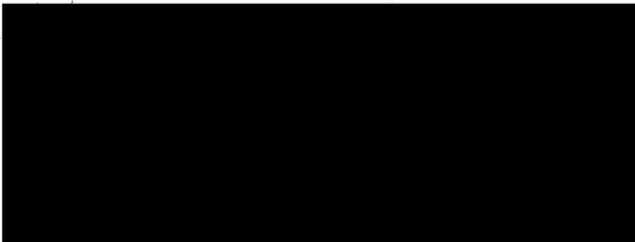
Petitioner:

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:



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 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 a construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time the priority date was established and continuing to the present, and denied the petition accordingly.

On appeal, counsel submits a brief statement and additional evidence.¹

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 the granting of 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 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 20, 2001. The proffered wage as stated on the Form ETA 750 is \$15.93 per hour (\$33,134.40 per year). The Form ETA 750 states that the position requires one (1) year of experience in the job offered or one (1) year of experience in the related occupation of carpenter. On the Form ETA 750B signed by the beneficiary on April 20, 2001, the beneficiary claimed to have worked for the petitioner since April 2000. On the petition, the petitioner claimed to have been established in 1987, to

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.

have a gross annual income of \$1,100,000, to have a net annual income of \$60,000, and to currently employ 45 workers.

With the instant petition filed on April 28, 2004, the petitioner submitted monthly bank statements for its business checking account from January 2001 to February 2004, and the beneficiary's W-2 form for 2000 and paystubs for 2000 through 2003 to establish the petitioner's ability to pay the proffered wage.

On August 23, 2004, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence (RFE) pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner:

Submit additional evidence to establish that [the petitioner] had the ability to pay the proffered wage or salary of \$15.93 per hour as of April 20, 2001, the date of filing, and continuing to the present.

Submit the 2001 United States federal income tax return(s), which all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax return. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.

As an alternative you may submit annual reports for 2001 which are accompanied by audited or reviewed financial statements.

If the beneficiary was employed by you in 2001, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business.

In response to the RFE received by the director on November 18, 2004, the petitioner submitted bank statements for 2001 through 2004, and the beneficiary's pay stubs and W-2 forms for 2000, 2001 and 2002.

The director denied the petition on April 4, 2005, finding that the record did not establish that the petitioner had the ability to pay the offered wage at the time of filing.

On appeal, counsel submits the beneficiary's W-2 forms for 2001 through 2004 and asserts that the petitioner's bank statements demonstrate that the petitioner had sufficient bank account balances to pay the difference between wages actually paid to the beneficiary and the proffered wage for those years.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 record contains copies of the beneficiary's W-2 forms for 2000 through 2004. Since the priority date is April 20, 2001, the wage paid to the beneficiary in 2000 is not relevant. The beneficiary's W-2 forms for 2001 through 2004 show that the petitioner paid the beneficiary \$29,697.57 in 2001, which is \$3,436.43 less than the proffered wage; the petitioner paid \$30,471.25 in 2002, which is \$2,663.15 less than the proffered wage; the petitioner paid \$33,711.35 in 2003 and \$34,146.50 in 2004. Therefore, the petitioner did establish that it paid the beneficiary the full proffered wage in 2003 and 2004, however, the petitioner is still obligated to demonstrate that it could

pay the beneficiary the difference of \$3,436.43 in 2001 and \$2,663.15 in 2002 between wages actually paid to the beneficiary and the proffered wage with its net income or net current assets.

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 or net current assets 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 petitioner's federal tax return is not the only evidence to establish the petitioner's ability to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage. The regulation 8 C.F.R. § 204.5(g)(2) also provides two other alternatives: annual reports or audited financial statements. In his RFE dated August 23, 2004, the director requested the petitioner to submit its tax returns as well as annual reports with audited or reviewed financial statements pursuant to the regulation. However, the petitioner did not submit any one of the three regulatory-prescribed forms of evidence to establish its ability to pay the proffered wage in the instant case. Therefore, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2001 and 2002.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for 2001 and 2002. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that are not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that would have been considered in determining the petitioner's net current assets if provided.

Therefore, 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.

Counsel's assertions on appeal cannot overcome the decision of the director that the evidence submitted by the petitioner did not demonstrate that the petitioner could pay the proffered wage from the day the Form



ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.