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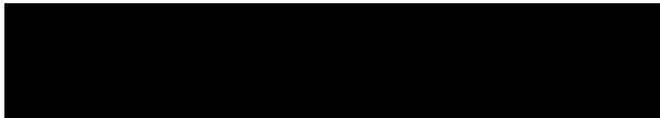
Office: NEBRASKA SERVICE CENTER

Date:

SEP 14 2009

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:

SELF-REPRESENTED

~~PHOTIC COPY~~

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 is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a construction limited liability company. It seeks to employ the beneficiary permanently in the United States as a concrete 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 continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and, that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, the petitioner submits additional evidence.

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 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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 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. 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 May 9, 2003. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour (\$29,120.00 per year). The Form ETA 750 states that the position requires four years experience.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested pertinent evidence such as copies of annual reports, the petitioner's federal tax returns, or audited financial statements of the petitioner's ability to pay the proffered wage beginning on the priority date. Supplementary evidence was also requested to the above. The director indicated accredited profit/loss statements, bank account records, or personnel records would be additional evidence of the ability to pay the proffered wage.

Also, as the director determined that there was insufficient evidence submitted of the beneficiary's occupational experience as a concrete supervisor, the director consistent with the regulation at 8 CFR § 204.5(l)(3)(ii) requested additional evidence.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted a U.S. Internal Revenue Service (IRS) Form 1065 tax return for year 2003.

In response to the request for evidence of the beneficiary's work experience, counsel submitted a letter verifying same dated June 1, 2004 was submitted from TCT Concrete,¹ Sheridan, Wyoming.

The director denied the petition on August 23, 2004, finding 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, that the evidence submitted did not demonstrate that the beneficiary has the requisite four years of salient work experience.

On appeal, petitioner asserts that it has always paid the beneficiary at the rate of \$15.00 per hour; that it would be a hardship if the beneficiary does not continue in the employ of the petitioner for the reasons stated; and, that the petitioner has employed the beneficiary for four years.

As additional evidence of its ability to pay the proffered wage, the petitioner has submitted an explanatory letter; a hand written note; a copy of the June 1, 2004 letter written by TCT Concrete; a pay statement for the last two weeks of October 2003 for the beneficiary; W-2 ("W-2") Wage and Tax Statements for 2002 and 2003 from the petitioner to the beneficiary; W-2 statements for 2002, 2001 and 2002 for other employers in Bellingham, Washington State, and, in Sheridan Wyoming.

The petitioner is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.² An investor's liability is limited to his or her initial investment. As the owners and others only are obliged to pay a certain portion of those debts should they

¹ According to a hand written note submitted on appeal, the petitioner was unable to obtain "more timely dates" from TCT Concrete's owner to prove work experience or W-2 statements.

² Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

come due, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary. W-2 Wage and Tax Statements were submitted for tax years 2002 and 2003. The wages stated are as follows for tax years 2002 and 2003: \$6,336.00; and, \$18,140.50. Since the proffered wage is \$29,120.00 per year, the wages paid to the beneficiary are less than the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that 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. *Supra* at 1084. 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 v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns³ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$29,120.00 per year from the priority date of May 9, 2003:

- In 2003, the Form 1065 stated a taxable income loss⁴ of <\$32,740.00>.⁵

Since 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, does not equal the amount of the proffered wage or more, CIS will review the petitioner's assets.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time for tax year 2003 for which the petitioner's tax returns are offered for evidence.

³ Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage.

⁴ IRS Form 1065, Line 22.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

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. That schedule is included with, as in this instance, the petitioner's filing of Form 1065 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 17. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

Examining the Form 1065 U.S. Income Tax Return submitted by the petitioner, Schedule L found in that return indicates the following:

- In 2003, petitioner's Form 1065 return stated current assets of \$103,252.00 and \$10,979.00 in current liabilities. Therefore, the petitioner had \$92,273.00 in net current assets. Since the proffered wage was \$29,120.00 per year, this sum is more than the proffered wage.

Petitioner asserts in his explanatory letter accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁷ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

The petitioner has submitted profit and loss statements for January 1, 2004 through September 23, 2004 stating net income after expenses of \$978,557.46, and, for the period January through December 2004 net income after expenses \$121,116.93. The profit and loss statement for the first three quarters of 2004 stated total income of \$1,277,850.23, and for the year \$1,204,562.24. Since the financial statements are not audited they have limited probative value to determine the ability to pay the proffered wage. Therefore, for the tax year 2003, the petitioner had established that it had the ability to pay, by a factor of three, the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

The second contention of petitioner in the appeal of the Director's decision is that CIS incorrectly applied the standard for determining whether the beneficiary met the experience requirement prior to the filing of the labor certification application and did not take into account the nature of the proffered position. The Director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (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).

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁷ 8 C.F.R. § 204.5(g)(2).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 13, 14 and 15, set forth job to be performed and the minimum education, training, and experience that an applicant must have for the position of a concrete supervisor.

Item 13 states as follows:

"Oversee and help setup all concrete portions of the jobs. Flatwork, stamped concrete and formed concrete."

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
 - Training Blank
 - Experience
 - Years Blank
 - Training
 - Years Blank

Under item 15, entitled special requirements, the petitioner stated as follows:

"Must have at least four years experience in concrete and specialty concrete applications to run and set up jobs."

As stated above, experience is required in concrete pouring and forming, etc. but not in supervision.

Petitioner asserts that because of the labor shortage and adverse working conditions in its business location, he has high turn over in construction workers, and, the beneficiary is necessary for the continuation of its business because of his skills.

The petitioner has presented evidence as recounted above of the beneficiary's qualification and work experience to support the petition. Initially, petitioner submitted the labor certification that stated in ETA 750 Part B that the beneficiary worked for the petitioner from August 2002 in construction, and, prior to that for an [redacted] (TCT Concrete, Sheridan, Wyoming) as a concrete contractor from February 1993 through August 2002. The Director requested more specific information and received a letter from Mr. Trujio dated June 1, 2004 stating that the beneficiary had been employed by him and paid in cash as a "laborer, in concrete finishing, roofing, etc." since 1992 "on and off."

On appeal, the petitioner submitted W-2 statements from additional construction contractors, Accurate Builders Inc. of Bellingham, Washington in 2000 for which the beneficiary received \$15,862.28; Madson Construction of Sheridan Wyoming in 2001 in the amount of \$6176.00; and, Grimshaw Construction, Sheridan Wyoming in 2002 in the amount of \$518.00. This employment had not been disclosed before. Under 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, that a bona fide job opportunity is available to U.S. workers. 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). Beyond the decision of the director, the AAO reviews appeals on a de novo basis. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)

The priority date of the certified Alien Employment Application is May 9, 2003. It is credible to assume that all the above employment indicated by the evidence submitted for ten years for five contractors prior to May 9, 2003, would support the beneficiary's qualifications as a concrete supervisor and his work in the construction industry. The totality of the evidence presented would indicate that since February 1993, the beneficiary has accumulated sufficient work experience for 4 total years in concrete and specialty concrete applications to run and set up jobs.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does demonstrate credibly that the beneficiary had the requisite four years of experience. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

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 sustained.