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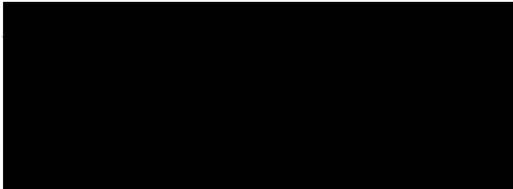
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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FILE: EAC-04-106-53225 Office: VERMONT SERVICE CENTER Date: SEP 29 2006

IN RE: Petitioner: [Redacted]
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:



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 Acting 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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker.¹ 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 record failed to establish 1) the petitioner's ability to pay the proffered wage as of date of filing and continuing to the present; 2) the beneficiary had the required experience in the job offered or related occupation as of the date of filing; and 3) failed to include the required ETA 750 Part B for the substituted beneficiary. The director denied the petition accordingly.

On appeal, counsel submits additional evidence.²

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 C.F.R. § 204.5(d).

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

² 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.

Here, the Form ETA 750 was accepted on March 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,689.60 per year). The Form ETA 750 indicates that the position of baker requires two years of experience in the job offered or in the related occupations of baker or kitchen helpers as minimum requirements. The evidence in the record of proceeding shows that the petitioner is structured as an S corporation and the petitioner's fiscal year is based on a calendar year. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$757,000, to have a net annual income of \$67,000, and to currently employ 15 workers.

The petitioner submitted the petition with a request of substitution from the petitioner but without a Form ETA 750B for the new beneficiary, an experience letter from a former employer concerning the beneficiary's employment experience, and the petitioner's tax returns for 2001 and 2002.

On August 17, 2004 the director denied the petition, finding that the petitioner did not establish that (1) it had the ability to pay the proffered wage beginning on the priority date; (2) the beneficiary had the required experience in the job offered or related occupation as of the date of filing; and (3) the petition failed to include the required ETA 750 Part B for the substituted beneficiary.

On appeal counsel submits a Form ETA 750B for the substituted beneficiary, letters from the petitioner regarding the termination of the previous beneficiary's employment, a copy of Employer's Quarterly State Report of Wages Paid to Each Employees for the fourth quarter of 2001, and a printout of Employee's Wage & Tax W-2 Backup for 2001 and 2002.

The first issue the AAO will discuss in the instant case is whether the petitioner established that it had the ability to pay the proffered wage beginning on the priority date.

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 petition is for a substituted beneficiary. The petitioner requested for substitution and verified in letters that previous beneficiary no longer works for the petitioner. Therefore, wages paid to that previous beneficiary can be considered as a part of the petitioner's ability to pay. On appeal counsel submits the petitioner's quarterly state report of wages paid to all employees for the fourth quarter of 2001, and the previous beneficiary's W-2 Backup for 2001 and 2002. These documents show that the petitioner paid the previous beneficiary \$18,060 in 2001 and \$22,046 in 2002, which were \$6,629.60 less than the proffered wage in 2001 and \$2,643.60 less than the proffered wage in 2002. The petitioner did not submit any evidence for the instant beneficiary's compensation from the petitioner although the beneficiary claimed to have worked for the petitioner since August 2000. Therefore, the petitioner did not establish that it paid either the previous beneficiary or the instant beneficiary the full proffered wage in 2001 and 2002. The petitioner is obligated to demonstrate that it could pay the difference of \$6,629.60 in 2001 and of \$2,643.60 in 2002 between wages actually paid to the previous beneficiary and the proffered wage.

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). Counsel's 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.

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

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 and 2002. The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay the difference between the wages already paid to the previous beneficiary and the proffered wage from the priority date:

Tax Year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$6,450 ³	\$6,629.60	\$(179.60)
2002	\$30,914	\$2,643.60	\$28,270.40

Therefore, the petitioner had sufficient net income to pay the instant beneficiary the difference between the wages already paid and the proffered wage for the year 2002, but did not have sufficient net income to pay the difference between the wages paid and the proffered wage for the year 2001.

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.

³ Ordinary income (loss) from trade or business activities as reported on Line 21.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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.

Calculation based on the Schedule L's attached to the petitioner's 2001 tax return yields that the petitioner had net current assets of \$8,557 at the end of the year 2001. The petitioner had sufficient net current assets to pay the instant beneficiary the difference of \$6,629.60 between the wages already paid to the previous beneficiary and the proffered wage for the year 2001. Therefore, it appears that the petitioner established that it had ability to pay the instant beneficiary the proffered wage in 2001 and 2002.

However, CIS record shows that the petitioner filed another Immigrant Petition for Alien Worker (Form I-140) for two more workers. One of them was filed with Vermont Service Center on December 7, 2002,⁵ using the priority date of March 27, 2001 reflected on a Form ETA 750. The petition was approved on April 14, 2004 and the alien obtained permanent resident status on April 29, 2006. The other I-140 immigrant petition was filed with the Nebraska Service Center on April 27, 2006.⁶ The beneficiary of that petition is the previous beneficiary whom was replaced by the instant beneficiary with the instant petition.⁷ The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). In the instant case the priority date is April 27, 2001. Therefore, the petitioner must show that it had sufficient income to pay each of the beneficiaries the proffered wage from the year of the priority date for each petition (at least two from 2001 until 2006) until the present. The petitioner established its ability to pay the instant beneficiary the proffered wage using the wages paid to the previous beneficiary in 2001. However, the record does not demonstrate that the petitioner had sufficient net income or net current assets to pay the instant beneficiary after it paid the beneficiary whose petition was already approved in April 2004.

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 because of multiple pending petitions. Counsel's assertion and evidence submitted on appeal cannot overcome the portion of the director's decision that the petitioner failed to establish its continuing ability to pay the proffered wage. This portion of the director's decision is affirmed.

The second issue the AAO will discuss in the instant case is whether the petitioner established that the beneficiary had the required experience in the job offered or related occupation as of the date of filing.

⁴According 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.

⁵ CIS receipt number: EAC-03-054-51389.

⁶ CIS receipt number: LIN-06-153-52218.

⁷ A certified Form ETA 750 may only be used by one alien to adjust status to lawful permanent resident.

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 March 27, 2001.

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).

The certified Form ETA 750 in the instant case states that the position of baker requires two (2) years of experience in the job offered or in the related occupation. On the Form ETA 750B, signed by the beneficiary on May 1, 2003 and submitted on appeal, the beneficiary set forth his work experience. He listed his experience as a "Baker" at the petitioner from August 2000 to the present, and a "Baker" at [REDACTED] in Mandaluyong City, Philippines from 1997 to 1999.

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.

With the initial filing the petitioner submitted an employment certification from Goldilocks Bakeshop, Inc. pertinent to the beneficiary's qualification as required by the above regulation. In her denial notice the director determined that "[a]s this letter does not provide the specific dates of employment, to include the beginning and ending months of employment with [REDACTED] the record fails to show the beneficiary has the required two years of experience in the job offered." On appeal counsel does not provides any assertions and evidence for the beneficiary's qualification.⁸

The letter from [REDACTED] was issued November 28, 1999 in Mandaluyong City, signed by Mr. [REDACTED] as the store manager. This letter states in pertinent part that:

This is to certify that [the beneficiary] has been employed by [REDACTED] as **BAKER** from 1997-1999.

(Emphasis in original.)

⁸ The appeal could have been summarily dismissed since as stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

This letter is on the company's letterhead, however, without any contact information for the former employer and the writer, such as address, and telephone number. The letter does not include a specific description of the duties performed by the beneficiary or of the training received as required by the regulation. In addition, as the director correctly noted, the letter does not provide the beginning and ending months of the employment. Moreover, the letter was dated November 28, 1999. Even though the beneficiary had started the employment from early January of 1997 until the date of the letter, the beneficiary's employment with [REDACTED] would have been only 23 months, which would not meet the requirement of two years of experience. Therefore, the experience letter from [REDACTED] cannot be considered as primary regulatory-prescribed evidence to establish that the beneficiary had worked as a baker or baker or kitchen helper for at least two years as required by the ETA 750. The AAO concurs with the director's decision on this issue and affirms the portion of the director's decision that the petitioner failed to establish that the beneficiary had the required experience for the proffered position.

The third ground of the director's denial is that the petition does not include the Form ETA 750 Part B for the substituted beneficiary. The record of proceeding contains a Form ETA 750B for the instant beneficiary which counsel submits on appeal. Therefore, the portion of the director's decision that the petition does not include the ETA 750B for the beneficiary is withdrawn.

In view of the foregoing, the decision of the director will be withdrawn in part and affirmed in part. The petition will remain denied for the above stated reasons with each considered as an independent and alternative basis for denial. 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.