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FEB 12 2007

FILE: WAC 04 023 53202 Office: CALIFORNIA SERVICE CENTER Date:

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a pastries business. It seeks to employ the beneficiary permanently in the United States as a chief cook pastry, Middle Eastern style. 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 the beneficiary has the requisite experience as stated on the labor certification petition, and, 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. The director denied the petition accordingly.

On appeal, counsel submits an explanatory statement and additional evidence.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. 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.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 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 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

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).

submitted with the instant petition. See 8 CFR § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on September 30, 1997.² The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024.00 per year). The Form ETA 750 states that the position requires four years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor; a letter dated June 7, 1997 from [redacted] and [redacted], of Soulemanie, Syria, general manager, concerning beneficiary's employment experience; and, a U.S. federal income tax return, IRS Form 1120S, of the petitioner.

The Beneficiary's Qualifications

An issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, item 14, set forth the minimum education, training, and experience that an applicant must have for the position of a chief cook pastry, Middle Eastern style.

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

² It has been approximately none years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

Job Offered	
Years/Months	4/0
Related Occupation (specify)	Blank
Years/Months	Blank

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, sets forth work experience that an applicant listed for the position of chief cook pastry, Middle Eastern style:

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER

[REDACTED] written in red ink and cursive on the form]

NAME OF JOB

Chief Cook Pastry

DATE STARTED

Month – 06 [June]Year - 1990

DATE LEFT

Month – Present [i.e. September 3, 1997]³

KIND OF BUSINESS

Pastry bakery

DESCRIBE IN DETAIL DUTIES...

Mixed and baked ingredients according to recipes to produce Middle Eastern pastry.

NO. OF HOURS PER WEEK

40

In this case the job verification statement was submitted with the petition to prove the beneficiary’s work experience as a chief cook pastry, Middle Eastern style conformed to the statement made on the Form ETA 750, Part B above stated.

A letter in English dated June 7, 1997 from [REDACTED] and [REDACTED], Soulemanie, (Syria), general manager, concerning beneficiary’s employment experience stated in pertinent part:

“This is to certify that ... [the beneficiary] ... has been employed in our pastry bakery as a Chief cook off [sic] pastry on a full- time basis since June 1990.”

The statement recounts the job duties of the beneficiary while working there, but it does not disclose the street address on the establishment but only provides a telephone number. The letter is not a translation, but purports to be written by [REDACTED] and [REDACTED] in the English language, and it is not on business letterhead. The statement is not notarized. There is a stamp⁴ underneath the signature on the letter with the spelling, “Soulrmsnia.”

³ This is the date that the beneficiary signed the form.

⁴ Why the Arabic speaking and writing signatories of the letter would have an English language address stamp was not stated.

The Deputy Chief of Consular Section, U.S. Embassy – Damascus, Turkey, conducted an investigation to verify the beneficiary's employment noted on the labor certification (USDOL Form ETA 750, Part B as certified).

According to the report, all attempts to verify the beneficiary's employment information submitted in the above mentioned letter issued on April 4, 2005, were negative. The investigator stated that the pastry bakery of [REDACTED] in Aleppo, Syria did not exist or ever existed, the telephone number was to a private home, and [REDACTED] and [REDACTED] were not listed in Aleppo's telephone directory. The investigator concluded that the employment verification letter was fraudulent.

The director denied the petition on May 19, 2005, finding, *inter alia*, that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

The petitioner appealed the director's decision on June 20, 2005, and, *inter alia*, states that "an ice cream and pastry shop by the name of "Souren" exists in the "Fifth Region of Aleppo City."

As additional evidence on this issue, counsel submits copies of the following documents: Decision No 66 from the Aleppo City council; a trade certificate from the Federal of Trade Association in Aleppo; an Industrial Firm Registration Certificate from the Syrian Ministry of Industry; a photograph; and, a letter of employment experience.

In an explanatory letter dated June 17, 2005, transmitting the above documents, counsel provides another name for an ice cream and pastry shop (i.e. "Souren Nbejian") which shop may or may not be (according to counsel) the facility that the beneficiary referenced in her statement of job experience in the labor certification.

Based upon a review of the above evidence, there does exist a retail store located in the Fifth Region, Aleppo city [REDACTED] Aleppo, Syria, licensed to sell pastry and ice cream since 1972. Also submitted was a translated job verification letter prepared for the beneficiary detailing her job experience, now in Arabic with an English translation made May 30, 2005, that repeats almost word for word the contents of the 1997 letter already introduced eight years ago. The document is not notarized. The declarations that have been provided on motion are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Along with these documents, a photograph is introduced of a store front marked "Souren", dated on its back side May 30, 2005, with an unidentified women in the foreground whom appears to be walking along the sidewalk. The maker or location of the photo is not identified.

There is only slight coincidence between the initial evidence submitted with the petition and the evidence received upon appeal. The names of the proprietors of the pastry shop are spelled differently, the shop's public trade name was not disclosed as the evidence was originally submitted, and, the street address and precise location of the shop is not given. The place name on the 1997 letter turned out to be a neighborhood of a city, and that neighborhood name ([REDACTED]ter) was spelled incorrectly twice (i.e. [REDACTED]).

and [REDACTED] in the 1997 letter. The petitioner provided the director with a job verification letter that was not only inaccurate but impossible to verify.

It is not credible that the beneficiary would not have provided a verifiable name and address and telephone number for an employer that she reputedly worked for the past 16 years, or that the employment reference letter originally submitted only in English, dated June 7, 1997, would have not provided the business address on the reference. Clearly, the employment information offered to support the labor certification and the petition must have enough specificity to be verifiable by the director. In this instance, it was not.

Further, the lack of supporting proof of employment of the beneficiary and wages paid to the beneficiary by the petitioner is a serious detriment to the petitioner's burden of proof in this matter. Acceptable evidence would be cancelled pay checks, pay stubs, a history of bank deposits of the beneficiary's pay, the beneficiary's personal tax returns, worker's insurance, or evidence of taxes paid in her home country on her wages. Letters from work associates, photographs of her at work at that location, or verification from independent, objective sources of her work experience in the job of chief cook pastry, Middle Eastern style would be acceptable proof.

In this instance, the petitioner has been put on notice of a deficiency in the evidence by notice dated April 7, 2005. The AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired four years of experience in the job position as chief cook pastry, Middle Eastern style from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of 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 had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The petitioner has not met that burden.

Ability to Pay the Proffered Wage

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.

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 Form ETA 750 was accepted on September 30, 1997.

With the petition, counsel submitted an U.S. federal income tax return, IRS Form 1120S from the petitioner.

Consistent with the regulation at 8 C.F.R. § 204.5(g)(2), the director requested on July 31, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested the petitioner's U.S. federal tax returns for 1997 to 2003. The director also requested annual reports or audited or reviewed financial statements.

In response to the above request, counsel submitted copies of the following documents: the petitioner's U.S. federal tax returns for 1998, 1999, 2000, 2001, 2002 and 2003.

The director denied the petition on May 19, 2005, finding, *inter alia*, 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.

The petitioner appealed the director's decision on June 20, 2005, and, *inter alia*, states the director should review the totality of the evidence presented and recognize that the owner employs 20 employees and owns three wholesale and retail pastry shops in three locations.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As additional evidence, counsel has submitted the petitioner's U.S. federal tax return for 2004, as well as a letter from the petitioner's accountant dated June 13, 2005, stating that the losses stated on the tax returns submitted were due to depreciation expenses and according to the accountant "do not have any direct cash implications to the company's profitability."

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 contends that depreciation amounts on the 1999 and 2002 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. (Original emphasis.) *Chi-Feng* at 537.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the years 1999 or 2002 were an uncharacteristically unprofitable years for the petitioner.

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 evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 resides in Syria.

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). 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.

The tax returns⁵ demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,024.00 per year from the priority date of September 30, 1997:

⁵ Where an S corporation's income is exclusively from a trade or business as is evident here, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

In 1997, the Form 1120S stated net income⁶ of \$32,294.00.

In 1998, the form 1120s stated net income of \$24,538.00.

- In 1999, the form 1120s stated net income of <\$64,611.00>.⁷
- In 2000, the form 1120s stated net income of \$65,229.00.
- In 2001, the form 1120s stated net income of \$35,583.00.
- In 2002, the form 1120s stated net income of <\$26,291.00>.
- In 2003, the form 1120s stated net income of \$88,005.00.
- In 2004, the form 1120s stated net income of \$56,167.00.

Therefore, for the years 1999 and 2002, the petitioner did not have sufficient net income to pay the proffered wage. For the years 1997, 1998, 2000, 2001, 2003 and 2004, the petitioner did have sufficient net income to pay the proffered wage.

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. We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ 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's net current assets during 1999 were <\$94,003.00>.
- The petitioner's net current assets during 2002 were <\$14,402.00>.

Therefore, for the years 1999 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage.

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 ability to pay the beneficiary the proffered wage and meet its

⁶ Ordinary income (loss) from trade or business activities as reported on Line 21.

⁷ 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.

⁸ 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.

personal expenses as of the priority date through an examination of its net income or net current assets in years 1999 and 2002.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns for 1999 and 2002 as submitted by the petitioner that demonstrates that petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The preponderance of the evidence does not demonstrate that the beneficiary acquired four years of experience in the job position as chief cook pastry, Middle Eastern style from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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

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 dismissed.