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S. Citizenship
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Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

JAN 29 2007

SRC 04 249 50777

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. While part of the director's decision will be withdrawn, the petition is remanded to the director for further consideration of the petitioner's current business operation and the existence of a bona fide position for the beneficiary.

The petitioner is a hotel.¹ It seeks to employ the beneficiary permanently in the United States as a front desk 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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.

As set forth in the director's August 12, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director in her decision stated that the petitioner had not provided evidence that it had properly submitted its tax returns for tax year 2001, 2002 and 2003. The director also stated that the petitioner had also submitted its 2004 tax return without proof of filing the return with the IRS, and that the letter from the petitioner's accountant was not sufficient to establish that he had filed the 2004 tax return subsequently submitted to Citizenship and Immigration Services (CIS). The director then stated that the failure to submit requested evidence which precludes a material line of enquiry was grounds for denying the petition and cited 8 C.F.R. § 103.2 (b) (14).

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

¹ The petitioner's articles of incorporation dated October 20, 1985 identify the petitioner, [REDACTED] Inc., as having been organized to operate three entities: [REDACTED], to operate and manage a restaurant motel and gift shop in Cherokee, North Carolina along with the management and operation of any retail consumer business that might be developed; [REDACTED] to acquire, develop and sell in all areas of real estate; and [REDACTED] Company, to invest the money that [REDACTED] earns in areas of real estate, stocks, bonds, treasury and businesses having three corporate branches. Among the seven incorporators identified are [REDACTED] and [REDACTED]

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 February 20, 2004. The proffered wage as stated on the Form ETA 750 is \$17.42 per hour (\$36, 233.60 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position of front desk supervisor or two years of experience in the related occupations of administrative supervisors or office managers.

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.² Counsel submits a brief on appeal, as well as an affidavit from one of the petitioner's officers. Other relevant evidence in the record includes the petitioner's Form 1120S for tax year 2004; a letter from Mr. [REDACTED] CPA Accounting Firm, Suwanne, Georgia that states the petitioner's 2004 tax return was filed with the IRS; two first pages of the petitioner's bank statements from United Community Bank for April and May 2005; and the petitioner's articles of incorporation dated October 20, 1985. It is noted that the petitioner submitted copies of computer-generated tax returns for the years 2001 through 2003.³ 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 appears to have been structured as a C corporation for tax years 2001 to 2003, and that in tax year 2004 based on the Form 1120S submitted to the record, the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in January 1988, to have a gross annual income of \$2,000,000 and to currently employ ten workers. On the Form ETA 750B, signed by the beneficiary on January 30, 2004, the beneficiary did not claim to have worked for the petitioner.⁴

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).

³ It is noted that since the priority date for the instant petition is February 20, 2004, the petitioner's claimed federal income tax returns for 2001, 2002, and 2003 are not necessarily probative of the petitioner's ability to pay the proffered wage as of the 2004 priority date and onward.

⁴ The record contains a letter from [REDACTED] dated June 28, 2005 that states the petitioner employed the beneficiary through a J-1 summer/travel work program from May 21, 2003 to September 11, 2003. This period of time is prior to the establishment of the February 20, 2004 priority date. Thus, the beneficiary appears to have worked for the petitioner previously.

On appeal, counsel asserts that the petitioner requested the official certified copies of the tax returns submitted from the IRS; however, these forms had not been received from the IRS. Counsel asserts that when the certified copies are received from the IRS, the petitioner will supplement the record. Counsel states that the submitted copies of tax returns are the true copies of the actual return filed with the IRS, and that the words "Do not file" or "Do not file, in Help Search, updating forms" are just messages generated by the tax preparation software.

Counsel states that the record is sufficient to establish the petitioner's ability to pay the proffered wage and notes that the 2004 corporate tax return shows net income of \$193,393, a sum well above the proffered wage of \$36,233. Counsel also notes that the petitioner's 2003 tax return indicates net income of \$18,707 and net current assets of \$53,259, and that in tax year 2003, the petitioner's net current assets are well above the proffered wage.

Counsel references a memorandum written by then Citizenship and Immigration Services (CIS) Associate Director William Yates with regard to establishing the petitioner's ability to pay.⁵ Counsel states that based on this memo, either the petitioner's net income or net current assets may be considered when determining whether the petitioner has the ability to pay the proffered wage. Counsel also submits a notarized statement from the petitioner's co-owner, [REDACTED], dated October 18, 2005. In this affidavit, Mrs. [REDACTED] identifies herself as co-owner of [REDACTED] Cherokee, North Carolina. Mrs. [REDACTED] states that the copies of the tax return submitted to CIS were true and accurate copies of the tax returns filed for the petitioner in 2001, 2002, 2003, and 2004. Mrs. [REDACTED] states that through counsel she had submitted a letter from her accountant, Mr. [REDACTED], confirming that these tax returns were filed and that they were the true and accurate copies of the original filed tax returns. Mrs. [REDACTED] then states that her accountant died a month ago unexpectedly, and that she cannot get better verification of the submission of the tax returns from her accountant. Mrs. [REDACTED] also states that a review of these tax returns can easily support the beneficiary's proffered wage. Mrs. [REDACTED] concludes by saying she was including re-signed copies of the petitioner's 2001, 2002, 2003 and 2004 tax returns with the affidavit. She also stated that she had ordered official filed copies of the petitioner's returns from the IRS, and would submit these to the record when received. The record does not reflect the submission of any further copies of the petitioner's claimed tax returns, and only includes a letter signed by Mr. [REDACTED] that states that he submitted the petitioner's 2004 tax return. This letter was submitted in response to the director's request for further evidence dated April 9, 2005.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

⁵ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

Upon review of the record, the petitioner submitted income tax returns for tax years 2001, 2002, and 2003 that list an address of [REDACTED]. These returns have computer-generated instructions on them, including the instructions "Do not file". As such, the income tax returns are not viewed as sufficient evidence as to the submission of the petitioner's tax returns to the IRS. As stated previously, the record reflects no letter from Mr. [REDACTED] with regard to the submission of the petitioner's income tax return to the IRS for tax years 2001, 2002, or 2003. It is noted that these tax returns all identify the petitioner's principal business activity as "motel industry". However, as stated previously, the priority date for the instant petition is February 2004, and therefore the claimed tax returns for tax years 2001, 2002 and 2003 are not probative as to the petitioner's ability to pay the proffered wage. Therefore the director's decision with regard to the tax returns not being verifiable and thus not able to establish the petitioner's ability to pay the proffered wage will be withdrawn.

The AAO now turns to the 2004 tax return submitted for the petitioner, with an address of [REDACTED] Buford, Georgia. This return is clearly identified as "self-prepared", although the petitioner submits a letter from Mr. [REDACTED] to Mr. [REDACTED] dated June 25, 2005 that states Mr. [REDACTED] completed and filed the 2004 tax return. This tax return identifies the principal business activity as "investment corporation". In the 2004 tax return, Mr. [REDACTED] is identified as the sole shareholder, while five others share ownership and officer compensation in the petitioner's taxes from 2001 to 2003.. It is noted that all federal income tax returns submitted to the file covering the time period of 2001 to 2004 share the same Employer Identification Number, namely [REDACTED].

Thus, the record is confused. While it is noted that the petitioner's articles of incorporation list both Mr. [REDACTED] and Mrs. [REDACTED] as incorporators and officers of the petitioner, the record is not clear as to whether the petitioner has moved to another location, is involved in the same business, or retains the same identity or ownership. This change of address would raise a question as to whether the beneficiary would be employed at the address noted on the Form ETA 750 which appears to be the motel side of the corporation or in some other job within the investment side of the corporation. This discrepancy thus raises the issue as to whether an actual bona fide job exists for the beneficiary. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Although the petitioner's articles of incorporation do note three business activities under the corporate umbrella, the petitioner's initial business location stipulated on the Form ETA 750 is Cherokee, North Carolina.

With regard to any apparent change of location of the petitioner and by extension, the proffered position, 20 C.F.R. § 656.30(a) states that a labor certification is only valid for the particular job opportunity and area of intended employment. Furthermore, the Department of Labor's (DOL) Technical Assistance Guide (TAG) states that the DOL will honor a labor certification if the new location of a job offer is within the same Standard Metropolitan Statistical Area (SMSA) or commuting area. TAG, No. 656, P. 104, A-11. See also *Matter of Seibel & Stern*, Case Nos. 90-INA-86, 90-INA-116 through 90-INA-129, 90-INA-144 through 90-INA-168 (BALCA 1990) (SMSA defined as "a county or group of counties which contain at least one central city of at least 50,000 inhabitants or a central urbanized area of at least 100,000.). If the job offer has indeed moved from North Carolina to Georgia, and is not within the same SMSA, the labor certification could be invalidated.

While acknowledging the material discrepancy noted above, the AAO will now examine the petitioner's ability to pay the proffered wage.

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, although the petitioner claimed it employed the beneficiary in 2003 during his participation in a J-1 summer/travel program, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2004 or subsequently.

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.

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.

As stated previously, the tax returns submitted to the record for 2001 through 2003 are not probative of the petitioner's ability to pay the proffered wage as of February 2004. While questions remain as to the current operations and the actual job to be offered the beneficiary, the Form 1120S filed for the petitioner in 2004 stated net income of \$193,393. This sum would be sufficient to pay the proffered wage of \$36,233.60.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of its net income.

While the evidence submitted to the record does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the 2004 priority date, the question remains as to any major change in the

proffered position or business operations of the petitioner that would eliminate the proffered position stipulated on the ETA 750, namely, front desk supervisor, or lead to the invalidation of the underlying labor certification.. While some evidence in the record does indicate that the petitioner does have sufficient resources to pay the proffered wage, the AAO will remand the petition to the director for further consideration of the petitioner's current business operations and whether a bona fide position is currently available for the beneficiary as front desk supervisor according to the terms of the certified Form ETA 750..

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.