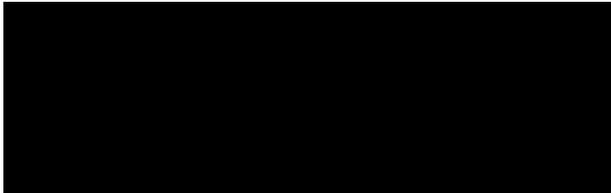




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invasion of personal privacy



B6

FILE: [Redacted]
SRC-04-163-51286

Office: TEXAS SERVICE CENTER Date: MAY 17 2007

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

The petitioner is a bakery and confectionary. It seeks to employ the beneficiary permanently in the United States as a retail store manager (manager). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director noted that the petition was filed by [REDACTED] but the approved labor certification was for [REDACTED] the record did not contain any evidence to establish the successor-in-interest relationship between [REDACTED] and [REDACTED] and therefore, [REDACTED] was not a qualifying entity with a valid labor certification to file the instant petition and the submitted [REDACTED] financial documents could not establish [REDACTED] ability to pay the proffered wage. 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 3, 2005 denial, the issues in this case are who is the petitioner and whether or not the petitioner submitted sufficient evidence to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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(c) states in pertinent part:

Any United States employer desiring and intending to employ an alien may file a petition for classification of the Alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act.

The regulation 8 C.F.R. § 204.5 also states in pertinent part:

(1) *Skilled workers, professionals, and other workers.* (1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker.

(3) *Initial evidence—* (i) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor,

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). 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).

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 appeal¹. Relevant evidence in the record includes financial statements of [REDACTED] for the period ended April 30, 2003, Form ST-3 Georgia sales and use tax report filed by [REDACTED] for the first 3 months of 2003, [REDACTED] payroll earnings report as of May 31, 2003, the beneficiary's education and training documents, stock certificates issued by [REDACTED] to its shareholders, [REDACTED] corporate tax returns for 2003 and 2004, [REDACTED] W-3 forms for 2002 through 2004, and Form 941 Employer's Quarterly Federal Tax Return for the period from the second quarter of 2002 to the fourth quarter of 2004. The record does not contain any other evidence relevant to the petitioner's status and ability to pay the proffered wage, and the beneficiary's qualifications.

On appeal, counsel asserts that in the instant case, the labor certification was issued to [REDACTED] the petitioning entity is [REDACTED] and the I-140 was filed on behalf of [REDACTED]. Counsel claims that the director erroneously issued receipt notice for the I-140 petition in the name of [REDACTED].

The record of proceeding contains the original Form I-140, Immigrant Petition for Alien Worker, on behalf of the instant beneficiary that was filed with CIS Texas Service Center on May 21, 2004 by [REDACTED] with IRS Tax # [REDACTED]. However, the record also shows that the Form I-140 uses [REDACTED]'s address as the petitioner's business address, and that the form was signed by [REDACTED], who is the president of [REDACTED]. In the submission letter, counsel indicated that he was filing the petition on behalf of [REDACTED] and submitted a petitioner's supporting letter from [REDACTED] the president of [REDACTED] and [REDACTED] financial documents to establish the petitioner's ability to pay. Therefore, counsel's claim that the director erroneously issued the receipt notice for the I-140 petition in the name of [REDACTED] is misplaced. However, after carefully reviewing all the evidence in the record, the AAO also concurs with counsel's assertion that the petition was filed on behalf of [REDACTED] despite [REDACTED]'s name

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).

² [REDACTED] tax returns for 2003 and 2004 in the record show that the IRS Tax # [REDACTED] is for [REDACTED].

and its IRS tax number on the Form I-140, in response to a request for evidence, counsel for the petitioner stated that the petitioner is [REDACTED]. If anything, that should have been accepted as an amendment of the I-140 petitioning entity. Since the labor certification was issued to [REDACTED] and it is the petitioner in the instant petition, it is not necessary to discuss the successor-in-interest issue between [REDACTED] and [REDACTED]. Therefore, this portion of the director's decision is withdrawn and the AAO will consider the instant petition as filed by [REDACTED] and review all the documents in the record under the name of [REDACTED] to determine whether or not this petitioner demonstrates its continuing ability to pay the proffered wage as of the priority date.

The Form ETA 750 was accepted on December 15, 2003. The proffered wage as stated on the Form ETA 750 is \$39,000 per year. The Form ETA 750 states that the position requires two years of experience in the job offered or a related occupation. The I-140 petition was submitted on May 21, 2004. On the form, the petitioner claimed to have been established in 2002, to have a gross annual income of \$1.2 million, to have a net annual income of \$240,000, and to currently employ 16 workers. On the Form ETA 750B signed by the beneficiary on October 20, 2003, the beneficiary did not claim to have worked 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 Sonogawa*, 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 petitioner did not submit the beneficiary's W-2 or 1099 forms or other evidence of compensation from the petitioner in 2003 through the present. The record contains the petitioner's Form ST-3 Georgia sales and use tax report for the first 3 months of 2003, payroll earnings report as of May 31, 2003, W-3 forms for 2002 through 2004, and Form 941 Employer's Quarterly Federal Tax Return for the second quarter of 2002 to the fourth quarter of 2004. However, none of them demonstrates that the petitioner employed and paid the beneficiary in 2003 onwards. Therefore, the petitioner failed to establish its ability to pay the beneficiary the proffered wage from the priority date through the examination of wages paid to the beneficiary. The petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage in 2003 through the present with its net income or net current assets.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income 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 total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 record contains the petitioner's financial statements for the period ended April 30, 2003. However, they are not audited. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The record contains the petitioner's tax returns for 2003 and 2004. The evidence in the record of proceeding shows that the petitioner was structured as a C corporation in 2003 and effective from January 1, 2004 the petitioner was elected as an S corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The petitioner's tax returns for 2003 and 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$39,000 per year as of the priority date:

- In 2003, the Form 1120 stated a net income³ of \$70,162.
- In 2004, the Form 1120S stated a net income⁴ of \$93,763.

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁴ Where an S corporation's income is exclusively from a trade or business, 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."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from

Therefore, for the years 2003 and 2004, the petitioner's tax returns indicate that the petitioner had sufficient net income to pay the instant beneficiary 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. 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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 2003 were \$(11,461).
- The petitioner's net current assets during 2004 were \$12,782.

Therefore, for the years 2003 and 2004, the petitioner did not have sufficient net current assets to pay the instant beneficiary the proffered wage.

CIS record shows that the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for two more workers. One petition⁶ with the priority date of November 24, 2003 was approved on March 1, 2005 and the other⁷ with the priority date of October 7, 2003 was approved on November 16, 2005. The record does not contain any evidence showing that the petitioner paid the two previous beneficiaries the proffered wages in these years. Instead, the submitted petitioner's payroll earnings report as of May 31, 2003 shows that the petitioner did not pay those two previous beneficiaries. Therefore, the petitioner must show that it had sufficient net income or net current assets to pay all the three proffered wages (including the instant beneficiary) during the years from 2003 to 2005. As discussed above, the petitioner did not have sufficient net current assets to pay a single

its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

⁵According 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.

⁶SRC-05-059-52477.

⁷SRC-05-200-51696.

proffered wage while the petitioner's net income in 2003 and 2004 were sufficient to pay the instant beneficiary the proffered wage of \$39,000 per year. However, it is more likely than not that the petitioner's net income of \$70,162 in 2003 and \$93,763 in 2004 is not sufficient to pay all the three proffered wages.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner established that it had the ability to pay the instant beneficiary the proffered wage in 2003 and 2004 through an examination of its net income, however, the record does not contain evidence to show that the petitioner still had sufficient net income to pay the instant beneficiary the full proffered wage after he paid the two beneficiaries their full proffered wage from the net income in 2003 and 2004.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has demonstrated that the beneficiary possessed the requisite two years of experience prior to the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *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); *see also 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 certified Form ETA 750 in the instant case states that the position of manager requires two (2) years of experience in the job offered or a related occupation. On the Form ETA 750B, signed by the beneficiary on October 20, 2003, the beneficiary set forth his work experience as a "Chief Executive Officer" at [REDACTED] since January 2001 and as a "Manager" at [REDACTED] in Bombay, India from 1995 to December 2001.

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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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.

The record of proceeding does not contain any experience letter from the beneficiary's current or former employer(s) as required by the above quoted regulation. The petitioner submitted the beneficiary's bachelor of commerce, certificate of fellowship, permission for exemption, and provisional certificate from Commercial University in India and nine certificates for completion of training courses. However, none of them meets the above regulatory requirements and further the Form ETA 750 does not indicate that the employer will accept any education or training in lieu of the requisite two years of experience.

Therefore, the petitioner failed to establish that the beneficiary possessed the requisite two years of experience with a regulatory-prescribed experience letter, and thus, the petition cannot be approvable.

The petition will be 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.