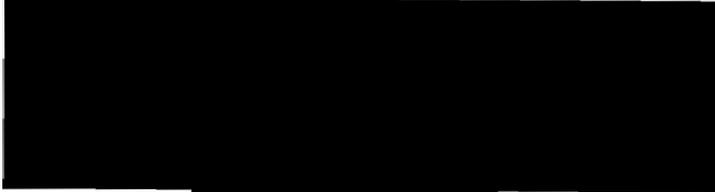




U.S. Citizenship
and Immigration
Services

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BE

FILE:



Office: NEBRASKA SERVICE CENTER

Date: **MAY 17 2007**

LIN-05-120-50593

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. Wieman, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (Director), Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery and ice cream shop. It seeks to employ the beneficiary permanently in the United States as a food service manager (fast food 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 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 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 27, 2005 denial, the only 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.

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). 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$37,500 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

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. Evidence in the record includes corporate federal tax returns filed by [REDACTED] [REDACTED] for 2001 through 2004 and its financial statements for the period from January 1, 2005 to April 30, 2005. 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 [REDACTED] structured as an S corporation. The petitioner claimed to have been established in 2001, to have a gross annual income of \$1,000,000, to have a net annual income of \$150,000, and to currently employ 15 workers. According to the tax returns in the record, [REDACTED] fiscal year is based on a calendar year. On the Form ETA 750B signed on April 12, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that the director improperly denied the application based upon an approved labor certification, and there was sufficient income to pay the required salary.

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 any evidence to show that the petitioner paid the beneficiary any amount of compensation in the relevant years. Thus, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 2001 onwards.

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).

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) and 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). However, counsel has not submitted a brief and/or evidence as of this date and our office sent a courtesy reminder in February 2007. The AAO will review and make a decision based on the evidence in the record only.

Reliance on its gross income and gross profit 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 petitioner submitted § [REDACTED] Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2004 as evidence of the petitioner's ability to pay the proffered wage. The tax returns for 2001 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$37,500 per year from the priority date:

- In 2001, the Form 1120S stated a net income² of \$20,038.
- In 2002, the Form 1120S stated a net income of \$(90,593).
- In 2003, the Form 1120S stated a net income of \$26,104.
- In 2004, the Form 1120S stated a net income of \$82,150.

Therefore, for the year 2004, [REDACTED] had sufficient net income to pay the proffered wage that year, but its net income in 2001 through 2003 could not establish its ability to pay the proffered wage in these years.

² 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 its various sources are to be shown not on page one of the Form 1120S, but on line 23 or line 17e 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>.

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.³ 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.

- [REDACTED] net current assets during 2001 were \$(2,725).
- [REDACTED] net current assets during 2002 were \$(39,275).
- [REDACTED] net current assets during 2003 were \$52,738.

Therefore, for the year 2003, [REDACTED] had sufficient net current assets to pay the proffered wage, however, it did not have sufficient net current assets to pay the proffered wage in 2001 and 2002.

The record before the director in the instant case closed on August 4, 2005 with the receipt by the director of the petitioner's submission of the response to the request for evidence. As of that date the petitioner's federal tax return for 2005 was not due yet. Therefore, the petitioner's tax return or other regulatory-prescribed evidence for 2005 is not necessarily dispositive. In addition, [REDACTED] financial statements for January 1 to April 30, 2005 are not audited. 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. 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.

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 continuing ability to pay the beneficiary the proffered wage as of the priority date in 2001 to 2002 through an examination of wages paid to the beneficiary, [REDACTED] net income or net current assets.

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

³According 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.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified additional grounds of ineligibility and will discuss these issues. 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 first issue is whether or not the petitioner has established that it is a qualifying entity to file the instant petition. 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. § 103.3(a)(1)(iii)(B) defines meaning of affected party as:

affected party (in addition to the Service) means the person or entity with legal standing in a processing. It does not include the beneficiary of a visa petition.

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 record of proceeding shows that a labor certification application with the DOL on April 30, 2001 on behalf of the beneficiary was filed by and the approved labor certification was issued on January 15, 2003 to [REDACTED] located at [REDACTED] Elgin, IL [REDACTED]. The original Form I-140, Immigrant Petition for Alien Worker, on behalf of the instant beneficiary was filed with CIS Nebraska Service Center on March 11, 2005 by the instant beneficiary, [REDACTED], as an individual petitioner and [REDACTED] as company petitioner with the beneficiary's address of [REDACTED], IL 60174 and social security number [REDACTED]. The regulation does not provide anywhere to allow a beneficiary to file an employment based immigrant petition under Section 203(b)(3)(A)(i) of the Act as a skilled worker. The instant petition must be denied as improperly filed.

Counsel submitted [REDACTED] corporate tax returns and financial statements as evidence to establish the petitioner's ability to pay the proffered wage. However, the record contains no evidence that [REDACTED]

⁴ Part 3 of the Form I-140 and concurrently filed Form I-485 show that [REDACTED] the beneficiary of the instant petition, the address of [REDACTED] IL 60174 is the beneficiary's address and the social security number [REDACTED] is the beneficiary's social security number.

Inc. was an entity on the labor certification or I-140 petition or qualifies as a successor-in-interest or is otherwise related to [REDACTED], dba [REDACTED] located at [REDACTED]

[REDACTED] Elgin, IL 60123. Successor-in-interest status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The record of proceeding contains no explanation of [REDACTED] eligibility for the benefit sought. In the instant petition, counsel did not submit any evidence showing that [REDACTED] has purchased or otherwise acquired [REDACTED] located at [REDACTED] and/or has assumed all of the rights, duties, and obligations of [REDACTED]. The record shows that [REDACTED] and [REDACTED] are separate corporations in the state of Illinois⁵. The record does not contain any documentary evidence to establish the financial ability of [REDACTED] to have paid the certified wage. Therefore, the petitioner failed to establish the status of successor-in-interest to [REDACTED] for [REDACTED] Inc. or vice versa, and the petitioner also failed to establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. There is no provision that an approved labor certification can be transferred to another employer without establishing the status of successor-in-interest to the predecessor enterprises. Therefore, without documentation of the successor-in-interest status the instant petition is not approvable.

The second issue beyond the director's decision is whether or not the petitioner demonstrated that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date. To determine whether a beneficiary is eligible for an employment based immigrant visa, 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, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of food service manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|--------------------|---------|
| 14. | Experience | |
| | Job Offered | 2 years |
| | Related Occupation | 0 |

⁵ This office notes that [REDACTED] is a current good standing corporation in the state of Illinois, that [REDACTED] is a current good standing corporation in the state of Illinois, and that there is no evidence they are related to each other. *See* <http://www.ilsos.gov/corporatellc/CorporateLlcController> (accessed on April 20, 2007).

The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on April 12, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been working as a full time manager for [REDACTED] located at [REDACTED] Glen Ellyn, IL 60137 since August 2000. Prior to that, he represented that he worked as a full time manager for [REDACTED] located at [REDACTED] Bolingbrook, Illinois from January 1999 to July 2000. He does not provide any additional information concerning his employment background on that form.

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.

The instant I-140 petition was submitted on March 11, 2005 without evidence pertinent to the beneficiary's qualifications as required by the above regulation. The director issued a request for additional evidence (RFE) on May 19, 2005 requesting evidence to establish that the beneficiary possesses the experience listed on the Form ETA 750. In response to the director's RFE, counsel submitted an experience letter from the beneficiary's former employer. The experience letter in the record was dated July 16, 2005 and from [REDACTED] of [REDACTED] of [REDACTED] at [REDACTED] Bolingbrook, IL 60440. This letter stated concerning the beneficiary's work experience in pertinent part that:

[The beneficiary] had worked at the above corporation located then at [REDACTED] in Bolingbrook, IL. His employment was from 8-31-1999 to 7-15-2000. He was trained to handle the night shift and manage the products being made and take care of the customers with utmost service.

The letter was from [REDACTED] however, it does not contain his title in the company, therefore, it is not clear whether the letter was from a former employer or coworker. The letter verifies that the beneficiary was trained to handle the night shift and manage the products and take care of the customers, however, it does not indicate the beneficiary's position, it does not include the duties of the proffered position, i.e. cash/sales receipts, reconciliation, compliance with health codes, ordering supplies and therefore, the letter is deficient in demonstrating the beneficiary's qualifications, too. The letter also mentioned that the beneficiary worked for ten and a half months from August 31, 1999 to July 15, 2000 which is not sufficient to qualify the beneficiary for the proffered position with the requirement of two years of experience in the job offered⁶. Therefore, this experience letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case. The record of proceeding does not contain any other evidence to support the

⁶ The starting date is different from the starting date represented by the beneficiary on the Form ETA 750B. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

beneficiary's qualifications. Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered for the proffered position as required by the ETA 750.

The AAO also notes that the representative of the petitioner who signed the Form I-140 has the same family name with the beneficiary. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). This cast doubt on the issue whether or not the petitioner's job offer is a *bona fide* job opportunity. "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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.