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U.S. Citizenship
and Immigration
Services

B36

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FILE:



Office: VERMONT SERVICE CENTER

Date: MAY 21 2007

EAC 05 202 54062

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 director, Vermont Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tennis facility. It seeks to employ the beneficiary permanently in the United States as a tennis professional/mental toughness coach. 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 October 26, 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.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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 July 29, 2002. The proffered wage as stated on the Form ETA 750 is \$1,000 a week, or \$52,000 a year. The Form ETA 750 states that the position requires a four-year bachelor's degree in psychology and two years of experience in the proffered position.

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 Counsel submits a statement from [REDACTED] who describes himself as the petitioner's accountant. [REDACTED] also identifies the petitioner as Yorktown Club Management, Inc. [REDACTED] noted the petitioner's operating revenues for tax years 2001 to 2004 and states that these revenues have steadily increased since inception. Mr. [REDACTED] then states that the petitioner's net income before depreciation and amortization for the years 2003 and 2004 is in excess of \$140,000.

[REDACTED] then asserts that the loss generated in tax year 2002 should not be relied upon as evidence of the petitioner's inability to pay the proffered wage, as the loss was primarily the result of depreciation and amortization expenses of \$208,902, which is a non-cash expenditure. [REDACTED] also states that as of December 31, 2002 and December 31, 2001, the petitioner had obtained bank loans in the amounts of \$2,200,000 and \$1,575,355 respectively, based on the personal guarantees of the petitioner's stockholders. [REDACTED] finally states that the petitioner has always had the ability to pay the beneficiary, and notes that the salaries and commissions paid for the year 2002 were \$626,061.

Other relevant evidence in the record includes the petitioner's² Form 1120S tax return for 2002, and W-2 Forms for the beneficiary for tax years 2003 and 2004. These documents indicate the beneficiary received \$57,933.44 in tax year 2003 and \$57,164.25 in tax year 2004. The record also identifies the business paying these wages as Yorktown Club Management Inc., doing business as Match Point Tennis & Fitness, at the same address as the I-140 petitioner in Elmsford, New York. Furthermore, the record contains an unaudited statement to the Board of Directors and stockholders of Yorktown Club Management, Inc. dated February 17, 2005. The statement entitled "Statement of Assets/Liabilities and Stockholders' Equity (Deficit)" examines Yorktown Club Management, Inc.'s assets and liabilities and stockholders' equity as of December 31, 2003 and 2004. 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 is structured as an S corporation. On the petition, the petitioner claimed to have been established in the year 2000 and to currently employ more than 40 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 20, 2002, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel notes the petitioner's depreciation and amortization deduction of \$23,500 in tax year 2002, and states that these are non-cash deductions. Counsel also states that the petitioner had revenues of \$1,370,295 in tax year 2002 and paid salaries and commissions of \$626,061 for the year, and that these wages

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 The AAO notes that the record is inconsistent with regard to the petitioner's name. On the I-140 petition the petitioner is identified as [REDACTED], while the tax returns identify the petitioner as Yorktown Club Management, Inc. It is also noted that the letter of support dated June 6, 2005 is from Stamford Indoor Tennis Club. The AAO will address this issue more fully further in these proceedings.

would include salaries paid to any other individuals previously employed in a position similar to the proffered position.

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 the instant petition, the AAO notes that the record does not establish that the tax returns submitted to the record are the tax returns for the petitioner identified on the I-140 petition, namely, Solaris Sports Club. Nowhere in the record is the relationship between Solaris Sports Club and Yorktown Club Management Inc. d/b/a Match Point Tennis & Fitness established. Thus, the AAO cannot determine if either the tax returns submitted to the record that identify the petitioner as Yorktown Management Club, Inc., rather than Solaris Sports Club, and the W-2 forms that also identify the employer as Yorktown Management Club, Inc. doing business as Match Point Tennis & Fitness are probative evidence of the I-140 petitioner's ability to pay the proffered wage. It is also noted that the petitioner has not established that it is successor-in-interest to the other entities, or that one of them is the successor-in-interest to the instant petitioner. It is noted that both entities appear to share the same federal Employer's Identification Number (EIN); however, the burden is on the petitioner to establish its identity and its eligibility for the visa preference. Section 291 of the Act, 8 U.S.C. § 1361. To date, the petitioner has not done so. Due to the unresolved questions with regard to the petitioner's identity, the appeal will be dismissed.

However, for illustrative purposes, the AAO will examine the evidence placed in the record in determining whether such evidence could establish a petitioner's ability to pay the proffered wage during a given period.

With the initial petition, the petitioner submitted an unaudited compilation report prepared by Needleman & Schachter, Inc., Lake Success, New York. This document examined the assets, liabilities and shareholders' equity as of December 31, 2003 and 2004. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore the statement submitted to the record would be given no evidentiary weight in these proceedings.

On appeal, both counsel and [REDACTED] state that the petitioner's depreciation and amortization expenses can be viewed as further financial assets as they are non-cash deductions. However, their reliance on the petitioner's depreciation and amortization deductions is misplaced. They are correct that those deductions do

not represent specific cash expenditures during the year claimed. They are systematic allocations of the cost of long-term assets, tangible and intangible, respectively. The depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While those expenses do not require or represent the current use of cash, neither are they available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's selection of an accounting method and a depreciation schedule accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its redistribution to other years as convenient. The AAO will comment again on the issue of depreciation and amortization when it examines how to calculate the petitioners' net income.

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, if the petitioner established that it was the same business entity as Yorktown Club Management, Inc., it would have established that it paid the beneficiary more than the proffered wage in tax years 2003 and 2004; however, it would not have established that it paid the beneficiary any wages that were equal to or greater than the proffered wage in the 2002 priority year. Therefore the petitioner cannot establish that it paid the beneficiary a salary equal to or greater than the proffered wage from the priority date and to the time the beneficiary obtained permanent residency. Thus, the petitioner also would have to establish its ability to pay the entire proffered wage in the 2002 priority year, namely \$52,000.

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, contrary to counsel's assertions, without consideration of depreciation, amortization, 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.

The tax return demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$52,000 per year in 2002:

- In 2002, the Form 1120S stated net income³ of -\$185,302.

Therefore, for the year 2002, the petitioner did not 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. 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and

³ 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K for 2002, the petitioner's net income is found on line 23, Schedule K of its tax return.

⁴ 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.

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 2002 were -\$419,151.

Therefore, for the year 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 continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. As stated previously, the AAO does not consider the petitioner's depreciation and amortization expenses in its examination of the petitioner's net income. The fact that a petitioner may have loans guaranteed by its shareholders is also not viewed as persuasive evidence of the petitioner's ability to pay the proffered wage, even if the petitioner has presented probative evidence of such loans. The AAO notes that the petitioner also has mentioned the amount of wages and commissions paid to the petitioner's employees; however, this factor by itself would not be sufficient to establish the petitioner's ability to pay the proffered wage in tax year 2001.

Finally, counsel suggests on appeal that the salaries paid to other employees who provided the same services as the beneficiary could be used to pay the proffered wage. However, the record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of any former employees during tax year 2002 involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

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.

As previously stated, the evidence submitted does not establish the actual identity of the petitioner nor does it establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position. 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).

In addition, 8 C.F.R. §204.5(l)(3)(ii)(C) states:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evident of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation

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 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 July 29, 2002.

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 petition, the Form ETA 750, Part A reflects that the proffered position requires a four year college degree in psychology, while the beneficiary's qualifications listed on Part B indicate that she possesses an associate degree in general business and tennis management from Technical College of the Lowcountry Hilton Head, South Carolina, studying from 1992 to May 1995. The ETA 750, Part B also indicates that the beneficiary then received a bachelor degree in psychology from York University, Toronto, Canada, studying from September 1997 to April 1999. The record does not contain any evidence of the actual diplomas received, or the coursework undertaken by the beneficiary. There is also no educational equivalency report submitted to the record.

The petitioner clearly delineated four years as the required number of years required for the bachelor's degree requirement on the Form ETA 750A. It is noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245.

The AAO would not consider the combination of two degrees as described in the record to be the equivalent of a four year college degree in the field of psychology as stipulated by the Form ETA 750. If the petitioner pursues this matter further, further documentation and examination of the beneficiary's academic qualifications would be warranted.

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.