



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **SEP 14 2007**
EAC 04 063 51523

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

[Redacted]

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a deli/restaurant. It seeks to employ the beneficiary permanently in the United States as a pizza baker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage from the priority date of April 30, 2001. 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original December 13, 2005 denial, the issue in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage from the priority date of April 30, 2001.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$400 weekly or \$20,800 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Relevant evidence submitted on appeal includes counsel's statement, a letter, dated December 28, 2005, from [REDACTED], copies of the petitioner's owner's bank statements for the period October 27, 2005 through December 12, 2005, copies of the petitioner's bank statements for the period January 31, 2000 through November 30, 2005,¹ a copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return, for the fiscal year July 1, 2000 through June 30, 2001, copies of the petitioner's 2000 through 2002 Forms W-3, Transmittal of Wage and Tax Statements, and copies of Forms W-2, Wage and Tax Statements, issued by the petitioner for all its employees for the years 2000 through 2002. Other relevant evidence includes copies of the petitioner's 2001 and 2002 Forms 1120 for the fiscal years July 1 through June 30 for both years. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2000 through 2003 Forms 1120 reflect total income before net operating loss deduction and special deductions of \$15,159, -\$7,827, and \$1,175, respectively. The petitioner's 2000 through 2003 Forms 1120 also reflect net current assets of \$22,987, \$20,508, and \$39,478, respectively.

The letter from the petitioner's CPA states:

I hereby verify that the company's gross income for the fiscal year ended 6/30/01 was \$814,576.00, and the net income was \$15,159.00 plus the depreciation expense \$23,676.00 which brings the total income to \$38,835.00. The gross income for the fiscal year ended 6/30/2002 was \$788,516.00, and the net income was -\$7,827.00 plus the depreciation expense of \$19,427.00, and the beneficiary earned part time income for tax year 2002 of \$12,027.75, which brings the total income to \$23,623.75 ($\$19,427.00 - \$7,827.00 + \$12,027.75 = \$23,627.75$). The gross income for the fiscal year ended June 30, 2003 was \$822,591.00, and the net income was \$1,175.00 plus the depreciation expense of \$17,894.00 and the beneficiary earned a part-time income of \$12,750.00 for tax year 2003 which brings the total income to \$31,819.00 ($\$17,894.00 + \$1,175.00 + \$12,750.00 = \$31,819.00$). The beneficiary's income for the tax year 2004 was \$18,850.00.

In addition to the above, as at 6/30/2005, the company has total assets of \$100,259.00 (based on historical cost), with a net book value of \$9,657.00. Attached is a copy of the company's balance sheet as of 6/30/2005, taken from the recent filing of the corporation's Federal Income Tax return. Also note that the business has a fair market value of approximately \$475,000.00.

The company has a current balance of \$4,033.77 in the checking account. Also, there are currently 12 employees on the payroll.

¹ Although requested by the director, reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that is considered in determining the petitioner's net current assets. Therefore, the AAO will not consider the petitioner's bank statements when determining the petitioner's ability to pay the proffered wage.

The president of the company, [REDACTED], has \$105,051.94 of savings in his personal bank accounts. Copies of recent bank statements are enclosed.

The company is financially stable, and the anticipated gross income for the current fiscal year is expected to exceed \$850,000.00.

The 2000 through 2002 Forms W-2,² issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary of \$9,399 in 2000, \$8,983.75 in 2001, and \$12,027.75 in 2002.³

² It is noted that the Forms W-2, issued by the petitioner on behalf of the beneficiary, show two different Social Security Numbers. Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at <http://ssa-custhelp.ssa.gov> (accessed on August 27, 2007).

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

³ Although the petitioner's CPA stated that the beneficiary earned \$12,750 in 2003 and \$18,850 in 2004, the Forms W-2 that would corroborate that claim was not submitted and is not part of the record. The assertions of counsel or in this case, the petitioner's CPA, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, those wages may not be considered when determining the petitioner's ability to pay the proffered wage of \$20,800.

On appeal, counsel states:

On August 26, 2005, the USCIS requested additional documents and granted 60 days to provide such documents. The petitioner had changed accountants and was unable to get copies of the W2s, W3s, etc. for 2000, 2001, and 2002 and had to request copies of said documents from the Social Security Office which took a while to get. On October 21, 2005, a written request was made for an extension of an additional 60 days. On December 13, 2005, the USCIS denied such request. I have since obtained all the documents/information requested and the following are enclosed.

- 1) Letter from the Petitioner's present accountant which is self-explanatory.
- 2) Copies of the Petitioner and president of the company, [REDACTED], bank statements and the petitioner's bank statements from January 2000 through December 2002.
- 3) Copies of the petitioner's tax return for fiscal year 2000.
- 4) W3's for tax years 2000, 2001, and 2002.
- 5) The employer petitioned for the following individuals:

[REDACTED] - EAC-04-027-50240 - Case completed in 2005 and W2 enclosed.

[REDACTED] - EAC-00-107-52681 - Case completed - W2 enclosed.

[REDACTED] - EAC number unknown - Case completed years ago.

[REDACTED] - EAC-98-202-50250 - Case completed - W2 enclosed.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750, signed by the beneficiary on April 16, 2001, the beneficiary does not claim the petitioner as a past or present employer. However, the petitioner has submitted the beneficiary's 2000 through 2002 Forms W-2. Therefore, the petitioner has established that it employed the beneficiary in 2000 through 2002.

The petitioner is obligated to show that it has sufficient funds to pay the difference between the proffered wage of \$20,800 and the actual wages paid to the beneficiary in the pertinent fiscal years (2000 through 2002). Those differences would have been \$11,401 in fiscal year 2000, \$11,816.25 in fiscal year 2001, and \$8,772.25 in fiscal year 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *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.

For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate that its net incomes in fiscal years 2000 through 2002 were \$15,159, -\$7,827, and \$1,175, respectively. The petitioner could not have paid the difference of \$11,816.25 in fiscal year 2001 or the difference of \$8,772.25 in fiscal year 2002 between the proffered wage of \$20,800 and the actual wages of \$8,983.75 in 2001 or the actual wages of \$12,027.75 in 2002 paid to the beneficiary out of its net income in those years. However, the petitioner could have paid the difference of \$11,401 between the proffered wage of \$20,800 and the actual wages of \$9,399 paid to the beneficiary in 2000 from its net income of \$15,159 in 2000.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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.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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2000 through 2002 were \$22,987, \$20,508, and \$39,478, respectively. The petitioner could have paid the differences of \$11,401 in 2000, \$11,816.25 in 2001, and \$8,772.25 between the proffered wage of \$20,800 and the actual wages paid to the beneficiary of \$9,399 in 2000, \$8,983.75 in 2001, and \$12,027.75 from its net current assets in those years. Therefore, the petitioner has established its continuing ability to pay the proffered wage from the priority date of April 30, 2001.

Beyond the decision of the director, there is another issue that must be addressed before the visa petition can be approved. 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). That issue is whether or not the petitioner has established that the beneficiary met the experience requirements of the labor certification before the priority date of April 30, 2001.

The regulation at 8 C.F.R. § 204.5(1)(3) states, in pertinent part:

(ii) *Other documentation* – (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 30, 2001.

Citizenship and Immigration Services (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).

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 approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess six years of grade school and two years of experience in the job offered of pizza baker. Block 15 does not state any additional requirements.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of pizza baker must have six years of grade school and two years of experience in the job offered.

In the instant case, counsel submitted a copy of an affidavit, dated April 27, 2001, from [REDACTED] President, of the petitioner stating:

I interviewed [the beneficiary] to work for me as a pizza baker in September 2000. At that time, he informed me that he had over five (5) years experience as a pizza baker and that he previously worked for Antonio's Pizza located at 130 Midland, Portchester, N.Y. 01573. Based on that information, I tested him and found that he indeed has experience as a pizza baker and I am hereby offering the position of a pizza baker to work for me.

This affidavit from the petitioner's president does not meet the regulations at 8 C.F.R. § 204.5(l)(3)(ii)(A) which state:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The experience letter must come from the beneficiary's prior employer, Antonio's Pizza, and not the petitioner, as the beneficiary could not have obtained the two years of experience with the petitioner before the priority date of April 30, 2001 (The beneficiary did not begin employment with the petitioner until 2000.).

The director must afford the petitioner reasonable time to provide evidence that the beneficiary meets the requirements of the labor certification to include a letter from the beneficiary's prior employer that meets the regulations at 8 C.F.R. § 204.5(l)(3)(ii)(A). The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's December 13, 2005 decision is withdrawn. The petition is remanded to the director to be adjudicated on its merits and for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.