



U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

DEC 29 2006

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition,¹ which is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The nature of the petitioner's business is construction and remodeling.² It seeks to employ the beneficiary permanently in the United States as a tile setter. The petition in the name of [REDACTED] is accompanied by a copy³ of Form ETA 750, Application for Alien Employment Certification, in the name of [REDACTED] approved by the U.S. 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 demonstrated that the appeal was properly filed, timely and made 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 denial dated October 25, 2006, an 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.

Beyond the decision of the director, additional issues in this case is whether or not the petitioner must submit an original labor certification in this matter and whether the petitioner has demonstrated that it is the successor-in-interest to [REDACTED]

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 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

¹ The petition was filed on April 14, 2006.

² The director erroneously referred to the nature of the petitioner's business in his decision.

³ The petitioner did not submit an original labor certification or explain why the original was not submitted with the petition other than to reference a prior employment based visa petition in the records of Citizenship and Immigration Services (CIS).

Ability to Pay

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 DOL. 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 DOL 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, 2001.⁴ The proffered wage as stated on the Form ETA 750 is \$32.47 per hour (\$67,537.60 per year). The Form ETA 750 states that the position requires four years of experience in the proffered position.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁵

Relevant evidence in the record includes copies of the following documents: a copy of the Form ETA 750, Application for Alien Employment Certification, approved by DOL; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2003 and 2004; the petitioner's U.S. IRS Form 1120S tax return for 2005; a letter from the petitioner dated September 28, 2004; W-2 Wage and Tax Statements for 2001 and 2002 issued by [REDACTED]⁶ to its employees not including the beneficiary; W-2 Wage and Tax Statements for 2004 and 2005 issued by the petitioner to the beneficiary in the amounts of \$13,740.00 and \$22,536.00 respectively; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation then elected to be treated as an S corporation. On the Form ETA 750 B signed by the beneficiary (but undated), the beneficiary did not claim to have worked for the petitioner.

The appellate brief includes the following:

- Counsel asserts that CIS will consider other evidence such as profit/loss statements, bank account records or personnel records referencing the regulation at 8 C.F.R. § 204.5(g)(2).

⁴ It has been approximately seven years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

⁵ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

⁶ The petitioner also submitted [REDACTED]'s tax returns for 2001 and 2002.

- Counsel cites the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) in support of his contentions that CIS will consider other evidence or apply standards in the determination of the ability to pay the proffered wage.
- Counsel states that the petitioner paid “substantial sums” to subcontractors to do the work that the beneficiary would perform as a tile setter for the petitioner.

Accompanying the appeal, counsel submits a legal brief; a March 2, 2007 affidavit from [REDACTED], officer of [REDACTED] and a letter from the petitioner’s accountant dated March 14, 2007. Counsel also submits additional Standard Form of Agreements between [REDACTED] and [REDACTED]. The six agreements are dated February 5, 2001, July 2, 2001, July 18, 2001, January 4, 2002, March 27, 2002, and July 8, 2002. The agreements provide in Article 8 of each agreement⁷ the following:

- That the work of the subcontract was to provide all labor for operations described in Project Manual Concrete Repairs, Jackson Heights, New York, New York.
- That the work of the subcontract was to provide all labor for operations described in Specifications for [REDACTED] and Miscellaneous Work prepared by [REDACTED] dated January 31, 2001.
- That the work of the subcontract was to provide all labor for operations described in Specifications for Façade Inspection and Repairs, [REDACTED], New York, New York, prepared by [REDACTED] dated June 18, 2001.
- That the work of the subcontract was to provide all labor for operations described in Specifications for [REDACTED], [REDACTED], New York, New York, prepared by [REDACTED] dated June 19, 2001.
- That the work of the subcontract was to provide all labor for operations described in Specifications for [REDACTED], [REDACTED] New York, New York, prepared by [REDACTED] dated February 11, 2002, as later revised.
- That the work of the subcontract was to provide all labor for operations described in Specifications for [REDACTED], [REDACTED] New York, New York, prepared by [REDACTED], dated April 2, 2002.

In substantiation of the subcontracting work, counsel has provided five invoices from [REDACTED] to [REDACTED] as follows: invoice 123, dated July 28, 2001, for work described “Work as per contract as per schedule attached”; invoice 135, dated October 30, 2001, for work described “Work in accordance with signed contract as per schedule attached”; invoice 138, dated December 30, 2001, for work described “Work in accordance with signed contract as per schedule attached”; invoice 139, dated January 24, 2002, for work described “Work in accordance with signed contract as per schedule attached”; and invoice 142, dated April 15, 2002, for work described “Work as per contract as per schedule attached”.

Similarly, counsel has submitted ten “Standard Form of Agreement Between Contractor and Subcontractor,” between [REDACTED] and three subcontractors, [REDACTED] and [REDACTED] for work projects accomplished between December 29, 2003 and June 7, 2006.

⁷ “Standard Form of Agreement Between Contractor and Subcontractor,” American Institute of Architect Form document A401 (1987 edition)

Accompanying the above project documents counsel has provided approximately 17 invoices from [REDACTED] and [REDACTED] to [REDACTED] and the petitioner for work projects accomplished between April 22, 2003 and November 30, 2006.

In substantiation of the consideration paid to the subcontractors for all of the above described work, counsel has submitted 90 cancelled checks from [REDACTED] and the petitioner to [REDACTED] and [REDACTED] made between January 16, 2001 to December 26, 2006.

The petitioner has provided a spreadsheet labeled "Exterior Restoration & Tile Work" for years 2001 through 2006 that details the "Subcontractor's [sic] Amount for Tile Work" which is 38% of the total cost of the subcontractors' totaled contract amounts. According to the spreadsheet data, which coincides with the agreements between contractor and subcontractor, invoices and checks provided, the contracted tile work constitutes 38% of the petitioner's total contract price amounts for all projects it undertook in that five year period.

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 Sonegawa*, 12 I&N Dec. 612 (BIA 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.

Counsel submitted W-2 Wage and Tax Statements for 2004 and 2005 issued by the petitioner to the beneficiary in the amounts of \$13,740.00 and \$22,536.00 respectively.⁸ Since the proffered wage is \$67,537.60 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is \$53,797.00 and \$45,001.00 respectively. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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 supported by federal caselaw. *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.

⁸ Other W-2 statements in the record were issued by other corporations.

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 sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's and [REDACTED] tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001 the Form 1120 [REDACTED] stated net income of \$2,790.00.
- In 2002 the Form 1120 of [REDACTED] stated net income of <\$215,904.00>⁹.
- In 2003 the petitioner's Form 1120 stated net income of <\$5,682.00>.
- In 2004 the petitioner's Form 1120 stated net income of \$4,023.00.
- In 2005 the petitioner's Form 1120S¹⁰ stated net income of \$94,038.00.

Since the proffered wage is \$67,537.60 per year, the petitioner¹¹ did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2001, 2002, 2003 and 2004. In 2005 the petitioner had sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during the 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.¹² A

⁹ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

¹⁰ 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 1120 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 lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

¹¹ Nor did [REDACTED]

¹² 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 as accounts

corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 and [REDACTED]¹³ net current assets during 2001, 2002, 2003, and 2004¹⁴ were <\$31,120.00>, <\$250,022.00>, <\$4,869.00> and <\$8,448.00> respectively.

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.

However, counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date.

As already stated, counsel states that the petitioner paid "substantial sums" to subcontractors to do the work that the beneficiary would perform as a tile setter. Counsel through documentation of work projects using cancelled checks, paid invoices, and agreements with each subcontractor over a period of five years has come forward with evidence that a substantial portion of petitioner's jobs from 2001 through 2006 have entailed tile work necessitating the employment of tile setter subcontractors. The documentation that counsel lays out is persuasive that subcontractors accounted for 66%¹⁵ of the total contract costs with tile work 25% of the total contract amount. Therefore for the period 2001 through 2006, tile work through "outside" sub-contractors more than approximates the proffered wage \$67,537.60 of per year. The petitioner has provided a standard for the evaluation of such savings.

Line 5 of Statement A to the tax returns submitted into the record evidence significant subcontracting expenses. The record of proceedings now does name the tile work sub-contractors, state their compensation, verify their contractual employment, and, provide evidence of the efficacy of the petitioner's intent to replace them with the beneficiary. The petitioner has documented the position, duty, and contract price of the subcontractors who performed the duties of the proffered position that the beneficiary would replace. Therefore, sufficient evidence has been presented to show the prospective savings that petitioner would earn by employing the beneficiary in the occupation of tile setter in lieu of the employment of sub-contractors.

Successor-in-Interest

Beyond the decision of the director, according to counsel, [REDACTED] was incorporated on January 14, 2003, and is the successor-in-interest to [REDACTED] (the petitioner) which according to the New York Department of State, Division of Corporations information website <<http://appsext8.dos.state.ny.us>> was incorporated on April 5, 2000. According to New York state corporate records [REDACTED] was dissolved on July 30, 2003. See <<https://atxp.choicepoint.com>> accessed August 21, 2008.

payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹³ Nor did [REDACTED]

¹⁴ In 2005 the petitioner had sufficient net income to pay the proffered wage.

¹⁵ The figures upon which this analysis was done are found in appellate Exhibit 7

Further, the record contains no evidence other than counsel's assertion and the affidavit of [REDACTED] made March 2, 2007, that [REDACTED] qualifies as a successor-in-interest to the entity that filed the labor certification. This 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 Original Labor Certification

Beyond the decision of the director, counsel has speculated in his brief dated March 13, 2007, that the original labor certificate (a copy of which was submitted in this case) is in a second denied employment based petition filed by the petitioner.¹⁶ As required by statute, the petition is not accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. The petitioner has the burden to submit the original labor certification by requesting CIS secure from DOL a duplicate original. Should the original be in another case file, counsel may identify and request that CIS secure that case file and consolidate it with the current matter.

Therefore, the matter will be remanded. The director must issue a new notice, examine the prior employment based visa petition for the original labor certification in the name of [REDACTED], request additional evidence if necessary, and if the petition remains denied, issue a decision containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.

¹⁶ According to the electronic records of CIS, the petitioner filed a second employment based labor certification for another beneficiary (i.e. SRC 08 045 52866).