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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B6

FILE:



Office: TEXAS SERVICE CENTER

Date:

AUG 09 2010

IN RE:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook (Mediterranean style cook) pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (Act), 8 U.S.C. §1153(b)(3)(A)(i). The petition is accompanied by a copy of Form ETA 750, Application for Alien Employment Certification (ETA 750), approved by the United States Department of Labor (DOL). The director determined that the petition was submitted without the certification from the Secretary of Labor based on a response from DOL that the underlying Form ETA 750 was never certified. Accordingly, the director denied the petition.

The record shows that the appeal is properly and timely filed, 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.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). On appeal, counsel submits a brief and additional evidence to support his assertions. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

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).

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The petitioner submitted a labor certification from DOL for an original beneficiary and a request to substitute the beneficiary of the instant petition for the original beneficiary on the certification. The Form ETA 750 was accepted on August 29, 2001 and certified on December 3, 2004 initially on behalf of the original beneficiary, Marcin Lauer. The instant petition for the substituted beneficiary was filed on December 4, 2006.

We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

The new rule also provides a 180-day validity period for approved labor certifications. All permanent labor certifications approved on or after the effective date of July 16, 2007, will expire 180 calendar days after certification, whether the original application was filed under the PERM or pre-PERM regulations, unless the employer uses the approved labor certification prior to expiration in support of an I-140 petition with U.S. Citizenship and Immigration Services (USCIS). Likewise, all labor certifications approved prior to July 16, 2007 will expire in 180 calendar days, unless filed in support of an I-140 petition with USCIS prior to the expiration date. Therefore, all currently approved labor certification applications must be filed in support of an I-140 petition by January 11, 2008. The underlying labor certification was certified on December 3, 2004, and therefore, it was still valid when the instant petition was filed.

USCIS may not approve a visa petition when the approved labor certification has already been used by another alien. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412 (Comm. 1986).² In

² While *Harry Bailen*, 19 I&N Dec. at 414, relies in part on language in 8 C.F.R. § 204.4(f) that no

response to the director's request for evidence, the petitioner claimed that the underlying labor certification had not been used for the original beneficiary. This office consulted USCIS records which show that the petitioner filed two I-140 immigrant petitions, however, these petitions were filed based on labor certifications with the priority date of April 29, 2001 and September 4, 2001 respectively. USCIS records show that the petitioner never filed an I-140 petition on behalf of the original beneficiary or that the original beneficiary obtained lawful permanent resident status using the underlying labor certification.

As set forth in the director's February 1, 2008 denial, the key issue in this case is whether or not the Form ETA 750 has been certified and whether the petitioner had valid labor certification to support the instant petition. Counsel submitted a copy of the certified labor certification [REDACTED] for the original beneficiary and claimed that the original labor certification was misplaced and requested that the director obtain a duplicate copy from DOL. The director received a response from DOL stating that "According to our records, this case was never certified."

On appeal, counsel submits correspondence dated March 20, 2008 from DOL Employment and Training Administration, Chicago National Processing Center concerning the Application for Alien Employment Certification for Dream Restaurant filed on behalf of [REDACTED]. The DOL Chicago National Processing Center's correspondence confirms that "this case was certified on December 3, 2004." During the adjudication of the appeal and pursuant to our consultation authority at section 204(6) of the Act, the AAO sent a letter to the Office of Foreign Labor Certification, Employment and Training Administration, DOL for verification of the instant labor certification. On July 8, 2010, this office received a response from DOL stating that "a review of the electronic records indicates that [REDACTED] was in fact certified in December 2004 as corroborated by the certification cover letter attached to the documents you sent us."

Therefore, the AAO finds that the petition was filed with a valid labor certification and thus, the director's February 1, 2008 decision is herewith withdrawn.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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 original Form ETA 750 was initially accepted on August 29, 2001. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750.³

longer exists in the regulations, the decision also relies on DOL's regulations, which continue to hold that a labor certification is valid only for a specific job opportunity. 20 C.F.R. § 656.30(c)(2). Moreover, the reasoning in *Harry Bailen*, 19 I&N Dec. at 414 has been adopted in recent cases. See *Matter of Francisco Javier Villarreal-Zuniga*, 23 I&N Dec. 886, 889-90 (BIA 2006).

³ Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28_-96a.pdf (March 7, 1996).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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 Form ETA-750A, item 14 set forth the minimum education, training, and experience that an applicant must have for the position of automotive mechanic. Item 14 requires two years of experience in the job offered. The duties of the proffered job 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 November 24, 2006 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 worked as a full time Mediterranean style cook for BUDA, Restaurant and Guesthouse in Poland from August 1998 to July 2001. He did 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) or 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 record contains a certificate dated December 14, 2006 from Buda, the beneficiary's former employer, on its letterhead verifying that the beneficiary was employed at the Restaurant and Guesthouse BUDA as Cook Mediterranean since August 1, 1998 till July 15, 2001 working 40 hours per week. The letter also contains a specific description of the duties the beneficiary performed at the restaurant during his employment. The letter meets the requirements set forth at 8 C.F.R. § 204.5(g)(1). The AAO finds that the petitioner established that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date in this matter with regulatory-prescribed evidence. 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 either 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the Form ETA 750 is \$19.25 per hour (\$40,040 per year).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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. The petitioner did not claim to employ the beneficiary and did not submit any documentary evidence showing that it hired and paid the beneficiary during the relevant years from the priority date. The petitioner failed to establish its continuing ability to pay the proffered wage through the examination of wages actually paid to the beneficiary. Therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the beneficiary the proffered wage from the year of the priority date to the present.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that

depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] 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.” *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. 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 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 evidence in the record shows that the petitioner is structured as an S corporation and files Form 1120S, U.S. Income Tax Return for an S Corporation.⁵ The record contains the petitioner’s Form 1120S for 2001 through 2006. The tax returns in the record demonstrate net income and net current assets for relevant years as shown below.

- In 2001, the petitioner had net income⁶ of \$81,960 and net current assets of \$104,684.

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.

⁵ The tax returns were filed by a company name Dream Donuts Restaurant Inc. while the instant petition was filed by Dream Restaurant Inc. However, the AAO finds that Dream Restaurant Inc. and Dream Donuts Restaurant Inc. are the same entity because they use the same federal employer identification number, conduct business at the same address and have the same owner.

⁶ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS

- In 2002, the petitioner had net income of \$88,696 and net current assets of \$123,562.
- In 2003, the petitioner had net income of \$90,701 and net current assets of \$198,577.
- In 2004, the petitioner had net income of \$94,143 and net current assets of \$25,100.
- In 2005, the petitioner had net income of \$95,326 and net current assets of \$89,170.
- In 2006, the petitioner had net income of \$102,477 and net current assets of \$122,401.

For the years 2001 through 2006, the petitioner had sufficient net income or net current assets to pay the proffered wage of \$40,040, and therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has established that it had the ability to pay the beneficiary the proffered wage as of the priority date and continued to the present through an examination of wages paid to the beneficiary, or its net income or net current assets.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions.

USCIS records show that the petitioner filed I-140 immigrant petitions for additional two workers, and both of them were approved.⁷ However, the adjustment of status application for one of them was denied. Therefore, the petitioner is obligated to demonstrate that it had ability to pay two proffered wages in 2001 through 2006. The record does not contain evidence showing that the petitioner paid the proffered wage to the additional beneficiary during these relevant years. However, assuming the beneficiary of the approved petition was offered the same proffered wage as the instant beneficiary, the petitioner's tax returns show that the petitioner had sufficient net income or net current assets to pay two proffered wages at the rate of \$40,040 per year in 2001 through 2006. Therefore, the petitioner has established that it had continuing ability to pay all proffered

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 (2003), line 17e (2004-2005) or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on February 3, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

⁷ The detailed information on the two approved immigrant petitions is as follows:

- [REDACTED] filed on April 26, 2005 with the priority date of April 29, 2001, and approved on May 14, 2005. The beneficiary was adjusted to lawful permanent resident status on July 20, 2006.
- [REDACTED] filed on July 18, 2005 with the priority date of September 4, 2001, and approved on September 19, 2005. The beneficiary's application for adjustment of status was denied June 20, 2007 and no further action was taken.

wages it was obligated to from the priority date to the time the beneficiary obtained permanent resident status or the present.

Counsel's assertions and additional evidence on appeal overcome the ground of the director's denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The director's February 1, 2008 decision is withdrawn, the appeal is sustained and the petition is approved.