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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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Date: **MAY 02 2011** Office:

FILE:

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:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On October 26, 2006, United States Citizenship and Immigration Services (USCIS), [REDACTED] (TSC), approved the petitioner's immigrant petition for alien worker, Form I-140. However, on February 10, 2009, the TSC director revoked the approval of the petition, finding that the petitioner was unauthorized to do overseas business at the time of filing the approval. The director also determined that the beneficiary was inadmissible under section 212(a)(6)(C) of the Immigration and Nationality Act (the Act).¹ Therefore, the director concluded that the immigrant petition was previously approved in error. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, and the matter will be remanded to the [REDACTED] for further action, consideration, and the entry of a new decision.

The petitioner is an international freight forwarding company. It seeks to employ the beneficiary permanently in the United States as a skilled worker, pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).² As required by statute, the petition is accompanied by an Application for Alien Employment Certification (Form ETA 750), approved by the United States Department of Labor (DOL). In revoking the approval of the petition, the director found that the petitioner did not have a proper license to conduct its business. More specifically, the director stated, "A search in Federal Register/Vol.70, No 95/Wednesday, May 15, 2005 reveals that the MCI [referring to the petitioner's business – Max Cargo, Inc.] was listed for the revocation of its Ocean Transportation Intermediary License by the Federal Maritime Commission for failure to maintain a valid bond."

On appeal, counsel for the petitioner contends that the petitioner has always maintained a proper license to conduct its business operation since 1999. Submitted along with the appeal are copies of the following relevant documents:

- [REDACTED] Federal Maritime Commission on May 1, 1999 certifying that the petitioner is authorized to carry on the business of providing non-vessel-operating common carrier services;
- [REDACTED] Federal Maritime Commission on September 27, 2001 certifying that the petitioner is authorized to carry on the business of providing freight forwarder services and non-vessel-operating common carrier services;

¹ Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), states, (i) "In general, any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible."

² Section 203(b)(3)(A)(i) of 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.

- A Notice of Reissuance of License dated May 12, 2005 from Federal Maritime Commission to the petitioner; and
- A letter dated February 20, 2009 from [REDACTED] stating that the petitioner has been licensed as an NVOCC (non-vessel-operating common carrier) since May 1, 1999.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

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.

Based on the evidence submitted, it appears that the petitioner was initially granted a license to only provide NVOCC services in 1999, but later in 2001, the petitioner upgraded its license in order to be able to provide more comprehensive services (the license issued in 2001 allowed the petitioner to provide both freight forwarder and NVOCC services). In 2005, the Federal Maritime Commission revoked the more comprehensive license issued in 2001 but reinstated the 1999 license. Under these circumstances, the AAO agrees with counsel that the petitioner has always maintained a proper license to conduct its business operation since 1999.⁴ The director's decision revoking the approval of the petition based on the petitioner's failure to maintain a proper license is withdrawn.

The director also found that the beneficiary was inadmissible under section 212(a)(6)(C). The record contains no specific evidence that would have warranted this finding. In his notice of intent to revoke (NOIR), for instance, the director merely stated in one sentence, "Further, [the] beneficiary, [REDACTED] is inadmissible under INA 212(A)(6)(c) Misrepresentation for willfully representing his non immigrant status in [the] United States." No specific information was given to support this conclusion. Where a notice of intention to revoke is based only on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, the director cannot revoke the approval of the visa petition. *See Matter of Esteime*, 19 I&N Dec. 450, 451 (BIA 1988). The director's decision finding that the beneficiary is inadmissible is withdrawn for the reasons stated above.

³ 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).

⁴ It is unclear whether the beneficiary's position as a freight agent is protected by either the 1999 or the 2001 license; however, that question is beyond the scope of this decision.

In revoking the approval of the petition, the director determined that the beneficiary failed to submit evidence to demonstrate that he has always maintained his legal status in the United States from the date he arrived in the United States.

Upon review, the AAO determines that such finding – whether or not the beneficiary has always maintained his legal status in the United States – is not relevant to the adjudication of the Form I-140 petition in this proceeding, and therefore, should not be grounds for revoking the approval of the petition. We note that such finding is properly made during the adjudication of the Form I-485 (Application to Register Permanent Residence or Adjust Status). The AAO has no jurisdiction to adjudicate an adjustment of status application; only USCIS has the exclusive jurisdiction over adjustment of status issues along with the immigration judge, when the immigration judge adjudicates the application under 8 C.F.R. § 1245.2(a)(1). *See* 8 C.F.R. § 245.2(a). Therefore, we will not discuss this issue further, but rather refer to the director the adjudication of the matter at such time when the beneficiary may be eligible to proceed with the adjustment of status application.

Nevertheless, the petition, as it currently stands, may not be approved, as the petitioner, insofar as the evidence in the record is currently constituted, has not established by a preponderance of the evidence that the beneficiary qualifies for the position and that the petitioner has the continuing ability to pay the proffered wage from the priority date.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, 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 (DOL) – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on May 16, 2003. The name of the job title or the position for which the petitioner sought to hire is “freight agent.” Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote:

Contact existing and potential clients to solicit business and explain freighting options. Use knowledge of tariffs and quotas to explain possible routes, taxes, and load limits. Act as liaison between shippers and carriers.

Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of four (4) years of experience in the related job of transportation manager.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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, *Madany v. Smith*, 696 F.2d, 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).

As set forth above, the proffered position requires the beneficiary to have a minimum of four years of work experience as a transportation manager. On the Form ETA 750, part B, signed by the beneficiary on February 17, 2003, he represented that he worked as a sales manager at [REDACTED] from February 1991 to February 1995; as a director of overseas business department at [REDACTED] from March 1996 to September 1999; and as director of commodity transportation department at [REDACTED] from October 1999 to November 2000. Submitted along with the approved Form ETA 750 and the I-140 petition were certificates of employment from [REDACTED]

None of these certificates of employment complies with the requirements prescribed by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A),⁵ in that none of the documents contains a description of the training received or the work experience obtained by the beneficiary while he was employed there. The certificates from [REDACTED] also lack the address and location of the business. Thus, the petitioner has not established that the beneficiary was qualified to perform the duties of the position as of the priority date.

Further, the regulation at 8 C.F.R. § 204.5(g)(2) explicitly requires a petitioner to establish an ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.⁶

⁵ The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

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.

⁶ 8 C.F.R. § 204.5(g)(2), in pertinent part, states:

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.

Thus, 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).

Here, as noted above, the petitioner submitted and the DOL accepted for processing the Form ETA 750 labor certification on May 16, 2003. The rate of pay or the proffered wage set by the DOL on that form is \$45,000 per year.

To show that the petitioner has the ability to pay \$45,000 per year beginning on May 16, 2003, the petitioner submitted copies of its federal tax returns filed on Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2003 through 2005.

The evidence submitted shows that the petitioner was initially incorporated on October 1, 1997 and elected to be an S Corporation as of January 1, 1998. On the petition, the petitioner claimed to currently employ eight (8) workers.

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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.

No evidence was submitted to demonstrate that the beneficiary was ever employed by the petitioner from the priority date.

When 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 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873 (E.D. Mich. 2010). 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 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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. "[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).

The petitioner's tax returns demonstrate its net income (loss) for 2003-2005, as shown below:

- In 2003 the Form 1120 stated net income (loss)⁷ of \$78,652.
- In 2004 the Form 1120 stated net income (loss) of \$101,482.
- In 2005 the Form 1120 stated net income (loss) of \$90,257.

Based on the information above, the petitioner had sufficient net income to pay the beneficiary's wage of \$45,000 per year in 2003, 2004, and 2005.

The petition may not be approved at this time, however, as the record contains no evidence of ability to pay from 2006 thereon. The petition will be remanded for issuance of a Notice of Intent to Deny (NOID) or Request for Evidence (RFE) consistent with the above. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of the response, the director shall enter a new decision. As always, the burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The decision of the director is withdrawn; however, the petition is currently not approvable for the reasons discussed above. As the petition is not approvable, the appeal is remanded to the [REDACTED] director for further action, consideration and the entry of a new decision, consistent with the above.

⁷ For an S corporation, USCIS considers net income (loss) to be the figure shown on line 21 of the Form 1120S so long as the S corporation has no other income, credits, deductions or other adjustments from sources other than a trade or business. Otherwise, the net income (loss) is found on line 23 (2002), line 17e (2005), or line 18 (2006-2009) of schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf> (accessed on June 15, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).