identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

B6

[redacted]

DATE: JUL 10 2012 Office: TEXAS SERVICE CENTER [redacted]

IN RE: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

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 Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter 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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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 petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact.[1] 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 February 23, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

Here, the Form ETA 750 was accepted on December 7, 2001, the priority date. The proffered wage as stated on the Form ETA 750 was $13.17 per hour ($27,393.60 per year) based on a 40-hour work week.

---

[1] Although the petitioner did not submit a brief or any other evidence on appeal as indicated on Form I-290B, the petitioner made a specific allegation of error in law or fact in Form I-290B, Part 3 for the AAO to consider this appeal.

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.[2]

On appeal, counsel asserts that because the petitioner is a partnership rather than a corporation, the petitioner's profit/loss statements and bank statements should be considered. As stated above, this evidence was not submitted on appeal and the record does not otherwise contain these materials.

The evidence in the record of proceeding shows that the petitioner is structured as a partnership. On the petition, the petitioner claimed to have been established in 1947, and to currently employ 26 employees (in January 2008). According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on October 31, 2001, the beneficiary claimed to have worked for the petitioner from July 2000 to the present (October 2001). The W-2 Forms in the record demonstrate that the beneficiary has worked for the petitioner from 2001 through at least 2006.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[3] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the petitioner submitted W-2 Forms showing it paid the beneficiary wages as follows:

- 2001 - $16,665.31
- 2002 - $17,082.70
- 2003 - $16,711.68
- 2004 - $17,727.56
- 2005 - $16,995.23
- 2006 - $17,692.89

---

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

[3] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

Thus, for those years the petitioner must establish the ability to pay the difference between the proffered wage and wages paid to the beneficiary. Those sums are:

- 2001 - $10,728.29
- 2002 - $10,310.90
- 2003 - $10,681.92
- 2004 - $9,666.04
- 2005 - $10,398.37
- 2006 - $9,700.71

The AAO notes that the director did not consider the petitioner's net income as reported on Schedule K. For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. In the instant matter, the petitioner's Schedules K for 2001, 2002, 2003, 2005, and 2006 reflect additional income and guaranteed payments, and the petitioner's Schedule K for 2004 reflects additional income, guaranteed payments, and deductions. Therefore the director should have utilized Line 1 of the Analysis of Net Income of Schedule K section, page 4 of IRS Form 1065 for the years 2001, 2002, 2003, 2004, 2005, and 2006 in determining the petitioner's ability to pay the proffered wage. These amounts are as follows:

- 2001 - $95,691.00
- 2002 - $105,240.00
- 2003 - $102,485.00
- 2004 - $83,463.00
- 2005 - $95,925.00
- 2006 - $97,801.00

This demonstrates that the petitioner had sufficient net income to pay the beneficiary the proffered wage for 2001, 2002, 2003, 2004, 2005, and 2006.

The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 appeal is sustained.