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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B6



FILE: [REDACTED]  
SRC 07 017 52010

Office: TEXAS SERVICE CENTER Date: **AUG 26 2008**

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:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, the petition will be approved.

The petitioner is a marketing/technology business. It seeks to employ the beneficiary permanently in the United States as a database administrator. 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 beneficiary the proffered wage beginning on the priority date of the visa petition and 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 7, 2006 decision, 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. For the reasons discussed below, the petitioner has overcome the director's concerns on appeal.

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.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

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. 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 C.F.R. § 204.5(d). The priority date in the instant petition is May 23, 2003. The proffered wage as stated on the Form ETA 750 is \$100,000 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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. Relevant evidence submitted on appeal includes counsel's brief, copies of the 2003 through 2005 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary, and a letter, dated November 9, 2006, from John Feehan, Chief Financial Officer of the petitioner. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The 2003 through 2005 Forms W-2 reflect wages paid to the beneficiary by the petitioner of \$100,158.42, \$114,332.10, and \$118,606.78, respectively.

The letter, dated November 9, 2006, from the petitioner's Chief Financial Officer states:

1. I am the Chief Financial Officer of [the petitioner], having access to all corporate and financial records;
2. [The petitioner] currently employs approximately 419 workers; and
3. [The petitioner] has the resources necessary to pay the currently offered wage of \$125,000/year.

On appeal, counsel claims that CIS "erred in denying the petition in finding that the petitioner did not establish the ability to pay the offered wage of \$125,000. The officer abused his/her discretion in failing to accept a letter from the CFO of [the petitioner] attesting to the number of employees and ability to pay the wage pursuant to 8 C.F.R. § 204.5(g)(2)."

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, 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 (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 May 19, 2003, the beneficiary claims to have been employed by the petitioner from October 2002 to the present (May 19, 2003). In addition, counsel has submitted on appeal copies of the 2003 through 2005 Forms W-2 issued by the petitioner on behalf of the beneficiary to corroborate the beneficiary's claim. Therefore, the petitioner has established that it employed the beneficiary in the pertinent years, 2003 through 2005.

The petitioner is obligated to establish that it has sufficient funds to pay the difference between the proffered wage of \$100,000 and the actual wages paid to the beneficiary of \$100,158.42 in 2003, \$114,332.10 in 2004, and \$118,606.78 in 2005. Since the beneficiary was compensated at a wage higher than the proffered wage of \$100,000 in each of the pertinent years, the petitioner has established its ability to pay the proffered wage from the priority date and continuing through 2005.

However, the AAO does take issue with counsel's contentions on appeal. First, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not normally accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and usually does not consider the sufficiency of the evidence submitted on appeal. However, in this case, the AAO has decided to consider the Forms W-2 submitted on appeal since counsel claims that this evidence was not available at the time the director issued her notice of intent to deny (NOID)<sup>1</sup> and the petitioner's response to the NOID was in good faith.

Second, counsel claims that the "the adjudicating officer abused his/her discretion in not accepting the CFO letter as evidence of the petitioner's ability to pay the wage." However, if counsel reads the regulation at 8 C.F.R. § 204.5(g)(2) closely, he will note that the regulation specifically states that "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 the instant case, while CIS normally will accept a statement from a financial officer of a well established petitioner, the adjudicating officer was well within his/her rights to request additional evidence of the petitioner's ability to pay the proffered wage in the form of federal tax returns as the Form I-140, Immigrant Petition for Alien Worker, clearly stated that the petitioner was a start-up company and since CIS records reveal that the petitioner has filed an additional 72 petitions, both immigrant and nonimmigrant. In addition, while the regulation at 8 C.F.R. § 204.5(g)(2) states that the director may accept a statement from a financial officer of a petitioning organization if the prospective United States employer employs 100 or more workers, the regulation does not suggest that the letter from the CFO is sufficient evidence of the number of employees employed by the petitioner. In this case, the petitioner did not submit any evidence that corroborates the CFO's contention that the petitioner employs 419 workers. Furthermore, while the petitioner did submit several articles from its own website, none of the information in those articles relates to the petitioner's ability to pay the proffered wage, and they do not provide any evidence that the petitioner has met all its obligations in the past. Neither counsel nor the petitioner can justifiably expect CIS to accept articles from the petitioner's own website as confirmation of the petitioner's continuing ability to pay the proffered wage of \$100,000 from the priority date of May 23, 2003.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly,

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<sup>1</sup> It is noted that neither counsel nor the petitioner has explained why this evidence was not available at the time of the NOID. In order for the beneficiary to pay his taxes each year, he should have been provided with a Form W-2 in each of the pertinent years.

after a review of the 2003 through 2005 Forms W-2 submitted on appeal, issued by the petitioner on behalf of the beneficiary, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

For the reasons discussed above, the evidence submitted on appeal overcomes the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

**ORDER:** The director's decision of December 7, 2006 is withdrawn. The petition is approved.