

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass Ave. N.W., Rm. A3042
Washington, DC 20529

identifying data deleted to
prevent [redacted] arrante
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B6

APR 21 2005



FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 97 050 52946

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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: SELF-REPRESENTED

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, Director
Administrative Appeals Office

CC: [redacted]

DISCUSSION: The employment based immigrant visa petition was initially approved by the Director, California Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The acting director served the petitioner with a notice of intent to revoke the approval of the preference visa petition. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a firm that sells, services, and offers lessons on pianos and organs. It sought to employ the beneficiary permanently in the United States as an electronic engineer. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was originally filed on December 21, 1996. It was initially approved on January 20, 1997. The alien beneficiary filed an application to adjust his status to that of lawful permanent resident. Following an interview at the district immigration office on September 11, 1998, an overseas investigation was initiated. The director subsequently determined that the I-140 was approved in error and issued an intent to revoke the petition on October 23, 2002. The director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage as of the visa priority date and had failed to establish that the beneficiary possessed the requisite qualifying work experience as of the visa priority date. The petitioner's response and subsequent submission of additional evidence failed to convince the director to revise his decision and the petition's approval was ultimately revoked on February 27, 2003, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, the petitioner¹ asserts that the director's analysis did not accurately reflect the petitioner's ability to pay the proffered wage and that the petitioner has established that the beneficiary obtained the requisite work experience as of the visa priority date.

Section 205 of the Act, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

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

¹ Although the record contains several notices of entry of appearance as attorney or representative (Form G-28), they have all been submitted on behalf of the beneficiary, rather than the petitioner. As such, the petitioner will be considered as being self-represented. Current counsel for the beneficiary, who filed the appeal, will be provided a copy of this decision.

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

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

(ii) *Other documentation*—

(A) *General.* 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The petitioner must also show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on December 17, 1993. The proffered wage as stated on the Form ETA 750 is \$9.50 per hour or \$19,760 per year. On an amendment to the Form ETA 750B, signed by the beneficiary on January 30, 1995, the beneficiary states that he has been self-employed for the past three years. Referring to the petitioner, he states that he does "some work as an independent contractor for [the petitioner], especially when the jobs require my knowledge and expertise." No other financial documentation related to this claim was submitted with the initial evidence.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that no formal education is required, but an applicant must have two years of work experience in the job offered as an electronic engineer. Relevant to employment experience gained by the priority date of December 17, 1993, the beneficiary lists three past jobs on the ETA 750B. From July 1978 until December 1983, he states that he worked as a technician/driver (electronic engineer) for the G.A. Yupango & Co. in Manila, Philippines, installing, repairing, and tuning pianos and organs. From January 1985 until October 1988, the beneficiary states that he was a partner and operator of "Byter, Inc.," a musical instrument repair shop in Manila. The beneficiary also claims that he repaired and installed organs and other musical instruments as a self-employed electronic engineer in Manila, Philippines from November 1988 until December 1989.

On Part 5 of the December 1996 visa petition, the petitioner claims to have been established in 1988, to have a gross annual income of \$336,000, a net annual income of \$50,000 and to currently employ two workers.

In support of its ability to pay the proffered salary, the petitioner initially submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 1994. It shows "Sooren Yans" as the 100% shareholder of the petitioner. The petitioner reported -\$1,353 as taxable income before the net operating loss (NOL) deduction and special

deductions (line 28). Schedule L of the tax return shows that the petitioner had \$207,088 in current assets and \$110,050 in current liabilities, resulting in \$97,038 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, CIS will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also supplied copies of two documents signed by [REDACTED] Personnel Officer of G.A. Yupangco & Co. Both are dated February 18, 1984. One is a "certificate of training," stating that the beneficiary completed a six-month orientation training as an "electrone technician" before assuming his position as "technician-driver." Mr. [REDACTED] states that the training was conducted by "Japanese Technicians from the mother company, Yamaha Group of Companies, Nippon Gakki Co., Ltd." In the other "certification," Mr. [REDACTED] states that the beneficiary, "formerly a regular employee of G.A. Yupangco & Co., was employed as Technician-Driver, Service Department from July 16, 1978 to December 16, 1983."

Because the director deemed the evidence insufficient to substantiate the petition's approval, the director issued a notice of intent to revoke on October 23, 2002. The director cited an overseas field investigation, originally initiated by the district office in 1999, in which verification of the beneficiary's past employment had been sought. The director noted that an April 2001 field investigation in the Philippines had been unsuccessful. This attempt by the overseas officer in querying the human resource officer at Yupangco had been unproductive due to the lack of records and lack of any other documentation or memory of the beneficiary's employment. The director stated that attempts to verify the existence of the beneficiary's employment through the Filipino Social Security system had yet to elicit a response. The director concluded that the petitioner had not established that the beneficiary had two years of experience as an electronic engineer as set forth in the terms of the labor certification.

The director also determined that the evidence relating to the petitioner's ability to pay the beneficiary's wage offer of \$19,760 had been inadequate to support the approval of the petition. The director noted that evidence of this ability, pursuant to 8 C.F.R. § 204.5(g)(2), should be in the form of annual reports, federal tax returns, or audited financial statements. The petitioner was accorded thirty days to offer evidence in support of the petition and in opposition to the proposed revocation.

In response, the petitioner submitted a copy of a 1993 corporate tax return for a corporation named "Digital Piano and Organtown, Inc." with a different employer identification number than the original petitioner but the same shareholder. It shows a net taxable income before the NOL deduction of -\$145. Schedule L reflects that this business had \$59,170 in current assets and no current liabilities, resulting in \$59,170 in net current assets.

The petitioner further provided the 1996, 1997, 1998, 1999, and 2000 corporate tax returns of "Five Star Music Corporation." These tax returns reflect a third employer identification number and a different 100 % shareholder named "Arture Garapetian." These tax returns contain the following information:

	1996	1997	1998	1999	2000
Net income	-\$ 204	-\$ 3,359	-\$ 3,793	\$ 9,433	\$ 3,461
Current Assets	\$8,091	\$27,899	\$19,277	\$28,319	\$28,579

Current Liabilities	\$1,738	\$ 1,888	\$ 1,220	\$ 6,154	\$14,658
Net current assets	\$6,353	\$26,011	\$18,057	\$22,165	\$13,921

The petitioner did not provide its 1995 corporate tax return and indicated that it would take some time to obtain it. The AAO notes that other documentation in the file indicates that the beneficiary received \$910 from the petitioner in 1996 for repairs performed. In 1998, a state quarterly wage report shows that Five Star Music Corp. reported that it paid the beneficiary \$4,940.01 in wages for the last quarter in 1998. The record also contains evidence of limited remuneration paid to the beneficiary in 1993, 1994, 1999, and 2000 by the petitioner and by Five Star Music Corp.

With reference to evidence establishing the beneficiary's two years of qualifying employment experience as an electronic engineer, the petitioner resubmitted a copy of the February 18, 1984, certification from Mr. [REDACTED] as well a copy of a June 2001 letter from the Filipino social security department disallowing any social security information relating to the beneficiary, absent his authorization or the employer concerned. The petitioner did provide three Filipino social security documents. The first, dated August 24, 2001, merely verifies that the beneficiary paid a total of 31 monthly contributions from February 1979 until September 1990. The second document, appears to be a batch balance sheet, but contains no information relevant to the beneficiary's employment with specific employers in the Philippines. The third document is labeled as an online inquiry system and lists an employment date with [REDACTED]

On February 27, 2003, the director revoked the approval of the petition, concluding, in part, that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of December 17, 1993. Although the director failed to discuss the petitioner's net current assets, the director noted that the net taxable income as shown on the corporate tax returns failed to show sufficient funds to cover the proffered wage.

The director also found that the petitioner had failed to persuasively demonstrate that the beneficiary had obtained the requisite two years of qualifying experience as an electronic engineer as set forth in the ETA 750. The director noted that the social security information from the Philippines does not clearly substantiate the period of time that the beneficiary claimed to have worked for the [REDACTED]. The director also notes that the petitioner could not offer any documentation supporting the claim that the beneficiary was an electronic engineer and partner in Byter, Inc.

On appeal, the petitioner states that it has been shown that sufficient funds have been shown to be available to pay the proffered wage and further analysis would be provided in thirty days. Upon review of the record, the AAO finds that such analysis was not received by this office from the petitioner. It is noted, however, that correspondence from counsel representing the beneficiary in his adjustment case has submitted additional copies of the Filipino social security department's documentation already contained in the record and urges consideration that the petitioner established the beneficiary's qualifying employment experience. This correspondence was received on May 15, 2003.

The petitioner states on appeal that it has established the beneficiary's qualifying two years of experience and faults CIS for failing to accept the offered letter from Mr. Guiuan and failing to pursue further inquiries with the Filipino social security department.

After review of the evidence in the record, the AAO must concur with the director's conclusions regarding the inadequacy of proof related to the beneficiary's qualifying work experience. The letter from M [REDACTED] fails to state whether the beneficiary worked full-time or part-time and failed to provide any indication how much of his time as a technician/driver was spent as a technician and how much as a driver. Further, as noted by the director, and by the Filipino social security ledger, the beneficiary's employment at Yupangco & Co., for social security purposes, apparently did not begin until February 1979, rather than July 1978, as claimed by the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Whether and to what effect CIS made overseas inquiries, which were ultimately inconclusive, does not mitigate the petitioner's obligation to establish the beneficiary's eligibility at the time of filing. See *Matter of Katigbak*, 14 I&N 45, 49 (Comm. 1971). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) reflects that a petitioner submit letters from trainers or employers asserting sufficient credible specificity to establish that a beneficiary has met the educational, training or work experience required by the terms of the individual labor certification.

Regarding a petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible documentary evidence that it may have 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 during a given period. In the instant case, as mentioned above, the beneficiary received \$910 in 1996 and \$4,940.01 in 1998. If the difference between the proffered salary and the wages actually paid can be covered by either the net taxable income or net current assets, a petitioner is deemed to have established its ability to pay the proffered wage for a specified period.

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 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). Showing that wages paid to other employees reached a specified level or exceeded the proffered wage is not sufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, 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.

In this case, assuming the petitioner can be considered as including these three corporate entities, as set forth above, although the taxable net income shown on the corporate tax returns was not enough to cover the proffered wage in 1993, 1994, 1997, and 1999, even without including any compensation paid to the beneficiary, the net current assets of \$59,170, \$97,038, \$26,011, and \$22,165, respectively, was sufficient to pay the proposed wage offer of \$19,760 during each of these periods. Similarly, in 1998, the difference of \$14,819.99 between the actual wages paid of \$4,940.01 and the proffered salary of \$19,760 could be covered by the petitioner's net current assets of \$18,057.

In 1996, however, neither the petitioner's net taxable income of -\$204, nor its net current assets of \$6,353 could meet the difference of \$18,850 between the compensation paid and the proffered salary.

As also reflected on the 2000 tax return, neither the net taxable income of \$3,461, nor the net current assets of \$13,921 was sufficient to cover the proffered wage of \$19,760 per year.

Finally, as neither a 1995 tax return, annual report, or audited financial statement was provided to the record, it cannot be concluded that the petitioner demonstrated its ability to pay the proffered wage during this year. As the regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay the proffered wage beginning on the priority date, it can also be concluded that the evidence has not persuasively established this petitioner's continuing financial ability to pay the certified wage.

Beyond the decision of the director, it is noted that the different corporate entities' tax returns with three different tax identification numbers and two different 100% shareholders requires a more complete corroboration that these entities can be considered as the same petitioning business. The regulation at 20 C.F.R. § 656.30 provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. Labor certifications are valid indefinitely unless invalidated by the Bureau, a consular officer, or a court for fraud or willful misrepresentation of material fact involving the labor certification application. The Department of Labor and the former Immigration and Naturalization Service (INS) agreed that the INS would make a determination regarding whether the employer listed in the labor certification and the employer filing the employment-based immigration petition are the same entity or a successor-in-interest to the original entity. If the employer/employee relationship changes, the validity of the approved labor certification may be affected; thus, if the employer filing the preference petition cannot be considered a successor-in-interest to the employer in the labor certification, the job opportunity as described in the approved certification no longer exists because the original employer no longer exists. See *Matter of United Investment Group*, Int. Dec. 2990 (Comm. 1985). In *Matter of United Investment Group*, the original employer was a partnership, which had several changes in partners between the original filing of the labor certification application and the filing of the I-140. Although one partner had remained constant throughout the changes, it was found that the changes in partners represented a series of different employers, and the validity of the labor certification expired.

In this case, "Piano & Organ Liquidators Corp." named on the labor certification, is also the entity that filed as the petitioner on the I-140. Strictly speaking, because these entities appear to be the same, this is not a question of whether the I-140 petitioner is the successor-in-interest to the employer named on the labor certification, but whether the employer named on both documents remained a viable business entity. However, the analysis involves the principles set forth in a successorship-in-interest. In this matter, no first-hand evidence was contained in the record supporting the continued existence of an entity named Piano & Organ Liquidators Corp. Moreover, the tax returns, tax identification numbers and shareholder composition reflect three different entities. The record failed to corroborate that any documented buy-out or merger occurred which involved any of these companies from which it may be concluded that these businesses were successors-in-interest to each other. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In summary, based on the evidence contained in the underlying record, as well as the argument submitted on appeal, the AAO cannot conclude that the director erred in revoking the petition based on the petitioner's failure to establish its continuing ability to pay the proffered wage as of the visa priority date and had failure to persuasively establish that the beneficiary possessed the requisite qualifying work experience as of the visa priority date. In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition. Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Esteime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, supra, ((citing *Matter of Esteime*, 19 I&N 450 (BIA 1987)).

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 not met that burden.

ORDER: The appeal is dismissed.