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U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC-02-162-51802

Office: VERMONT SERVICE CENTER

Date: JUN 14 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

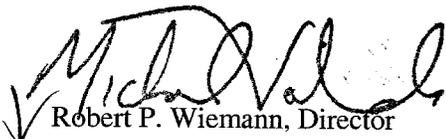
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook, for Nepalese and Indian cuisine. 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.

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.

The regulation at 8 C.F.R. § 204.5(g)(2) 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. 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 petition's 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 April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$11.46 per hour, which amounts to \$23,836.80 annually. On the Form ETA 750B, signed by the beneficiary on March 24, 2001, the beneficiary claimed to have worked for the petitioner beginning in 1995 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on April 13, 2002. On the petition, the petitioner claimed to have been established in 1997 and to currently have nine employees. In the items for gross annual income and net annual income the petitioner wrote the words "See Attached Papers." With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated August 14, 2002, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested a complete copy of the petitioner's federal

tax return for 2001. The director also stated that if the beneficiary was employed by the petitioner in 2001, the petitioner must submit copies of the beneficiary's Form W-2 Wage and Tax Statements showing how much the beneficiary was paid by the petitioner.

In response to the RFE, the petitioner submitted additional evidence, but no Form W-2's were among the evidence submitted. The petitioner's submissions in response to the RFE were received by CIS on November 8, 2002.

In a decision dated October 6, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the director erred by failing to consider the petitioner's depreciation expenses shown on its federal tax returns as evidence of additional financial resources of the petitioner, since those expenses are non-cash expenses. Counsel also states that the petitioner's tax return for 2002 shows continued growth in the petitioner's business. Finally, counsel states that the beneficiary's ability to generate income for the petitioner should be considered in evaluating the petitioner's ability to pay the proffered wage.

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). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, the documents newly submitted on appeal are copies of federal and state tax returns for the year 2002 and a letter from a certified public accountant dated November 3, 2003. None of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

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 first year of 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 750B, signed by the beneficiary on March 24, 2001, the beneficiary claimed to have worked for the petitioner beginning in 1995 and continuing through the date of the ETA 750B. In a letter dated January 16, 2001 the petitioner's president also states that the beneficiary has been working for

the petitioner since 1995 and continuing until the date of that letter. In the RFE, the director had requested copies of Form W-2 Wage and Tax Statements for the beneficiary for the year 2001, but no Form W-2's were submitted in evidence. Nor does any other evidence in the record indicate the amount of any compensation paid by the petitioner to the beneficiary. Therefore the evidence relating to the beneficiary's employment by the petitioner fails to establish the petitioner's ability to pay the proffered wage for the year 2001 or thereafter.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the following amounts for taxable income on line 28: \$7,585.00 for 2001 and \$16,399.00 for 2002. Since each of those figures is less than the proffered wage of \$23,836.80, those figures fail to establish the ability of the petitioner to pay the proffered wage in 2001 or in 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: \$15,802.00 for the beginning of 2001; \$3,973.00 for the end of 2001; and \$6,469.00 for the end of 2002. Since each of those figures is less than the proffered wage of \$23,836.80, they also fail to establish the ability of the petitioner to pay the proffered wage.

The record also contains letters dated September 18, 2002 and November 3, 2003 from a certified public accountant. In those letters, the accountant states that depreciation expenses of the petitioner should be considered as additional financial resources available to the petitioner, since they do not represent cash expenditures. Nonetheless, CIS will not add depreciation expenses back to the petitioner net income. See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The accountant states in his November 3, 2003 letter that the petitioner's interest expenses should be considered as additional financial resources of the petitioner in order to

more accurately reflect the cash flow of the petitioner. The accountant states that interest expenses in the amount of \$33,882.00 for the year 2001 were incurred by the petitioner when it purchased the building in which the petitioner's business operates. The accountant does not clarify how the petitioner's interest expenses create an inaccurate picture of the petitioner's cash flow. But in any event, CIS does not consider any expenses shown on a petitioner's federal tax returns to be additional financial resources of the petitioner.

Finally, the accountant asserts that the purchase in 2001 of the building housing the petitioner's business improved the petitioner's financial situation. Real property, however, does not appear on federal tax returns as one of the categories of current assets. Therefore real property is not considered as a financial resource readily available to the petitioner to pay the proffered wage to the beneficiary. Moreover, in the instant petition, the record lacks details on the purchase of the building described in the accountant's letter of November 3, 2003. Notably, the record lacks information on the amount of any mortgage liability incurred by the petitioner pursuant to that purchase, and on the amount of cash paid by the purchaser as part of that purchase.

In his brief, counsel states that the beneficiary's ability to generate income for the petitioner should be considered in evaluating the petitioner's ability to pay the proffered wage. The evidence discussed above indicates that the beneficiary has been working for the petitioner, though the evidence fails to establish the amount of compensation received by the beneficiary. But in any event, the record lacks evidence to establish any effect on the petitioner's income from hiring the beneficiary.

In his decision, the director correctly analyzed the petitioner's federal tax return for 2001, which was the only federal tax return then in the record. The director found that the net income shown on the 2001 return and the figure for net current assets calculated from the information on the Schedule L attached to that return were insufficient to establish the petitioner's ability to pay the proffered wage. The director also found that the record did not establish that the petitioner's depreciation deduction was not an actual expense of the business. The director's decision to deny the petition was correct, based on the evidence then in the record.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted for the first time on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the evidence in the record fails to establish that the beneficiary had the required experience as of the priority date. The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states the following concerning evidence which would establish a beneficiary's qualifications:

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.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS 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).

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a

subsequent time. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, the petitioner must illustrate that the beneficiary alien met the requirements for the position at the time it filed the alien labor certification application.

Certain safeguards within the regulatory scheme governing the alien labor certification process assure that petitioning employers do not treat alien workers more favorably than U.S. workers. Pursuant to 20 C.F.R. § 656.21(b)(5), a petitioning employer is required to document that its requirements for the proffered position are the minimum necessary for performance of the job and that it has not hired or that it is not feasible for the petitioner to hire workers with less training and/or experience. Furthermore, the regulation at 20 C.F.R. § 656.21(b)(5) addresses the situation of a petitioning employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the petitioner is not allowed to treat the beneficiary alien more favorably than it would a U.S. worker. *See ERF Inc., d/b/a Bayside Motor Inn*, 1989 INA 105 (U.S. Dept. Labor, BALCA, Feb. 14, 1990). According to the Department of Labor's interpretation of 20 C.F.R. § 656.21(b)(5), the beneficiary alien must have obtained his or her qualifying employment experience with an employer different than the petitioning employer. *See Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 1990 INA 200 (U.S. Dept. Labor, BALCA, May 23, 1991). The AAO will defer to the Department of Labor's interpretation of its own regulation.

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *See Matter of Katigbak*, 14 INA Dec. 45, 49. Thus, the petitioner must illustrate that the beneficiary alien met the requirements for the position at the time it filed the alien labor certification application. Additionally, the beneficiary alien must have obtained his or her qualifying employment experience with an employer different than the petitioning employer. *See Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 1990 INA 200.

In the instant petition, the ETA 750 requires two years of experience in the offered position. The only experience of the beneficiary stated on the ETA 750B is with the same petitioner/employer, experience which began in 1995. The only documentation of the beneficiary's experience is a letter dated January 16, 2001 from the petitioner's president, confirming that experience. Accordingly, the beneficiary does not meet the requirements of the labor certification because the beneficiary's only employment experience was acquired with the petitioning employer. *Id.*

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and fails to establish that the beneficiary had the required job qualifications as of 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 not met that burden.

ORDER: The appeal is dismissed.