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



U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 123 52577 Office: CALIFORNIA SERVICE CENTER Date: MAR 25 2005

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:



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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a garment manufacturing company. It seeks to employ the beneficiary permanently in the United States as an assistant garment designer. 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 the beneficiary had the requisite work experience to qualify for the position, and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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(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 worker.* If the petitioner 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 The minimum requirements for this classification are at least the two years of training or experience.

With the petition, the petitioner submitted Form ETA 750 that stated the position required a high school education along with four years of experience as an assistant garment designer. The petitioner also submitted a letter from [REDACTED] General Manager, Party Fashion, Tel Aviv, Israel, dated October 27, 1975. This letter stated that

the beneficiary had been the employee of Party Fashion from February 1991 to October 1995, and that he had worked as a garment/assistant designer.

Because the evidence submitted was insufficient to demonstrate the beneficiary's qualifications for the position, on June 13, 2003, the director requested additional evidence pertinent to the beneficiary's qualifications. In particular, the director stated that the letter provided by [REDACTED] of Party Fashion did not identify the duties or the number of hours worked each week and also was not on company letterhead. The director requested that the petitioner provide any additional evidence of his previous employment, and asked that any such evidence of prior experience should be submitted in letterform on the previous employer's letterhead showing the name, address, phone number, and title of the person verifying the information.

The petitioner then submitted three affidavits. One affidavit was from the beneficiary, the second was from his former supervisor, [REDACTED] who held the position of supervisor of production at Party Fashion, and the third was from [REDACTED] a production seamstress, who also worked with the beneficiary at Party Fashion. All three affidavits stated that the beneficiary worked for the same period of time for Party Fashion in Tel Aviv, Israel, namely, from February 1991 to either October or September 1994. The beneficiary stated he worked with Party Fashion from February 1991 to October 1994, [REDACTED] stated that the beneficiary worked at Party Fashion from February 1991 to October 1994, and [REDACTED] stated that the beneficiary began working at Party Fashion in February 1991, and was still working there when she left the company in September 1994.

On October 1, 2003, the director denied the petition and stated that the affidavits submitted by the petitioner only established three years and eight months of the beneficiary's work experience in clothing design. The director noted that the ETA 750 stated that four years of experience were required. The director also stated that Citizenship and Immigration Services (CIS) may not ignore a term of the labor certification, nor may it impose additional requirements.

On appeal, counsel states that through a harmless error, the beneficiary had inadvertently failed to list another previous job in which he received experience as a garment designer. Counsel states that since the beneficiary was not able to contact the other previous employer, the beneficiary did not present evidence of this relevant work experience in the immigration filings. Counsel identified this prior employer as [REDACTED] an Israeli company, and submitted a letter on plain paper from [REDACTED] owner, [REDACTED] Tel Aviv, Israel. The letterwriter states that he or she is owner and manager of [REDACTED] which was established in 1952 and is located in Tel Aviv. The letterwriter goes on to state that the beneficiary worked with the company as a garment designer from January 1989 to December 1990, for a minimum of 40 hours a week. The letter also describes the beneficiary's duties while working for [REDACTED]. Counsel asserts that based on the beneficiary's work experience with [REDACTED]; the beneficiary had a total of five years, eight months of work experience acquired before the priority date of October 7, 1996.

Counsel's explanation of the submission of another letter detailing further work experience on appeal is not persuasive. 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). In his request for further evidence, the director requested evidence as to the beneficiary's qualifications, namely the requisite four years of work experience. Although counsel asserts on appeal, that the beneficiary was aware of his prior employment with [REDACTED] at the time the I-140 petition was filed, and therefore, was also aware

of this employment when the director requested further evidence, no mention was made of this prior employment by either counsel or the petitioner in the petitioner's response to the director's request for further evidence.

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 accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner and the beneficiary had wanted the claimed work experience with ██████ to be considered, it should have submitted a letter or an explanation of why a letter was not available at the time the petitioner responded to the director's request for further evidence. *Id.* Nevertheless, even if the information about ██████ had been presented earlier, no such information is contained on the original ETA 750 Form, which undermines significantly the weight to be given to such correspondence. Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal with regard to the beneficiary's qualifications. Therefore, the petitioner cannot establish the beneficiary's qualifications with regard to the requisite four years of work experience as a garment designer.

Beyond the decision of the director, the petitioner also has not established that it has the ability to pay the proffered wage as of the 1996 priority date onward.

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day 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). Here, the Form ETA 750 was accepted for processing on October 7, 1996. The proffered wage as stated on the Form ETA 750 is \$8.50 per hour, which amounts to \$17,680 annually.

In support of the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the calendar years July 1, 1999 to June 30, 2000, and for July 1, 2000 to June 30, 2001, and for July 1, 2001 to June 30, 2002. The petitioner also submitted Forms DE-6, Quarterly Wage and Withholding Reports for the four quarters of 2002. These documents indicated the petitioner employed between fourteen and twenty-four employees in 2002. The petitioner also submitted Bank of America business checking account monthly statements for March to August 2000.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 13, 2003, the director requested additional evidence pertinent to that ability. The director noted that the priority date of the ETA 750 is October 7, 1996 and

specifically requested copies of the petitioner's federal tax returns, with all accompanying schedules, statements and attachments, for the years 1997, 1998, and 1999.

In response, the petitioner submitted Form 1120 corporate tax returns for the petitioner for the years 1997, 1998, and 1999. These returns covered the period of time from July 1, 1997 to June 30, 2000. Counsel noted the petitioner's assets and gross receipts for each year. Counsel stated that although the company had a net operating loss of \$141,348 in 1997, it appeared that this was due to a carryover generated from year-end of June 30, 1996. As such, counsel stated this figure was a mere book entity which did not affect the company's cash flow or viability. Counsel noted that this carryover figure affected the petitioner's assets and total sales in 1998, and 1999, and that only in 2000, with more growth, did the petitioner have positive taxable income which continued in 2001.

Although the director did not address the issue of whether the petitioner has the capability to pay the proffered wage as of the priority date to the present in her decision, the AAO will analyze this issue in the current proceedings.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) 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. The petitioner did not claim to have employed the beneficiary as of the priority date. Thus, the petitioner cannot establish that it employed and paid the beneficiary the full proffered wage in 1996 and onward.

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 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 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, now CIS, should have considered income before expenses were paid rather than net income. With regard

to the petitioner's net income, its federal income tax returns document the following net incomes for the period of time from July 1, 1997 to June 30, 2002: -\$141,348 in 1997; -\$86,064 in 1998; -\$122,698 in 1999; \$1,157,954 in 2000; and \$3,128,009 in 2001. Based on the net income figures in 2000, and 2001, the petitioner has established its ability to pay the proffered wage in 2000 and 2001; however, the petitioner's net income figures in 1997, 1998, and 1999 are not sufficient to establish the petitioner's ability to pay the proffered wage.¹

The petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. In addition, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year 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. It is noted that the petitioner submitted no federal income tax return that covered the salient part of 1996 and that the petitioner's 1999 federal income tax return contains no Schedule L. Therefore these two years cannot be examined with regard to net current assets. Only the petitioner's net current assets in 1997 and 1998 will be examined. The petitioner's tax returns reflect the following information for these two years:

	1997	1998
Taxable income ³	\$ -141,348	\$ -86,064
Current Assets	\$ 700,089	\$ 643,174
Current Liabilities	\$ 6,988	\$ 153,702
Net current assets	\$ 693,101	\$ 489,472

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1996 to 1999. However, based on the petitioner's net current assets for 1997 and 1998, as illustrated above, the petitioner had sufficient net current assets in both years to establish its ability to pay the proffered wage of \$17,688. Nevertheless, as

¹ It is noted that the director did not request the petitioner's federal income tax return for 1996, which would be necessary to establish whether the petitioner had the ability to pay the proffered wage as of the priority date of October 1996.

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

³ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

previously stated, the petitioner did not submit its federal income tax return for 1996 to provide more information with regard to its net income or net current assets to establish whether the petitioner had the ability to pay the proffered wage as of October 7, 1996, the priority date. In addition, there is no Schedule L in the petitioner's 1999 federal income tax returns which would allow an examination of the petitioner's net current assets for 1999. Accordingly, although the petitioner has established its ability to pay the proffered wage in four of the six years in the period of time in question, it has not established that it has the capability of paying the proffered wage as of the priority date to the present. 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. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In addition, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present.

As stated previously, the petitioner has not established the beneficiary's qualifications as of the priority date. In addition, the petitioner has not established that it has the capability to pay the proffered wage as of the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.