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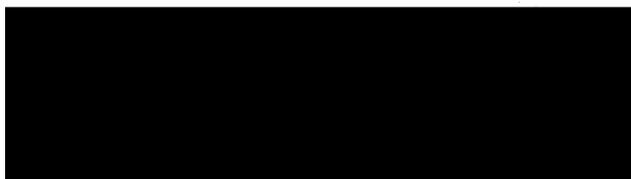
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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File: [Redacted] Office: TEXAS SERVICE CENTER Date: AUG 14 2006
SRC-05-038-51274

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a custom drapery and design shop that seeks to employ the beneficiary permanently in the United States as an alteration tailor ("Custom Tailor"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's March 3, 2005, denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence. The case was additionally denied based on the petitioner's failure to document that the beneficiary had all of the required training and experience as set forth in the certified ETA 750.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

The regulation 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 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 26, 2001. The proffered wage as stated on Form ETA 750 for the position of an alteration tailor is \$10.00 per hour, \$15.00 hour for overtime, 40 hours per week, which is equivalent to \$20,800.00 per year. The labor certification was approved on October 5, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on November 24, 2004. Counsel listed the following information on the I-140 Petition related the petitioning entity: established: April 1991; gross annual income: \$589,896; net annual income: "see letter"; and current number of employees: 7; salary: \$400 per week.

On January 26, 2005, the Service Center issued a Notice of Intent to Deny ("NOID") based on the petitioner's failure to demonstrate its ability to pay the beneficiary the proffered wage, and to show that the beneficiary had the required training and experience. The director determined that the evidence submitted in response to the NOID was insufficient, and denied the case on March 3, 2005.

The evidence in the record of proceeding regarding the petitioner's ability to pay includes the petitioner's U.S. Federal Tax Returns for the years 2001 and 2002, along with Forms 941, Employer's Quarterly Federal Tax Return for the quarters ending: March 31, 2003, June 30, 2003, September 30, 2003, March 31, 2004, June 30, 2004, September 30, 2004, December 31, 2004. On appeal, the petitioner additionally submitted a letter from an accountant for the company, as well as a "profit and loss" statement from the time period October 2003 through September 2004.

We will initially examine the petitioner's ability to pay pursuant to Citizenship & Immigration Services (CIS) policies. We will then examine the petitioner's additional arguments, and finally turn to the question of the beneficiary's documented experience. First, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will 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. On Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not list that she was employed with the petitioner. The petitioner has not claimed that they have employed the beneficiary.²

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. 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). 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.

² A letter from the petitioner's "enrolled agent," or accountant, states that the beneficiary will only be employed after she obtains "legal employment status."

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$20,800.00 per year from the priority date. The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. Line 21 indicates ordinary income as follows:

<u>Tax year</u>	<u>Net income or (loss)</u>
2002	\$7,896
2001	-\$10,410

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in either year.³

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 the difference between the petitioner's current assets and current liabilities.⁴ 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 on the Forms 1120S. 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2002	-\$19,493
2001	\$25,228

Following this analysis, the petitioner's Federal Tax Returns shows that the petitioner would have the ability to pay the proffered wage in the year 2001, but would lack the ability to pay the required wage in 2002.

Counsel contends on appeal that the "financials and training were not explicit and are attached in detail." The petitioner's accountant submitted a letter explaining that in a subchapter S corporation "the net profit or loss from the business in any tax accounting period is taxed on the tax return of the majority shareholders . . . in fact it is often a tax planning tool to create losses in the corporation by paying the officer additional salary as cash flow allows. This is in fact what was done on the 2001 tax return." Further, the accountant asserts, "ordinary income is calculated AFTER GROSS WAGES ARE PAID OR 'PROFFERED.'" [Emphasis in original]. Therefore the assertion in the petitioner denial [sic] that the ordinary income is not equal to or

³ The petitioner files pursuant to a tax year schedule: for example, the petitioner's 2001 taxes are based on the dates of October 1, 2001 to September 30, 2002. The service center requested that the petitioner submit evidence of its ability to pay for the year 2003, which would have been partially covered by the 2002 tax return for the dates of October 1, 2002 to September 30, 2003. The petitioner did not submit a tax return for 2003, which may not have been available at the time of filing the I-140 petition. Therefore, we lack information related to the petitioner's ability to pay from the priority date to October 1, 2001, and from September 30, 2003, until the date that the record closed.

⁴ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

greater than the proffered wage is a completely erroneous statement. It is also customary that the worker turnover in this business is high. So the individuals who were paid gross wages during the periods 10/1 – 9/02 and 10/02 - 9/03 may no longer be at their jobs. In this case their wages would be paid to the Beneficiary AFTER SHE OBTAINS LEGAL EMPLOYMENT STATUS.” [Emphasis in original].

While the benefits of an S corporation that the accountant states may in fact be true, the accountant’s assertions in no way demonstrate or point to where the proffered wage would come from to pay the beneficiary. We have no statement and evidence that the officer is willing and able to waive part of his compensation to pay the proffered wage. And while industry turnover may be high, the petitioner has not submitted evidence of which, if any, of the petitioner’s employees has left or been terminated, the wages paid to that employee, and proof that the wages previously paid will now be paid and available to the beneficiary.

Regarding the additional documents submitted, the record contains a profit and loss statement was for the time period October 2003 through September 2004. Where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. See 8 C.F.R. § 204.5(g)(2). An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance that the business’ financial statements are free of material misstatements. The “profit and loss statement” that counsel submitted is akin to an unaudited financial statement, and therefore, not persuasive evidence. The report was produced pursuant to a compilation rather than an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form, and the unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner additionally submitted Forms 941 to show quarterly wage payments. The forms reflect only that the petitioner has paid wages to employees. However, the evidence does not demonstrate that the petitioner has paid the beneficiary, and, therefore, is not relevant.

Based on the foregoing, the petitioner has failed to demonstrate its ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

A second point raised in the director’s denial was the petitioner’s failure to document that the beneficiary had all of the required education, training, and experience as required in the certified ETA 750. 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 labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition’s priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date 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).

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(1)(3):

(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 beneficiary must demonstrate that she had the required skills by the priority date of April 26, 2001. On the Form ETA 750A, the "job offer" states that the position requires two years of training in tailoring,⁵ and two years of experience in the job offered, as an alteration (custom) tailor, or two years in a related occupation of apprentice tailoring, or custom tailoring, with job duties including: "Develop, design & make custom products-all types of clothing. Apply principals of garment design, construction & style. Work with customers to determine type of fabric and style desired. Measure customer for size, record all information & prepare patterns. Develop designs for garments or copy existing designs; make separate patterns for all products and be able to alter . . . be able to interpret designers' drawings & visualize finished products." The petitioner listed that the position required grade school education in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, the beneficiary listed that she completed "general education" from September 1982 to June 1990 in the Czech Republic. She also lists that she studied at Stredni Odborne Uciliste, Ostrava-Michalkovice, in the Czech Republic from September 1990 to June 1993. She listed that her field of study was as a "Tailor," and for degree or certificate received "Apprenticeship (See certificate attached)."

She listed prior experience as: (1) self-employed, custom tailor, Tampa, Florida, June 1998 to "present" (the time of filing the labor certification), the number of hours worked per week were not listed; (2) self-employed, custom tailor, Brusperk, Czech Republic, from July 1995 to May 1998, the number of hours worked per week were not listed; and (3) Fa Sarm, tailor, clothing shop, Brusperk, Czech Republic, June 1993 to June 1995, 40 hours per week.

As evidence to document the beneficiary's qualifications, the petitioner submitted the following letters:

1. Letter from Fa Sarm, from the owner, [REDACTED] (not on company letterhead);
Dates of employment: June 1993 to June 1995 (the letter does not specify whether the position was full-time or part-time, and does not list the number of hours worked per week);
Title: not listed;

⁵ The amount of training and experience listed on the ETA 750A was reduced while the labor certification was pending from the three years initially listed to two years, a correction which was approved by DOL.

Job Duties: "cutting fabric to my specifications, or from a picture and pined [sic] it together, sewed it and then fitted it on the mannequin while checking for any errors. She learned to make many difficult patterns, work together, repaired and sewed them. She made entire garments, not just sleeves or parts. It was a pleasure working with Petra from the entire time she graduated from her tailoring school through the two years."

2. Letter from [REDACTED] (not on company letterhead);
Dates of employment: June 1995 to May 1998 (the letter does not specify whether the position was full-time or part-time, and does not list the number of hours worked per week)
Title: not listed;
Job Duties: "[REDACTED] sewed according to my requirement ideas and according to fashion magazines. She made her own patterns in all different sizes. I sold [REDACTED] custom made clothing in my shop, and they were much in demand. On the side she made custom clothes for customer's special requirements. In my shop she made custom patterns to order. She was a favorite with our customers. Besides sewing clothes, she made bedding and home decorations."⁶

To document the beneficiary's two years of training, the petitioner submitted: a "trade license" issued in 1995 for the "enterprise" of a "dressmaker," and "report cards" (similar to transcripts) for her studies at Stredni Odborne Uciliste, which lists her program of specialization as "dressmaker." The "report cards" list that she took courses in a variety of areas, including for the school year 1992 to 1993: Czech language and literature, German language, civics, mathematics, physical education, economics and organization, as well as more specialized courses in: machines and devices, clothing materials, drawing and construction of cuts, clothing technology, and special training; for the school year 1991 to 1992: Czech language and literature, German language, civics, mathematics, physical education, fundamentals of automation, chemistry, as well as more specialized courses in: machines and devices, clothing materials, drawing and construction of cuts, clothing technology, and special training; and for the school year 1990 to 1991: Czech language and literature, German language, civics, mathematics, chemistry, physical education, ecological fundamentals, fundamentals of automation, as well as more specialized courses in: machines and devices, clothing materials, drawing and construction of cuts, clothing technology, and special training.

The petitioner additionally submitted an evaluation report completed by the Foundation for International Services. The report outlines the beneficiary's studies and finds that the training completed would be equivalent to completion of grade 11 from a secondary vocational institute in the U.S. The evaluator reviewed her resume, showing eight and one-third years of experience, and three letters to document her experience, which the evaluator concluded was equivalent to an associate's degree in fashion and interior design in the U.S.

Based on the beneficiary's studies completed at Stredni Odborne Uciliste, it is apparent that the beneficiary has received some training in tailoring. However, it is not readily apparent that the three years spent studying Czech language, literature, and other studies would be equivalent to specifically two years of full-time training in tailoring. Further, the evaluation report finding that the beneficiary would have the equivalent of an Associate's degree in fashion and interior design does not demonstrate that she has two years of training in tailoring. The evaluation is additionally based on a formula considering three years of *experience* deemed

⁶ We note that this letter may conflict with the information the beneficiary listed on the ETA 750B for this time period. Based on the letter and the ETA form, it may be possible that the beneficiary was self-employed and did some work for the author of the letter and that boutique's customers, however, the reason for discrepancy between the letter and the ETA 750B is unclear.

equivalent to one year of university level credit. While part of the beneficiary's curriculum at Stredni Odborne Uciliste was related to tailoring, the completed studies would appear to only represent approximately 1.5 years of training over the course of the three school (partial) years.

Additionally, the letters provided are deficient in that they do not specify whether the beneficiary worked full-time or part-time, and therefore, the exact amount of the beneficiary's prior experience cannot be determined. While it is likely that the letter provided from Fa Sarm would provide for two years of experience, this cannot be definitely determined based on the letter as the letter is presently drafted. Further, the second letter from [REDACTED] conflicts with the "self-employment" listed on the beneficiary's ETA 750B for this time period. No explanation has been provided for this discrepancy.

Based on the documentation submitted, we cannot conclude that the beneficiary has met the training requirements set forth on the labor certification. Therefore, the petition was properly denied for: (1) failure to demonstrate that the petitioner could pay the beneficiary the proffered wage beginning on the priority date until the beneficiary obtains permanent residence; and for (2) failure to demonstrate that the beneficiary met all the requirements of the position offered.

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.