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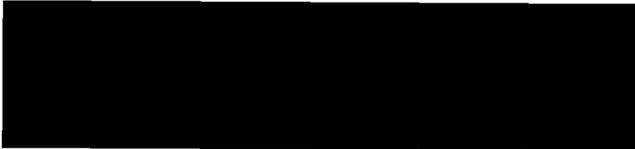
Office: VERMONT SERVICE CENTER

Date: JUN 13 2006

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director (Director), Vermont 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 seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The director determined that the petitioner failed to establish its ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel indicated that she would submit a brief and/or evidence to the AAO within 30 days and stated the following: "The petitioner represents that he has filed amended Tax Returns for 2001 and was in a position to pay the proffered (sic) wages at the time of filing the Petition in 2001."

Counsel dated the appeal November 15, 2004, and the appeal was received on November 19, 2004. As of this date, more than 17 months later, the AAO has received nothing further. The AAO sent a fax to counsel on May 11, 2006, informing counsel that no separate brief and/or evidence was received to confirm whether or not she would send anything else in this matter, and as a courtesy, providing her with five (5) days to respond. To date, more than three weeks later, no reply has been received.

The petitioner is a "wholesale seller of meat, dairy, and groceries." The petitioner seeks to employ the beneficiary permanently in the United States as a manager, sales, for the grocery, deli market. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. As set forth in the director's October 29, 2004, denial, the denial was based on whether or not the petitioner has the ability to pay the proffered wage. The director found that the petitioner did not demonstrate the continuing ability to pay the required wage, and the director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes an 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.

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 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 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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 25, 2001. The proffered wage as stated on Form ETA 750 for the position of a sales manager is \$31 per hour, 40 hours per week, which is equivalent to \$64,480.00 per year.

The labor certification was approved on July 14, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on October 9, 2003. A request for additional evidence ("RFE") was sent to the petitioner on June 10, 2004, asking the petitioner to submit the beneficiary's Form W-2 Wage and Tax Statement, if the beneficiary were employed by the petitioner; or any other evidence to show that the company could pay the proffered wage, including, but not limited to, accredited profit/loss statements, bank account records, or personnel records. The petitioner had until September 5, 2004, to respond to the RFE. On September 2, 2004, counsel for the petitioner sent a request asking for more time to respond as the company's accountant was overseas. The petitioner did not send a response to the RFE. On October 29, 2004, the director denied the petition based on the petitioner's lack of ability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

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 appeal¹.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the I-140 petition filed on October 9, 2003, the petitioner listed the following information related to the petitioning entity: established 1997; gross annual income: \$313,058.00; net annual income: \$97,483.00; and that the petitioner had two employees. The I-140 Petition additionally listed the beneficiary's salary at \$15 per hour.² The record does not contain any other evidence relevant to the petitioner's ability to pay the wage other than the 2000 and 2001 federal tax returns submitted.

The petitioner must establish that its 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. Therefore, the petitioner must establish that the job offer was realistic as of the priority date, here, April 25, 2001, 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).

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (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. In the instant case, the petitioner has not claimed that it

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). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The petitioner had initially listed \$15 per hour on the Forms ETA submitted to the Department of Labor. The Department of Labor determined that the proper wage for the position based on the job title, and job duties was \$31 per hour. The application was certified based on the petitioner paying the beneficiary the wage of \$31 per hour, and not the \$15 that the petitioner lists on the Form I-140.

employed and paid the beneficiary the full proffered wage from the priority date of April 25, 2001. On Form ETA 750B, signed by the beneficiary on February 25, 2001, the beneficiary did not claim to have worked for the petitioner.

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).

The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for the years 2000, and 2001.³

For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return.

The petitioner's tax returns state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2000	\$2,267
2001	-\$2,280

The petitioner's net income would not allow for payment of the beneficiary's proffered wage of \$64,480.00 in either tax year, 2000, or in 2001. The petitioner therefore cannot demonstrate its continuing ability to pay the wage from the priority date of April 25, 2001, until the beneficiary obtains lawful permanent residence.

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, and a corporation's 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

³The petitioner files its taxes based on a "tax year" beginning June 1 and ending on May 31 for each year, so that the 2000 tax return covers the time period June 1, 2000 to May 31, 2001, and the 2001 return covers the time period June 1, 2001 to May 31, 2002. We note that, therefore, the tax year 2002 return might not have been available at the time of filing the I-140 Petition on October 9, 2003, but would have been available at the time the RFE was sent to the petitioner's counsel in June 2004. The petitioner did not, however, submit the 2002 tax return at any time.

⁴According 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.

out of those net current assets, and evidences the petitioner's ability to pay. CIS expects that the net current assets could be converted to cash as the proffered wage becomes due.

Following this second analysis, the petitioner's Federal Tax Return similarly shows that the petitioner lacks the ability to pay the required wage.

- The petitioner's net current assets during 2000 were \$41,998.
- The petitioner's net current assets during 2001 were \$48,218.

Under this method of evaluation, the petitioner has similarly failed to establish its ability to pay the proffered wage of \$64,480.00 from the priority date until the beneficiary obtains lawful permanent residence, as the petitioner did not have sufficient net current assets to pay the wage.

While petitioner's counsel asserts on the I-290B appeal form that the petitioner has filed amended Tax Returns for 2001, and could pay the proffered wage at the time of filing the labor certification, the petitioner has failed to submit any additional evidence, or the amended tax return referenced.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, April 25, 2001, to the present, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage. The petitioner fails this test under an examination of wages paid to the beneficiary (no evidence), its net income (insufficient for tax years 2000 and 2001), or net current assets (insufficient for tax years 2000 and 2001).

Further, although not raised in the director's denial, we find a conflict between the beneficiary's experience listed on his Form ETA 750B, and the lack of experience listed on Form G-325 filed with his adjustment of status application. The discrepancy in experience listed on these two separate forms raises concerns regarding the beneficiary's veracity. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." Further, "it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice." *Matter of Ho*, 19 I&N Dec. at 591-592.

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).

On the Form ETA 750A, the "job offer" states that the position requires three years of experience in the job offered, as a manager, sales, with job duties including "directs purchases and distributes food and supplies to the store; reviews purchase orders; arranges for disposal (sic) surplus material; analyzes (sic) market and delivery condition for future material; estimates food and beverage availability costs and coordinates food

service activities with different vendors.” The petitioner listed no other educational requirements in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed by the beneficiary, but not dated, the beneficiary listed only one prior employer relevant to the position, his employment with the [REDACTED], a meat market, from the dates December 1997 to December 2000.

At the I-140 stage, as evidence of prior experience, the petitioner submitted a letter to document the beneficiary’s prior work as required by 8 C.F.R. § 204.5(1)(3).⁵ The petitioner submitted a letter, which indicated that the beneficiary had worked at the House of Shindler from December 1, 1997 to December 2000. While this would be acceptable for purposes of the I-140, on the beneficiary’s Form G-325, he fails to list any employers for the last five years. The beneficiary signed the Form G-325 on September 27, 2003. The five years prior to his signature would include from September 1998 to September 2003. These dates would include the time period that the beneficiary claimed to have been employed with the [REDACTED]. Whether the forms were not properly filed out, or whether the beneficiary lacked the experience claimed is unclear. While this discrepancy would not affect the experience documented for purposes of the I-140, we note the inconsistency for purposes of the record.

Since the petitioner has failed to demonstrate that it can pay the beneficiary the proffered wage, the case was properly denied. The petitioner’s assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns submitted by the petitioner, which demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on 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 denied.

⁵ 8 C.F.R. § 204.5(1)(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.