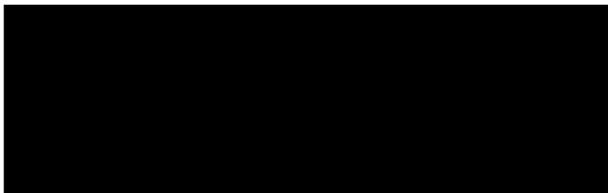


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U.S. Citizenship  
and Immigration  
Services

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BE

FILE: [REDACTED]  
SRC 03 157 52716

Office: TEXAS SERVICE CENTER Date:

**MAY 10 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)

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, Chief  
Administrative Appeals Office

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

The petitioner is a body shop.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as an automobile-body repairer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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, that the director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director 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 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 shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

<sup>1</sup> The petitioner is also known as Floridavest Corp.

Here, the Form ETA 750 was accepted on April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$15.69 per hour (\$32,635.20 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 2001 and 2002; a job verification dated March 27, 1998; four W-2 Wage and Tax Statements; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director issued a notice of intent to deny on October 25, 2004, for pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested the beneficiary's W-2 Wage and Tax Statements for 2001, 2002 and 2003 also pay stubs, and cancelled payroll checks. The director requested evidence of the petitioner's ability to pay the proffered wage for 2003. The director also requested annual reports with audited financial statements, federal tax returns, or annual reports.

Relative to the beneficiary's Form ETA Part B, the director requested the original document.

In response to the request counsel submitted a copy of the beneficiary's original Form ETA Part B; the beneficiary's driver's license and Employment Authorization Card; Form I-797N; the petitioner's 2003 U.S. federal tax return; a financial statement prepared without an audit; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax return for year 2003; approximately 22 checking account statements; the beneficiary's Form 1099-MISC for 2003; 14 cancelled checks issued in 2004; beneficiary's amended Form 1040X tax return for 2003 with the beneficiary's and spouse's personal tax information; and, a State of Florida personal tax return.

The director denied the petition on December 3, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, that the director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

On appeal, counsel asserts that the employment of the beneficiary "will be a source of increased revenues" to petitioner; and, the petitioner's ability to pay is not reflected in the petitioner's tax returns. Counsel asserts, "... the balance sheet is only a snap shot of the employer's assets."

Counsel has submitted copies of the following documents to accompany the appeal statement: a job verification dated March 27, 1998; and, an excerpt of commentary to the U.S. Department of Labor PERM regulations. (Since the Form ETA 750 was accepted on April 12, 2001, the later PERM regulations are not applicable to the subject case). Also submitted were the U.S. federal tax returns for 2001 2002 and 2003 already submitted in response to the above mentioned notice of deny and with the petition; as well as other documentation already submitted into the record of proceeding.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. Evidence was submitted to show that the petitioner employed the beneficiary. The beneficiary's Form 1099-MISC for 2003 stated compensation paid of \$6,584.82. Cancelled checks were submitted showing total payments in 2004 of \$4,834.68 by the petitioner to the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$32,635.20 per year from the priority date of April 12, 2001:

- In 2001, the Form 1120S stated a taxable income loss<sup>2</sup> of <\$7,909.00>.<sup>3</sup>
- In 2002, the Form 1120S stated a taxable income loss of <\$34,090.00>.
- In 2003, the Form 1120S stated a taxable income loss of <\$88,890.00>.

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 2003, the Form 1120S stated a taxable income loss of <\$88,890.00>. The beneficiary's Form 1099-MISC for 2003 stated compensation paid of \$6,584.82. The proffered wage is \$32,635.20 per year. The sum of the taxable income loss and compensation for 2003 is less than the proffered wage.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2003 for which the petitioner's tax returns are offered for evidence.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered

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<sup>2</sup> IRS Form 1120S, Line 21.

<sup>3</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

wage. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of \$1,962.00 and \$31,135.00 in current liabilities. Therefore, the petitioner had <\$29,173.00> in net current assets. Since the proffered wage is \$32,635.20 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$2,743.00 and \$64,873.00 in current liabilities. Therefore, the petitioner had <\$62,130.00> in net current assets. Since the proffered wage is \$32,635.20 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120S return stated current assets of \$5,034.00 and \$156,755.00 in current liabilities. Therefore, the petitioner had <\$151,721.00> in net current assets. Since the proffered wage is \$32,635.20 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts that the petitioner's ability to pay is not reflected in the petitioner's tax returns. Counsel asserts, "... the balance sheet is only a snap shot of the employer's assets." According to regulation,<sup>5</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. As is described above there are several alternative methods in which the petitioner may demonstrate its ability to pay the proffered wage. In this case, neither taxable income, net current assets, actual wages paid the beneficiary, or actual wage plus net current assets demonstrates that the petitioner had the ability to pay the proffered wage from the priority date.

Counsel asserts that the employment of the beneficiary "will be a source of increased revenues" to petitioner. Since the beneficiary has been employed by the petitioner in 2003 and 2004, counsel's premise has not been substantiated by the largest taxable loss reported, <\$88,890.00>, in 2003 out of the three years examined. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as an automobile – body repairer will significantly increase petitioner's profits. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>5</sup> 8 C.F.R. § 204.5(g)(2).

Counsel submits a financial statement prepared without an audit as evidence of the ability to pay the proffered wage. The unaudited financial statements that petitioner submitted are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the unaudited financial statements are of little evidentiary value in this matter.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a automobile-body repairer will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The second issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of an automobile-body repairer.

In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education .....	
	Grade School	<u>6</u>
	High School	<u>2</u>
	College	<u>0</u>
	College Degree Required	<u>N/A</u>
	Major Field of Study	<u>N/A</u>
	Training	<u>0</u>
	Experience (Years/Months)	<u>2/0</u>
	Training	<u>N/A</u>
	Years (Years/Months)	<u>0</u>

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, set forth work experience that an applicant listed for the position of an automobile-body repairer.

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER

Odd Jobs

NAME OF JOB

N/A

DATE STARTED

Blank

DATE LEFT

Blank

KIND OF BUSINESS

Blank

DESCRIBE IN DETAIL DUTIES...

N/A

NO. OF HOURS PER WEEK

Blank

15. WORK EXPERIENCE

b. NAME AND ADDRESS OF EMPLOYER

New York

NAME OF JOB

Automobile-body repairer

DATE STARTED

Month - 01 [January] Year - 1998

DATE LEFT

Month - 01 [January] - 2000

KIND OF BUSINESS

Body shop

DESCRIBE IN DETAIL DUTIES...

Repair damaged bodies and body parts of automotive vehicles ...

NO. OF HOURS PER WEEK

40

15. WORK EXPERIENCE

c. NAME AND ADDRESS OF EMPLOYER

Classic U.S.A.

NAME OF JOB

Automobile-body repairer

DATE STARTED

Month - 02 [February] Year - 1997

DATE LEFT

Month - 04 [April] - 1998

KIND OF BUSINESS

Body shop

DESCRIBE IN DETAIL DUTIES...

Repair damaged body parts of automotive vehicles.

NO. OF HOURS PER WEEK

40

In this case the beneficiary's Form G-325A dated April 29, 2003, stated that he was employed in odd jobs from February 1997 to the date of signing as an automobile body repairer with no other employment list for the five prior years. As noted by the director, the above stated employment with New York Painting Body Shop, Inc. and Classic U.S.A. conflicts with the Form G-235A information. Other than resubmitting job verification dated March 27, 1998 from New York [REDACTED] there was no explanation offered on appeal by any party for the inconsistency in job experience affirmations.

The purpose of the Notice of the Intent to Deny 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). The failure to submit requested evidence to explain the inconsistency that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Further, the pertinent regulation states in part, "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." *See* 8 CFR § 204.5(1)(3)(ii). Since there is no description of the training received or the experience of the alien, this job verification has less probative value in this matter.

There are inconsistencies in information provided by the beneficiary. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast 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." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "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."

The AAO concurs with the director's determination that no probative evidence establishes that the beneficiary has two years of experience as an automobile-body repairer. No pay stub contained in the record of proceeding establishes that the beneficiary was employed for two years in an employment capacity with duties similar to the duties of the proffered position prior to the priority date.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary had the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.