U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 06 2006
WAC-03-243-54001

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[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, Chief
Administrative Appeals Office

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

The petitioner is a clothing manufacturing and wholesale company. It seeks to employ the beneficiary permanently in the United States as a commercial and industrial designer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification application or Form ETA 750), approved by the 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 petitioner failed to provide evidence to prove the beneficiary's qualifying experience. The director denied the petition accordingly.

Counsel filed a timely appeal with a brief and additional evidence.[1]

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 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. *See* 8 CFR § 204.5(d). 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).

Here, the Form ETA 750 was accepted on September 13, 2001. The proffered wage as stated on the Form ETA 750 is $4,254 per month ($51,048 per year). The Form ETA 750 states that the position requires two (2) years experience in the job offered. On the Form ETA 750B signed by the beneficiary on August 30, 2001, he claimed to have worked for the petitioner since January 2001. On the petition, the petitioner claimed to

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[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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

have been established in 2000, to have a gross annual income of $638,545, to have a net annual income of $325,635, and to currently employ four (4) workers.

With the petition, the petitioner submitted a certificate of employment from for the beneficiary's qualifying experience, and the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2001 and 2002 pertinent to its ability to pay the proffered wage.

On September 27, 2004, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and insufficient to establish the beneficiary's requisite two years experience for the proffered position, the director requested additional evidence (RFE). 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 such evidence for 2003. The director requested the petitioner's Form DE-6 Quarterly Wage Reports for all employees for the last 3 quarters, and the beneficiary's W-2 forms for years 2001 through 2003. As for the beneficiary's qualifications, the director pointed out that the letter provided by failed to indicate the duties, number of hours worked per week, and a name, title, and phone number of the person verifying the information, and requested evidence to establish that the beneficiary possesses the two years of experience listed on the Form ETA 750 with detailed instructions.

In response to the director's request for evidence to establish the petitioner's ability to pay, counsel submitted the petitioner's 2003 tax return, nine month financial statement for 2004, DE-6 for the first three quarters of 2004 and the beneficiary's W-2 forms for 2001 through 2003. Counsel also submitted an affidavit from the beneficiary, and declarations from nd in response to the director's RFE pertinent to the beneficiary's qualifications.

The director denied the petition on February 24, 2005, finding that the evidence submitted with the petition and in response to his RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and did not establish that the beneficiary possessed the requisite two years of experience as required on the Form ETA 750.

On appeal, counsel asserts that the fact that the petitioner has paid and is currently paying the beneficiary the proffered wage establishes the petitioner's ability to pay the proffered wage according to May 4, 2004 memorandum. Counsel also submits a copy of California Business Portal for from the Secretary of State's website to support his assertion that with evidence submitted the petitioner established that the beneficiary possessed the requisite two years of experience prior to the priority date.

The first issue that needs to be discussed is whether the petitioner established its continuing ability to pay the proffered wage beginning on the priority date with regulatory-prescribed evidence. 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. In the instant case, the petitioner submitted the petitioner's DE-6 Quarterly Wage Reports for the first three quarters of 2004, and the beneficiary's W-2 forms for 2001 through 2003.

The DE-6 forms show that the petitioner paid its employees $13,562 in the first quarter, $15,162 in the second quarter and $28,302 in the third quarter of 2004. Among them $12,762 was paid to the beneficiary each

quarter, which equals the monthly proffered wage of $4,254. Therefore, the petitioner has established that it paid the beneficiary the proffered wage at least for the first three quarters of 2004.

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since January 2004, according to the language in memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel asserts tha makes a clear distinction between past and current salaries and since he used the conjunction "or" in the context of evidence that the petitioner "has paid or currently is paying the proffered wage," counsel urges CIS to consider the wage rate paid in the first three quarters of 2004 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

The memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is September 13, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2004, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001 through 2003. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

The beneficiary's W-2 forms for 2001 through 2003 indicate that the petitioner paid the beneficiary $20,000 in 2001, $18,000 in 2002 and $12,000 in 2003. Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage during the period from the priority date through 2003. Instead, the petitioner paid partial wages, which is $31,048 less than the proffered wage in 2001, $33,048 less than the proffered wage in 2002 and $39,048 less than the proffered wage in 2003. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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). Reliance on the petitioner's gross receipts, or wage expense is misplaced. 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 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. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record of proceeding contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001 through 2003. The tax returns show that the petitioner is structured as a C corporation and the petitioner's fiscal year is based on a calendar year. The tax returns for 2001 through 2003 demonstrate the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date.

Tax Year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	$(163)[2]	$31,048	$(31,211)
2002	$819	$33,048	$(32,229)
2003	$(529)	$39,048	$(39,577)

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the difference between wages actually paid to the beneficiary and the 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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

[2] Taxable income before net operating loss deduction and special deductions as reported on Line 28.

liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets were $(13,744) in 2001, $(38,501) in 2002 and $(1,051) in 2003. Therefore, the petitioner had insufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2001 through 2003.

In response to the director's RFE, counsel submitted the petitioner's unaudited financial statements as of September 30, 2004. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's compilation report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Therefore, 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 continuing ability to pay the beneficiary the difference between the wage paid and the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return as submitted by the petitioner that demonstrates that the petitioner could not 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The portion of the director's decision that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date must be affirmed.

The second issue in the instant case is whether the petitioner established the beneficiary's requisite two years of experience with proper evidence as required by the regulation.

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). The priority date in the instant petition is September 13, 2001.

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[3] 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.

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).

The certified Form ETA 750 in the instant case states that the position of commercial and industrial designer requires two (2) years of experience in the job offered. On the Form ETA 750B, the beneficiary set forth his work experience. He listed his experience as a full time [redacted] at the petitioner from January 2001 to the present and as a full time '[redacted]' at [redacted]n Los Angeles, CA from November 1993 to September 1996. He provided no further information concerning his working experience as a commercial and industrial designer on this form, which was signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The petitioner did not submit any experience letter for the beneficiary's eight months of experience as a full time cloth designer with the petitioner. However, the petitioner submitted a certificate of employment from [redacted] as primary evidence to establish that the beneficiary possessed the requisite two years of experience. [redacted] certificate of employment appears to be on computer created letterhead of the company, with the company's address but without a telephone number. The certificate was dated April 25, 1997 and signed by [redacted] however without [redacted] title in the company. The writer failed to indicate the duties the beneficiary performed, and number of hours per week the beneficiary worked. Therefore [redacted] certificate of employment does not meet the requirements set forth at the above quoted regulation, and thus cannot be considered as primary evidence to establish the beneficiary's qualifications.

Because of these defects, the director issued a RFE and requested for evidence to establish that the beneficiary possesses the two years of experience listed on the Form ETA 750 with detailed instructions. However, in response to the director's RFE, counsel submitted an affidavit from the beneficiary, and declarations from [redacted] pertinent to the beneficiary's qualifications instead of resolving the defects of the certificate of employment from [redacted] These affidavit and declarations are not regulatory-prescribed letters from a former employer. The regulation only allows CIS to consider other documentation relating to the alien's experience or training when a regulatory-prescribed letter is unavailable. However, the record does not contain any evidence to show that the regulatory-prescribed letter from [redacted] unavailable and therefore, other documentation must be considered in the instant case. The petitioner failed to establish that evidence or documents relating to the beneficiary's prior experience other than a letter from a former employer must be considered in the instance case pursuant to the regulation. The affidavit from the beneficiary and declarations from two persons who alleged to have had business relationships with the beneficiary cannot be considered and cannot establish the beneficiary's requisite two years of experience since there is no evidence that a letter from [redacted] onforming to the regulatory requirements was unavailable.

Additionally, although the regulation at 8 C.F.R. § 204.5(g)(1) states that the director may consider other documentation relating to the alien's experience if a letter from a current or former employer is unavailable, it still requires other documentation meet certain evidentiary standards. The alleged affidavit from the beneficiary and declarations from [redacted] not notarized. The declarations that have been provided on motion are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, 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). These statements are not supported with any objective evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On appeal counsel submits a printout of California Business Portal from the Secretary of the State's website regarding [redacted] This document shows that corporation document for [redacted] filed on March 3, 1993, the company's address and that [redacted] was the agent of the corporation. However, this printout does not provide any information on the beneficiary's work experience at this company.

For the reasons discussed above, the AAO finds that the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior two years of experience as a commercial and industrial designer, and further failed to establish that the beneficiary is qualified for the proffered position. The petitioner's assertions and new evidence submitted on appeal fail to overcome the ground of denial in the director's decision pertinent to the beneficiary's qualifications.

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.