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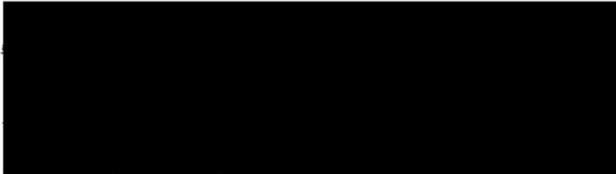
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

[Redacted]
SRC-04-046-52139

Office: TEXAS SERVICE CENTER

Date:

OCT 06 2006

IN RE:

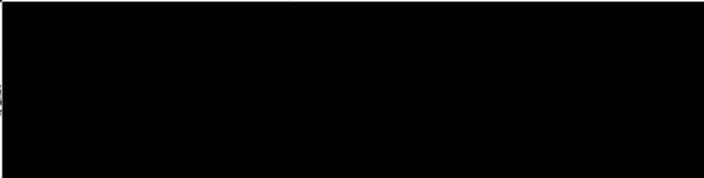
Petitioner:
Beneficiary



PETITION:

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 petition¹ was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The director's decision will be affirmed in part and withdrawn in part. The petition will remain denied.

The petitioner is an apparel retail store. It seeks to employ the beneficiary permanently in the United States as a retail store manager (assistant manager). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification or the 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.

On appeal, counsel submits a brief statement.

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 C.F.R. § 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$7.70 per hour (\$14,014 per year²). On the Form ETA 750B signed by the beneficiary on April 16,

¹ The instant petition was re-filed by the petitioner on the behalf of the same beneficiary. The previous petition (SRC-03-169-51055) was filed on May 22, 2003. On November 17, 2003 the petitioner requested withdrawing the petition because it was unable to provide the requested information within the timeframe provided in the request for additional evidence dated August 28, 2003 and indicated that upon receipt of the appropriate documentation, a new Form I-140 would be filed.

² Based on working 35 hours per week as indicated on Form ETA 750.

2001, he did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$225,273, and to currently employ 2 workers.

With the petition and in the response to the request for additional evidence (RFE) dated March 22, 2004, the petitioner submitted the following documents as supporting documentation regarding ability to pay with the initial filing: Form 1120S, U.S. Income Tax return for an S Corporation for 2001 and 2002, and Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, for 2003.

On March 9, 2005 the director denied the petition, finding that the petitioner did not establish that it had the ability to pay the proffered wage in 2002.

On appeal counsel argues that the petitioner established its ability to pay the proffered wage with its net income in 2001 and 2002 which respectively was more than the proffered wage.

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 did not submit evidence that it paid any compensation to the beneficiary in 2001 through the present. Therefore, the petitioner did not establish that it employed and paid the beneficiary the proffered wage from the priority date to the present through wages paid.

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 and 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 contains copies of the petitioner's tax returns for 2001 and 2002. The evidence indicates the petitioner was structured as an S corporation and its fiscal year is based on a calendar year. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage from the priority date.

In 2001, the Form 1120S stated net income³ of \$17,990.

In 2002, the Form 1120S stated net income of \$35,458.

Therefore, for the years 2001 through 2002, the petitioner did have sufficient net income to pay the proffered wage of \$14,014. The AAO acknowledges that petitioner established its ability to pay the beneficiary the proffered wage for the years 2001 and 2002 under the regulation at 8 C.F.R. § 204.5(g)(2). Therefore, since the petitioner overcame this issue on appeal, the portion of the director's decision that the petitioner did not establish its ability to pay the proffered wage for 2001 and 2002 will be withdrawn.

However, according to the regulation at 8 C.F.R. § 204.5(g)(2) the petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The record closed before the director on June 14, 2004 with receipt of response to the RFE. The petitioner submitted a copy of Form 7004 showing that the filing deadline of the petitioner's tax return for 2003 was extended to September 15, 2004. However, the petitioner did not submit any evidence to establish its ability to pay for 2003 when an appeal was filed on April 5, 2005. By that time, the petitioner's 2003 tax return should have been available. The petitioner did not submit the petitioner's 2004 tax return, nor did it explain whether the 2004 tax return was available or not. The petitioner must address this issue in any future proceedings.

The director also denied the petition because the petitioner failed to demonstrate that the beneficiary is qualified for the proffered position. Counsel argues on appeal that the beneficiary has provided acceptable evidence of his qualifying experience. The issue to be discussed is whether the petitioner established the beneficiary's requisite two years of experience for the proffered position with regulatory-prescribed evidence.

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), (2). 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 in the instant petition is April 27, 2001.

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).

³ Ordinary income (loss) from trade or business activities as reported on Line 21.

The certified Form ETA 750 in the instant case states that the position of assistant manager requires two (2) years of experience in the job offered or two (2) years of experience in a related occupation including one year in the job offered and one year as a buyer.

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) of 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 record contains a letter dated May 8, 2003 from [redacted] Manager of Attitude, letters dated November 20, 2003 and June 7, 2004 from [redacted] affidavit of [redacted] and affidavit of the beneficiary.

The first issue here in the instant case is whether the Attitude May 8, 2003 letter sufficiently established the beneficiary's requisite two years experience for the proffered position under the requirement set forth at 8 C.F.R. § 204.5(g)(1). The regulation requires such evidence must be in the form of a letter from a current or former employer or trainer and must 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. The Attitude May 8, 2003 letter is from the manager of the beneficiary's former employer and on the letterhead of the company. It states in pertinent part that:

This is to confirm that [the beneficiary] has been employed by our company as an Assistant Manager and Buyer from June 1999 to present.

In this position, [the beneficiary] has been responsible for purchasing swimwear, clothing and accessories by utilizing his knowledge of the fashion industry. He has been conducting market research, negotiating contracts and prices, and importing and determining store needs.

The letter confirms that the beneficiary worked as an assistant manager and buyer from June 1999 at least until May 8, 2003 the date of the letter which is for almost four years. However, the petitioner must 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In the instant case, the priority date is April 27, 2001. The beneficiary's experience from June 1999 to April 2001 amounts to less than the requisite two years. Therefore, the petitioner failed to establish that the beneficiary possessed the requisite two years as experience with the Attitude May 8, 2003 letter.

In addition, the petitioner did not submit objective evidence to support the contents of the Attitude May 8, 2003 letter, such as the beneficiary's personnel records, payroll records, paycheck stubs or any bank statements or tax records. Instead the petitioner submitted affidavits of [redacted] and the beneficiary asserting that Attitude did not pay the beneficiary any compensation during the period he worked for them and the beneficiary did not receive any amounts from the employer because the beneficiary did not have a social security number. However, the record provides inconsistent information with affidavits. Not only the instant Form I-140 and I-485 indicate that the beneficiary has a social security number, but also the I-140 previously filed on May 22, 2003 contains the beneficiary's social security number. The inconsistency casts doubt on reliability of the affidavits of Ofer Ramim and the beneficiary. "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." See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). "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." See *Matter of Ho*, 19 I&N Dec. at 591. Because of these defects, the affidavits will be given little weight in these proceedings.

The letter dated November 20, 2003 from [REDACTED] states in pertinent part that:

This is to confirm that [the beneficiary] has been working as an Assistant Manger and a Buyer for Attitude since June 1999.

I can verify this because I was a retail sales clerk during that time with the business. ...

The letter dated June 7, 2004 from [REDACTED] further states in pertinent part that:

I was a retail sales clerk (part time) with Attitude from April 1999 to October 2000. I can confirm that [the beneficiary] worked as an Assistant Manager and Buyer for the company, starting in June 1999 and continuing to the time I left.

[REDACTED] was a retail sales clerk at Attitude from April 1999 to October 2000. The letters from [REDACTED] are not the evidence required by the regulation. The regulation requires such evidence must be in the form of a letter from a current or former employer or trainer. Letters from a co-worker are not regulatory-prescribed evidence. Therefore, [REDACTED] letters cannot be considered as primary evidence to establish the beneficiary's qualifications. In addition, [REDACTED] can only verify the beneficiary's experience for a period of seventeen (17) months from June 1999 to October 2000, which is less than the requisite two years (24 months).

Although 8 C.F.R. § 204.5(g)(1) permits the consideration of other documentation of the beneficiary's qualifying experience in the circumstances that the required evidence is not available, it still requires other documentation to meet certain evidentiary standards. The petitioner did not provide information on the circumstances why in the instant case the other documentation of the beneficiary's qualifying experience should be considered. The statements of [REDACTED] submitted through counsel are 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).

Therefore, the petitioner did not establish with regulatory-prescribed evidence that the beneficiary possessed the requisite two years experience prior to the priority date. The portion of the director's decision that the petitioner failed to establish the beneficiary's qualifications will be affirmed.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.