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File: EAC-02-087-53283

Office: VERMONT SERVICE CENTER

Date: OCT 19 2006

In re: Petitioner:  
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:

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, 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 is a gas and auto repair service and seeks to employ the beneficiary permanently in the United States as a manager, automobile service station ("Assistant Manager"). 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 October 24, 2002 denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered labor certification 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 appeal.<sup>1</sup>

The record shows that the appeal is timely filed. 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 shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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<sup>1</sup> 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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on March 26, 2001. The proffered wage as stated on Form ETA 750 for the position of a manager, automobile service station is \$14.50 per hour, 40 hours per week, equivalent to \$30,160.00 per year. The labor certification was approved on November 27, 2001, and the petitioner filed the I-140 on the beneficiary's behalf on January 11, 2002. On the I-140, counsel listed the following information related the petitioning entity: date established: 1993; gross annual income: \$1,880,551.00; net annual income: \$41,142.

The Service Center issued a Request for Additional Evidence ("RFE") on March 12, 2002, which requested that the petitioner provide its last two most recently filed federal quarterly income tax returns and attachments. Further, the petitioner had filed four other petitions for full-time employees, but its 2000 federal tax return showed that the petitioner had not paid any wages to employees other than the owner. Therefore, the RFE sought evidence that the petitioner could pay the wages of the sponsored employees.

On October 24, 2002, the case was denied based on the petitioner's inability to demonstrate that it could pay the proffered wage for the beneficiary and the other petitioned for workers from the priority date until the beneficiaries obtain lawful permanent residence. The petitioner appealed to the AAO.

We will examine the petitioner's ability to pay based on the record and then consider the petitioner's additional arguments on appeal.

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 case at hand, on Form ETA 750B, signed by the beneficiary on March 19, 2001, the beneficiary did not list that he was employed with the petitioner. Therefore, the petitioner cannot establish its ability to pay based on prior payments to the beneficiary.

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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$30,160.00 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	not submitted <sup>2</sup>
2001	not submitted
2000	\$41,142

While the petitioner's net income would allow for payment of the beneficiary's proffered in the year 2000, we note that the priority date is March 26, 2001, and therefore, the petitioner's 2001 tax return would be most relevant to our inquiry. The petitioner did not submit its 2001 tax return in response to the RFE or on appeal. Further, we note, as raised by the Service Center, while the 2000 tax return can demonstrate the payment of one worker, the petitioner had filed for three additional employees, and cannot demonstrate the ability to pay for all the sponsored workers.

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. 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	not submitted
2001	not submitted
2000	\$29,848

Following this analysis, the petitioner's Federal Tax Returns shows that the petitioner similarly lacks the ability to pay the proffered wage for multiple workers.

The petitioner also submitted a "personal financial statement," or statement of the owner's net worth. Consideration of individual assets would be appropriate in the case of a sole proprietorship,<sup>3</sup> but the petitioner here is structured as an S corporation, and therefore, personal assets would not be considered. In the case of a

<sup>2</sup> Based on the date of filing the petitioner's 2001 and 2002 federal tax returns would not have been available. However, the petitioner's 2001 tax return should have been available at the time of filing the appeal.

<sup>3</sup> A sole proprietorship, unlike a corporation, does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Accordingly, a sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

corporation, CIS may not “pierce the corporate veil” and look to the assets of the owner to satisfy the petitioner’s ability to pay the proffered wage. Therefore, while the petitioner’s owner may have substantial individual assets, those assets are not relevant in the case at hand. Assets of the shareholders (or of other enterprises or corporations) cannot be considered in determining the petitioner’s ability to pay the proffered wage.

The petitioner additionally submitted Forms 941, Employer’s Federal Quarterly Tax Returns, for the quarters ending December 31, 2001, and March 31, 2002. The December Quarterly return shows that the petitioner paid \$6,617 in wages; and the March Quarterly return lists that the employer had three employees and paid quarterly wages in the amount of only \$2,036. The Service Center notes in its denial that the amounts paid annualized would result in wages less than the proffered wage and, therefore, would not demonstrate the petitioner’s ability to pay the proffered wage. We would agree with the Service Center on this issue.

The petitioner also submitted bank statements for the time period January 1, 2002 to March 31, 2002. The January ending balance exhibited a high of \$30,161.22, and the March ending balance exhibited a low in the amount of \$189.61. We note that the bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner’s ability to pay a proffered wage. This regulation allows for consideration of additional material “in appropriate cases.” As a fundamental point, the petitioner’s tax returns are a better reflection of the company’s financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner’s taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner’s net current assets. The bank statements submitted were for a small time period, and we would not conclude based on the statements submitted that the petitioner has demonstrated its ability to pay based on these records.

On appeal, counsel contends the director’s decision was in error, and that the petitioner has the financial ability to pay the proffered wage. The evidence in the record does not demonstrate that the petitioner can pay the beneficiary the proffered wage from the date of March 26, 2001 (the priority date) until the beneficiary (or multiple beneficiaries) obtain permanent residence. Counsel provided no further documentation or subsequent 2001 federal tax returns, audited financial statements, or other evidence to demonstrate the petitioner’s ability to pay the proffered wage from March 2001 onward, and did not raise any additional arguments on appeal.

Further, the petition should also have been denied for failure to document that the beneficiary met all the requirements of the certified labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also 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 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).

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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v.*

*Coomey*, 661 F.2d 1 (1<sup>st</sup> 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).

The beneficiary must demonstrate that he had the required skills by the priority date of March 26, 2001. On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as an assistant manager with job duties including: "assist the manager in selling gas, scheduling employee hours, ordering gas, motor oil, and other merchandises, fixing the pumps, changing hoses and nozzles; assist in supervising maintenance work, do price survey and changes." The petitioner listed no education requirements in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, the beneficiary listed his prior experience as: (1) unemployed, November 2000 to present; and (2) [REDACTED], July 1998 to October 2000. The beneficiary signed the ETA 750B on March 19, 2001.

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

As evidence to document the beneficiary's qualifications, the petitioner submitted the following letter: "this is to certify that Mr. [REDACTED] has been worked with us as a Manager from July 28<sup>th</sup>, 1998 to October 13, 2000. He was a very hard worker, honest, punctual and diligent employee." [*Errors in the original*]. The signature is not legible, and the typed signature line lists only "for Shaafaie Traders Inc."

The letter provided is unduly vague as it does not give the title of the employer, and fails to provide a description of the beneficiary's work experience. Further, the letter does not list whether the beneficiary's employment was full-time or part-time to allow us to conclude that he has the required two full years of experience in the job offered as an Assistant Manager of a gas station with job duties consistent with those set forth in the certified

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<sup>4</sup> In the I-140 petition box provided to list the beneficiary's social security number, the petition is marked "none."

ETA 750A job offer. The beneficiary listed no other experience, and no other documentation was provided to show that the beneficiary had the required skills to meet the position requirements of the labor certification.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary and other sponsored workers the required wages from the priority date until the time of adjustment. Further, the record does not demonstrate that the beneficiary meets the position's experience requirements certified on the Form ETA 750.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.