

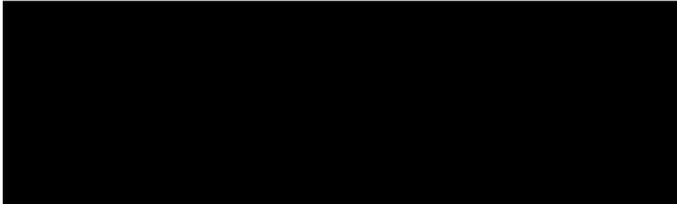
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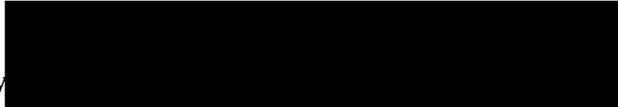
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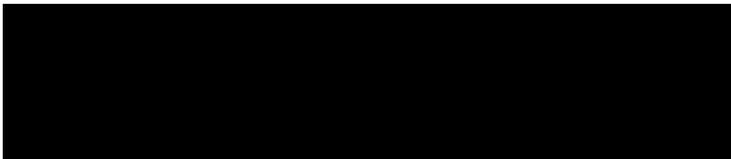
FILE: WAC 03 131 54459 Office: CALIFORNIA SERVICE CENTER Date: OCT 24 2006

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:



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 garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a branch manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it is a United States employer, 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 had not established that the beneficiary is qualified to perform the duties of the proffered position with three years of qualifying employment experience. The director denied the petition accordingly.¹

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

As set forth in the director's January 13, 2005 denial, the three issues in this case are whether or not the petitioner is a United States employer, whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether or not the beneficiary is qualified to perform the duties of the proffered position.

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 director first determined that the petitioner had not established that it is a United States employer. The regulation 8 C.F.R. § 204.5(c) states that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section... 203(b)(3) of the Act." In employment-based preference visa petition proceedings, a petitioner with no location in the United States is not an employer and, therefore, cannot offer permanent employment in the United States to an alien. Only a U.S.-based branch office, affiliate, or subsidiary of a foreign organization may file such a petition. *Matter Of A. Dow Steam Specialities, Ltd.*, 19 I&N Dec. 389 (Comm. 1986).

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.² On appeal, counsel submits a letter dated February 9, 2005 from the petitioner, a letter dated February 4, 2005 from Henry Chi, CPA, the petitioner's previously submitted Certificate of Qualification issued by the State of California on August 19, 1996, and the petitioner's Statement and Designation by Foreign Corporation filed

¹ This office notes that the petitioner previously filed another I-140 petition on behalf of the beneficiary. The California Service Center denied the petition and this office dismissed a subsequent appeal.

² 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).

with the Secretary of State of the State of California on August 19, 1996. Relevant evidence in the record includes a letter dated December 9, 2004 from [REDACTED] the petitioner's IRS Forms W-2, Wage and Tax Statements, for 1998, 1999, 2000, 2001, 2002 and 2003, the petitioner's IRS Forms 1120-F, U.S. Income Tax Returns for a Foreign Corporation, for 1998, 1999, 2000, 2001, 2002 and 2003, the petitioner's IRS Form SS-4, Application for Employer Identification Number, and the petitioner's State of California Forms DE-6, Quarterly Wage and Withholding Reports, for 2001 and 2002. The record does not contain any other evidence relevant to the petitioner's status as a United States employer.

On appeal, the petitioner asserts that the petitioner is a United States employer because it is subject to the tax laws of the United States and it has paid taxes to the United States government. The petitioner's accountant states that the petitioner has employed workers in the United States since 1996, that it has paid all relevant taxes and that it is qualified to do business in California.

The petitioner appears to be a branch office of a foreign corporation. The branch office is located in California. The petitioner has submitted probative evidence that it operates as a branch office, including evidence that the foreign corporation is authorized to engage in business activities in the State of California; copies of IRS Forms 1120-F, U.S. Income Tax Returns of a Foreign Corporation; copies IRS Forms W-2, Wage and Tax Statements, listing the branch office as the employer; and copies of State of California Forms DE-6, Quarterly Wage and Withholding Reports, listing the branch office as the employer. A U.S.-based branch office of a foreign corporation may file a petition and, therefore, the petitioner has overcome the portion of the director's determination that the petitioner is not a United States employer.

Next, 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. 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 DOL. *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 DOL 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 January 9, 1998. The proffered wage as stated on the Form ETA 750 is \$5,208.12 per month (\$62,497.44 per year). The Form ETA 750 states that the position requires three years of experience in the job offered.

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.³ On appeal, counsel submits a letter dated February 9, 2005 from the petitioner. Relevant evidence in the record includes the petitioner's IRS Forms W-2, Wage and Tax Statements, for 1998, 1999, 2000, 2001, 2002 and 2003, the petitioner's IRS Forms 1120-F, U.S. Income Tax Returns for a Foreign Corporation, for 1998, 1999, 2000, 2001, 2002 and 2003, the petitioner's bank statements for March 2002 through February 2003, the petitioner's State of California Forms DE-6, Quarterly Wage and Withholding Reports, for 2001 and 2002, financial statements for the foreign corporation for 2000 and 2001 and a letter dated August 14, 2002 from Patrick Dunn, CPA.⁴ The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in August 1996, to have a gross annual income of \$198,448.00, and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 30, 1997, the beneficiary claimed to have worked for the petitioner as a branch manager from April 1997 to the date he signed the Form ETA 750B.

On appeal, the petitioner asserts that the beneficiary has been paid the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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).

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 beneficiary's IRS Forms W-2 for 1998, 1999, 2000, 2001, 2002 and 2003 show compensation received from the petitioner, as shown in the table below.

- In 1998, the Form W-2 stated compensation of \$44,356.65.
- In 1999, the Form W-2 stated compensation of \$45,000.00.
- In 2000, the Form W-2 stated compensation of \$45,000.00.⁵

³ 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).

⁴ The record contains copies of the petitioner's IRS Forms 1120-F, U.S. Income Tax Returns for a Foreign Corporation, for 1996 and 1997. Evidence preceding the priority date in 1998 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

⁵ This office notes that the employee name listed on the 2000 IRS Form W-2 is [REDACTED]. However, the beneficiary's social security number is listed on the Form W-2, and the beneficiary's 2000 individual

- In 2001, the Form W-2 stated compensation of \$45,000.00.
- In 2002, the Form W-2 stated compensation of \$45,000.00.
- In 2003, the Form W-2 stated compensation of \$45,000.00.

Therefore, contrary to the petitioner's assertion, for the years 1998, 1999, 2000, 2001, 2002 and 2003, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages each year. Since the proffered wage is \$62,497.44 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$18,140.79, \$17,497.44, \$17,497.44, \$17,497.44, \$17,497.44 and \$17,497.44 in 1998, 1999, 2000, 2001, 2002 and 2003, respectively.

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).

For corporations reporting income in IRS Form 1120-F, U.S. Income Tax Return of a Foreign Corporation, CIS considers net income to be the figure shown on page 3, Line 29 of the Form 1120-F. The record before the director closed on December 15, 2004 with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to deny. As of that date, the petitioner's 2003 federal income tax return is the most recent return available. The petitioner's tax returns demonstrate its net income for 1998, 1999, 2000, 2001, 2002 and 2003, as shown in the table below.

- In 1998, the Form 1120-F stated net income of -\$83,676.00.
- In 1999, the Form 1120-F stated net income of -\$240,530.00.
- In 2000, the Form 1120-F stated net income of -\$177,644.00.
- In 2001, the Form 1120-F stated net income of -\$196,548.00.
- In 2002, the Form 1120-F stated net income of -\$156,629.00.
- In 2003, the Form 1120-F stated net income of -\$140,592.00.

Therefore, for the years 1998, 1999, 2000, 2001, 2002 and 2003, the petitioner did not have sufficient net income to pay the difference between the 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. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A foreign corporation's year-end current assets are shown on Schedule L, lines 1

income tax return indicates that he received \$45,000.00 in income that year, which matches the income detailed on the Form W-2. Therefore, this office will credit the beneficiary with \$45,000.00 in wages from the petitioner in 2000.

⁶According 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

through 6 and include cash-on-hand. Its year-end current 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 tax returns demonstrate its end-of-year net current assets for 1998, 1999, 2000, 2001, 2002 and 2003, as shown in the table below.

- In 1998, the Form 1120-F stated net current assets of \$10,100.00.
- In 1999, the Form 1120-F stated net current assets of \$9,147.00.
- In 2000, the Form 1120-F stated net current assets of \$3,169.00.
- In 2001, the Form 1120-F stated net current assets of \$943.00.
- In 2002, the Form 1120-F stated net current assets of \$2,800.00.
- In 2003, the Form 1120-F stated net current assets of \$16,792.00.

Therefore, for the years 1998, 1999, 2000, 2001, 2002 and 2003, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary 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.

The record of proceeding contains the petitioner's bank statements. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. In addition, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. 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 was considered in determining the petitioner's net current assets.

The record of proceeding also contains a letter of credit issued to the foreign corporation by Wachovia Bank, National Association. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since a line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax

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.

returns or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Further, the record of proceeding contains the foreign corporation's financial statements for 2000 and 2001. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns 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 the DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Finally, the director also determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with three years of qualifying employment experience. To determine whether a beneficiary is eligible for an employment based immigrant visa, 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, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of branch manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	C
	High School	C
	College	0
	College Degree Required	not required
	Major Field of Study	not applicable

The applicant must also have three years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for the petitioner as a branch manager from April 1997 to the date he signed Form ETA 750B, that he was a student from July 1991 to April 1997 and that he worked for [REDACTED] as a trade manager from March 1984 to June 1991. He does not provide any additional information concerning his employment background on that form.

With the petition, the petitioner submitted a certificate of experience dated July 26, 2001 from Y.D. Corporation indicating that from 1984 to 1986, the beneficiary worked in the export department, where his duties included handling L/C documents, receiving approval from official agencies and bank related business. From 1987 to 1991, the certificate indicates that he performed business work at Y.D. Corporation, including consulting of export orders and export-related general activities.

On appeal, the petitioner asserts that the beneficiary was employed as a trade manager by Y.D. Corporation in Korea from March 1984 to June 1991. The petitioner states that the duties of trade manager were virtually identical to those of a branch manager.

The regulation at 8 C.F.R. § 204.5(l)(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.

As noted by the director in his decision, the duties listed in the experience letter submitted by Y.D. Corporation are different from those of the proffered position. Further, as noted by the director in his notice of intent to deny, the certificate does not indicate the beneficiary's job title(s), number of hours worked per week or exact dates of employment. The petitioner has submitted no new evidence on appeal to document the beneficiary's prior employment experience. The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired three years of experience as a branch manager from the evidence submitted into this record of proceeding. Therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.