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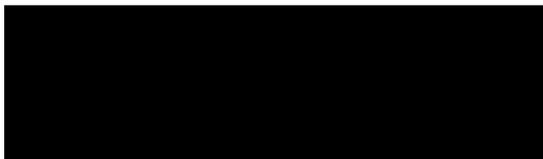
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **SEP 26 2006**
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Other Worker Pursuant to § 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a commercial and residential plumbing repair business. It seeks to employ the beneficiary permanently in the United States as a plumber apprentice. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 had not established that the beneficiary met the experience requirements of the labor certification as of the priority date of the visa petition. The director denied the petition accordingly.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 19, 2005 denial, one of the issues in this case is 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour or \$26,000 annually.

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 appeal¹. Relevant evidence submitted on appeal includes a copy a previously submitted letter from counsel, a memorandum, dated April 29, 2004, to the petitioner from the Department of Workforce Services, State of Utah, copies of job posting corrections, a newspaper ad of the job posting, a copy of the ETA 750 as it was originally filed, copies of the beneficiary's 2002 through 2004 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss From Business, and copies of payroll checks, issued by the petitioner, for the beneficiary for the years 2003 and 2004. Other relevant evidence in the record includes the petitioner's 2001 through 2003 Forms 1120S and copies of payroll checks, issued by the petitioner, for the beneficiary for the years 2001 and 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2003 Forms 1120S reflect ordinary incomes or net incomes of -\$18,373, -\$34,224, and -\$5,557, respectively. The petitioner's 2001 through 2003 Forms 1120S also reflect net current assets of \$18,811, \$11,836, and \$2,596, respectively.

The payroll checks issued to the beneficiary reflect wages paid of \$24,567.46 in 2001, \$24,505.04 in 2002, \$28,797.57 in 2003, and \$33,858.40 in 2004.

On appeal, the petitioner states that it has established its ability to pay the proffered wage of \$26,000 based on the wages paid to the beneficiary and based on the petitioner's net current assets.

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 evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on July 20, 2004, the beneficiary claims to have been employed by the petitioner since October 1998. Although counsel has not provided any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary indicating that the petitioner employed the beneficiary in 1998 through 2004, she has submitted copies of payroll checks, issued by the petitioner, for the beneficiary for the years 2001 through 2004. Therefore, the petitioner has established that it employed the beneficiary in the years 2001 through 2004.

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).

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. [REDACTED] The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2001 through 2003³ were \$18,811, \$11,836, and \$2,596, respectively. The petitioner is obligated to establish that it has sufficient funds to pay the difference between the proffered wage of \$26,000 and the actual wages paid to the beneficiary in 2001 through 2003. Those differences would have been \$1,432.54 in 2001 and \$1,494.96 in 2002. The petitioner compensated the beneficiary \$2,797.57 more than the proffered wage of \$26,000 in 2003 and \$7,858.40 more than the proffered wage of \$26,000 in 2004. As the petitioner's net current assets were \$17,378.46 more than the difference of \$1,432.54 between the proffered wage of \$26,000 and the actual wages paid to the beneficiary of \$24,567.46 in 2001 and \$10,341.04 more than the difference of \$1,494.96 between the proffered wage of \$26,000 and the actual wages paid to the beneficiary of \$24,505.04 in 2002, and since the petitioner compensated the beneficiary more than the proffered wage of \$26,000 in 2003 and 2004, the petitioner has established its ability to pay the proffered wage in the pertinent years.

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

³ The petitioner's 2004 income tax return was not initially submitted nor on appeal.

The second issue pertinent to this proceeding is whether the beneficiary met the experience requirements of the proffered job as specified by the Form ETA 750.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

(D) *Other workers*. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 30, 2001.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary have a high school education and four years of experience in the job offered. It is noted that the ETA 750 was amended from two years of experience in the job offered to four years of experience in the job offered by the petitioner on August 5, 2004, prior to the Department of Labor's (DOL) March 8, 2005 certification. Block 15 requires that the beneficiary must be in the process of getting his apprentice license and have backflow certified tech work.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of plumber apprentice must have a high school education and four years of experience as a plumber apprentice, be in the process of getting his apprentice license, and have backflow certified tech work.

In the instant case, the petitioner submitted an undated letter stating that "[w]e have found that [REDACTED] has the needed skills, personality, and experience to fulfill the position as per our newspaper advertisement." The petitioner also submitted a letter, dated August 27, 2005, from the prior owner stating that he employed the beneficiary from October 10, 1998 until January 2001 when his son, the current petitioner, took over as president of the company. The beneficiary's duties included, but were not limited to, pipe threading, soldering, drain cleaning, pipe fitting, etc. The director denied the petition noting that the beneficiary met the requirement of a high school education, but not that of four years of experience in the job offered.

On appeal, counsel states:

The original 750 was filed with a required 2 years of experience, but was subsequently changed to 4 years experience by mistake. The newspaper ad in this case was run with a "2 years apprentice requirement." It was the intention of the employer to only require 2 years of experience for this position. The newspaper ad that was approved by the local office prior to publication indicated that 2 years was the requisite experience. The change on the 750 from 2 to 4 years apprentice experience was done in error.

While there does appear to have been some confusion regarding the newspaper advertisement and the amendment to the ETA 750, the labor certification was certified by DOL after the changes were made by the petitioner to the ETA 750. Once a labor certification has been certified by DOL, there are limited changes CIS may make to the ETA 750 (address change, etc.). 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, it would be necessary for the petitioner to contact DOL to determine any remedy available to the petitioner. The petitioner would then need to submit a new petition with the new or amended Form ETA 750 on behalf of the beneficiary.

After a review of the record, it has been determined that the petitioner has established its ability to pay the proffered wage from the priority date of April 30, 2001 and continuing through 2004, however, the petitioner has not established that the beneficiary met the four-year experience requirement of the labor certification, and, therefore, the appeal will be dismissed for that reason. 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.