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20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

BE

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FILE: WAC-03-268-53952 Office: CALIFORNIA SERVICE CENTER Date: **SEP 29 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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

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 flooring company. It seeks to employ the beneficiary permanently in the United States as a floor layer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, the petitioner submits a letter 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.

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 21, 2000.

Citizenship and Immigration Services (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 floor layer requires two (2) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on March 13, 2000, the beneficiary set forth his work experience. He listed his experience as a "Custom Floor Covering Layer" at the petitioner from December 1996 to the present, as a "Landscape Gardener" at [REDACTED] from December 1994 to December 1996 and at [REDACTED] from March 1992 to 1994.

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

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.

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 instant I-140 petition was submitted on September 29, 2003 without evidence pertinent to the beneficiary's qualifications as required by the above regulation or about the petitioner's ability to pay the proffered wage. The director issued a request for additional evidence (RFE) on July 20, 2004 requesting evidence for the petitioner's ability to pay and evidence to establish that the beneficiary possesses the experience listed on the Form ETA 750. In response to the director's RFE, the petitioner submitted its tax returns for 2000 through 2003, Form DE-6 Quarterly Wage Report and the beneficiary's tax records for 1996 through the present but did not submit any experience letter from the beneficiary's current or former employers. On January 12, 2005, the director denied the petition finding that the record did not clearly establish that the beneficiary has two years of qualifying work experience prior to the priority date as required by the ETA 750.

On appeal the petitioner declares that the beneficiary has been employed by the petitioner since December 1996 to present and submits the beneficiary's W-2 forms and 1099 forms for 1996 through 1999 to support its assertions.

The issue here in the instant case is whether the petitioner established the beneficiary's requisite experience prior to the priority date 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 director requested the same in his RFE issued on July 20, 2004 and provided instructions for the experience letter. The record shows that the owner of the petitioner, [REDACTED] stated the following concerning the beneficiary's work experience in his response to the director's RFE:

In reference to the evidence to establish that the beneficiary possesses the experience listed on the Form ETA 750, the beneficiary worked as a self employed Custom Floor Covering Layer from January 1990 to March 1992. During those years [the beneficiary] worked in Aguascalientes, Mexico for several customers who requested his services as a Floor Covering Layer on a cash basis. He did not work on a formal way, meaning that he did not own a business or pay income taxes, nor Social Security. Therefore, there is no written documentation registered for the services rendered by [the beneficiary] during the period from January 1990 to March 1992.

However, [REDACTED] did not explain what sources his statements are based on or submit any documentary evidence to support his statements. 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)). This is not an experience letter from an employer or trainer as required by the regulation. [REDACTED] did not even sign the letter. Therefore, [REDACTED]'s statement concerning the beneficiary's self-employment as a custom floor covering layer from January 1990 to March 1992 cannot be considered as primary

regulatory-prescribed evidence to establish that the beneficiary had worked as a floor layer for at least two years as required by the ETA 750.

On appeal [REDACTED] disagrees with the director's statements that "no evidence of prior experience was submitted to substantiate the beneficiary's work experience claimed on part B of form ETA 750" and that "the beneficiary's tax documentation does not indicate the beneficiary ever worked for the petitioner in 1996 and 1997." [REDACTED]'s appeal letter states in pertinent part that:

In reference to the above statements, we must declare that the beneficiary has indeed been employed by [the petitioner] since December 1996 to present. During December 1996 the beneficiary worked for [REDACTED], and only some days of December 1996 for [the petitioner]. During 1996, 1997, 1998 and part of 1999 the beneficiary was paid on a cash basis as a part time employee of [the petitioner].

The beneficiary also worked part [sic] time cash basis as a Custom Floor Covering Layer for [REDACTED] c. during the years 1997, 1998 and 1999.

[REDACTED] statement is not an letter from a former employer, nor does it include a specific description of the duties performed by the alien. The petitioner did not submit any evidence or explanation that such regulatory-prescribed evidence is unavailable, and other documentation relating to the alien's experience must be considered. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide experience letter(s) from current or former employer(s). The experience letters would have demonstrated the beneficiary's qualifications for the proffered position and further revealed his eligibility for the classification sought. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

[REDACTED] appellate letter verifies that the beneficiary worked for the petitioner only some days in December 1996, and during 1996 through 1999 the beneficiary worked for the petitioner as a part time employee and was paid cash. However, the letter does not indicate how many hours per week the beneficiary worked for the petitioner during that period. The petitioner failed to establish that the part time experience the beneficiary acquired with the petitioner prior to the priority date was equivalent to the two years of full time experience as required by the ETA 750.

The petitioner submitted the beneficiary's tax returns, W-2 forms and 1099 forms to support the claims that the beneficiary worked for the petitioner as a floor layer for a period from December 1996 to the present. The tax return for 1996 shows that the beneficiary's occupation is a laborer and the beneficiary reported his compensation of \$14,868 as an employee with a W-2 form issued by [REDACTED]. No evidence submitted supports the assertion that the beneficiary worked for the petitioner in 1996. Attached to the beneficiary's 1997 tax return is a W-2 form issued by [REDACTED] in the amount of \$4,898.83 and two Form 1099-Misc issued by the petitioner for nonemployee compensation of \$11,050. The beneficiary reported the nonemployee compensation from the petitioner on Schedule C as his business's gross receipts or sales on line 1. The forms 1099 do not indicate what type of service or in what position and how many hours the beneficiary's own business provided to the petitioner. In addition to the W-2 income of \$9,107.66 from [REDACTED], the beneficiary reported \$13,550 as other income (nonemployee

compensation) on line 21 of Form 1040 for 1998. Again the form 1099 for 1998 issued by the petitioner to the beneficiary itself does not indicate the type of work or number of hours the beneficiary worked for the petitioner. The W-2 and 1099 forms for 1999 show that the beneficiary had \$21,242 employee compensation and \$2,357 nonemployee compensation from the petitioner. The 2000 tax return and W-2 form indicate that \$23,090 the beneficiary received from the petitioner as employee compensation was all of the income the beneficiary received that year. However, the record does not contain any evidence verifying the beneficiary's full time status, compensation rate, or how many hours per week the beneficiary worked for the petitioner. Therefore, it is still not clear whether the beneficiary worked for the petitioner as a full time or part time employee in 2000.

The beneficiary's tax documentation shows that the beneficiary worked as a part time employee for J. Williams Landscape, Inc. in 1996; the beneficiary worked as a part time employee for The Vons Companies, Inc. in 1997, 1998 and 1999; the beneficiary provided part time services to the petitioner as a self-employer in 1996, worked on a part time basis and was compensated as a nonemployee in 1997, 1998 and 1999, and worked and was compensated as an employee in 2000. However, without further information or evidence conforming to the regulatory requirements about how many hours of work or service the beneficiary provided to the petitioner during 1997 through 2000, the evidence currently in the record has not clearly established that the beneficiary's part time work experience with the petitioner prior to September 21, 2000, the priority date, meets the requisite two full time years of experience in the job offered as required by the Form ETA 750.

Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's two years of experience as a floor layer, and further failed to establish that the beneficiary is qualified for the proffered position. The petitioner's assertions on appeal fail to overcome the director's decision.

Beyond the director's decision and the petitioner's assertion on appeal, the AAO will discuss the issue of whether the petitioner established that it had the ability to pay the proffered wage beginning on the priority date. 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*, 299 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 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).

As noted above, the Form ETA 750 was accepted on September 21, 2000. The proffered wage as stated on the Form ETA 750 is \$18.83 per hour (\$39,166.40 per year).

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 beneficiary’s W-2 and 1099 forms for 1996 through 2003. Since the priority date in the instant case is September 21, 2000, only the beneficiary’s W-2 or 1099 forms for 2000 through present from the petitioner are relevant. These forms show the beneficiary’s compensation received from the petitioner, as shown in the table below.

Year	Bene’s actual compensation	Proffered wage	Wage increase needed to pay the proffered wage
2000	\$23,090	\$39,166.40	\$16,076.40
2001	\$24,020	\$39,166.40	\$15,146.40
2002	\$23,945	\$39,166.40	\$15,221.40
2003	\$7,800	\$39,166.40	\$31,366.40

Therefore, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage during these years. Instead, the petitioner is still obligated to demonstrate that it could pay the difference of \$16,076.40 in 2000, \$15,146.40 in 2001, \$15,221.40 in 2002 and \$31,366.40 in 2003 between 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 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 petitioner's tax returns for 2000 through 2003 demonstrate the following financial information concerning the petitioner's ability to pay the difference of \$16,076.40 in 2000, \$15,146.40 in 2001, \$15,221.40 in 2002 and \$31,366.40 in 2003 between wages actually paid to the beneficiary and the proffered wage.

In 2000, the Form 1120S stated net income² of \$35,807.

In 2001, the Form 1120S stated net income of \$69,176.

In 2002, the Form 1120S stated net income of \$(54,172).

In 2003, the Form 1120S stated net income of \$42,830.

Therefore, for the years 2000, 2001 and 2003, the petitioner had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage, while for 2002, the petitioner's net income was insufficient to pay the difference for that year.

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 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

² Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

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.

expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets in 2002 were \$(40,734). Therefore, the petitioner had insufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2002.

In addition, the petitioner filed another Immigrant Petition for Alien Worker (Form I-140) for at least five more workers, some of which are approved and others are still pending either with the California Service Center or the AAO (WAC-04-011-52118 filed on October 16, 2003 with the priority date of June 9, 2000 and approved on January 13, 2005; WAC-04-080-53786 filed on January 29, 2004; Wac-04-080-53797 filed on January 29, 2004 with the priority date of April 5, 2001 and approved on April 7, 2005; WAC-04-102-50125 filed on March 1, 2004 with the priority date of September 21, 2000 and approved on January 13, 2005 and WAC-06-066-51528 filed on January 20, 2006). The petitioner must show that it had sufficient income to pay all the wages at the priority date.

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 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 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.