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U.S. Citizenship  
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Services

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APR 20 2007

FILE:

WAC-05-073-50738

Office: CALIFORNIA SERVICE CENTER

Date:

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 an international collection agency. It seeks to employ the beneficiary permanently in the United States as a bill and account collector (foreign national collector). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). 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 director also determined that the petitioner had not demonstrated that the beneficiary possessed the requisite two years of experience prior to the priority date. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a general 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 August 9, 2005 denial, the issues in this case are 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 petitioner has demonstrated that the beneficiary possessed the requisite two years of experience prior to the priority date.

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 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>. However, counsel did not submit a brief and any additional evidence on appeal<sup>2</sup>. Relevant evidence in the record includes the petitioner's corporate federal tax return for 2003, the petitioner's quarterly unemployment tax and wage reports for the four quarters of 2004, and an experience letter, employee's identification, paystubs, employment contracts and job description of teller operator from the beneficiary's former employer. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage and the beneficiary's qualifications for the proffered position.

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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).

<sup>2</sup> On the Form I-290B, counsel indicated that he would be submitting a separate brief and/or evidence to the AAO within 30 days. On January 12, 2007, the AAO sent a fax to counsel requesting a copy of the additional evidence and /or brief within five business days since this office has no record that any further evidence or brief was ever received with regard to this appeal. On January 19, 2007, counsel faxed back requesting an extra week to respond. However, as of this date, more than four months later, this office has not received any correspondence from counsel regard to this case. Thus, the appeal will be adjudicated as the record is currently constituted.

First of all, the regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$1,522 per month (\$18,264 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax return in the record, the petitioner's fiscal year runs from April 1 to March 31. On the petition, the petitioner claimed to have been established in 1977, to have a gross annual income of more than \$1 million, to have a net annual income of \$96,000, and to currently employ 35 workers. On the Form ETA 750B, signed by the beneficiary on April 9, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the denial based on lack of showing of "ability to pay" is contrary to the evidence and contrary to law, but counsel does not make a specific allegation of error in law or fact.

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, Citizenship and Immigration Services (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 during a given period, 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 did not claim to have worked for the petitioner. On the Form ETA 750B Item 15, the beneficiary represented that she worked for Banamex from October 1983 to November 1988 and then

worked for herself from August 1997 to the time she signed the form in April 2003. On the Form G-325A, Biographic Information, signed on November 24, 2004, the beneficiary confirmed her self-employment from November 1997 to the present time. The petitioner submitted its quarterly unemployment tax and wage reports for all four quarters of 2004, however, the reports did not indicate that the beneficiary worked for the petitioner and was paid by the petitioner during the year of 2004. The record does not contain any W-2 or 1099 forms or other documentary evidence showing the beneficiary was employed and paid by the petitioner in the relevant years from 2001 to 2004. In his decision, the director erred in determining that “the beneficiary was employed with the petitioner in 2003.” The record does not contain any evidence that the beneficiary was hired and paid by the petitioner in 2003 or any year during the relevant period. The petitioner failed to establish its ability to pay the proffered wage in 2001 onwards through examination of wages paid to the beneficiary. Therefore, the petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage from the priority date in 2001 onwards with its net income or its net current assets.

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 total income and wage expense is misplaced. Showing that the petitioner’s total income 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 in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537

The record contains copies of the petitioner’s Form 1120, U.S. Corporation Income Tax Return for its fiscal year 2003. The petitioner’s 2003 tax return demonstrates the following financial information concerning the petitioner’s ability to pay the proffered wage of \$18,264 per year for 2003:

- In the fiscal year 2003 (4/1/2003-3/31/2004), the Form 1120 stated a net income<sup>3</sup> of \$(25,451).

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<sup>3</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the

Therefore, for the fiscal year 2003, the petitioner did not have sufficient net income to pay 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. 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.<sup>4</sup> 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 expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during the fiscal year 2003 were \$51,553.

For the fiscal year 2003, the petitioner had sufficient net current assets to pay the proffered wage. Therefore, the petitioner established its ability to pay the proffered wage with its net current assets in the fiscal year 2003.

The priority date in the instant case is April 30, 2001. The regulation expressly requires the petitioner to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains her lawful permanent residence. Therefore, the petitioner must establish its ability to pay the proffered wage from its fiscal year 2001 to the present. The record before the director closed on April 25, 2005 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date the petitioner's federal tax return for 2004 should have been available. However, the petitioner did not submit its tax returns for 2001, 2002 and 2004, nor did counsel explain why the tax returns were not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although the director specifically and clearly requested such evidence for the year 2001 to the present in his RFE, the petitioner declined to provide copies of its tax returns for 2001, 2002 and 2004. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be

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Form 1120.

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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).

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 from 2001, the year of the priority date, to 2004 except for 2003 through an examination of wages paid to the beneficiary, and its net income or its net current assets.

The second issue is whether the petitioner demonstrated that the beneficiary possessed the qualifying experience prior to the priority date.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (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 foreign national collector. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |     |                                      |                                |
|-----|--------------------------------------|--------------------------------|
| 14. | Experience                           |                                |
|     | Job Offered (number of years)        | 2 years                        |
|     | Related Occupation (number of years) | Blank                          |
|     | Related Occupation (specify)         | Financial Institution Employee |

The duties 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 reflects other special requirements as follows: "Fluency in Spanish language and knowledge of geography, culture, banking and business practices in Mexico required as they are a business necessity. Accounting knowledge and computer literacy required."

The beneficiary set forth her credentials on Form ETA-750B and signed her name on April 9, 2003 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, she represented that she has been working as a "Foreign National Collector" for herself since August 1997. Prior to that, she represented that she worked as a full time (working 40 hours per week) "Universal Cashier" for Banamex Banco Nacional de Mexico (Banamex) from October 1983 to November 1988. She does not provide any additional information concerning her employment background on that form.

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

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The record contains an experience letter from human resources, National Bank of Mexico, S.A. as the beneficiary's former employer, verifying that the beneficiary worked for its Nogales Center 0396 as a teller operator from October 20, 1983 to November 4, 1988. The petitioner also submitted the beneficiary's identification card issued by the bank, paystubs from the bank, employment contracts signed between the beneficiary and the bank, and a job description of teller operator. The director noted that "[t]he experience submitted is as a Teller Operator, not a foreign National Collector. It is clear from the job description listed for the Teller Operator that it is not the same as the job duties as required for the Foreign National Collector. ... The petitioner has not met the above minimum requirements necessary at the time of filing." As mentioned previously counsel asserts that the denial based on lack of showing of required experience is contrary to the evidence and contrary to law. However, counsel has not submitted a brief and/or additional evidence, nor does counsel make a specific allegation that the director's decision is contrary to the evidence submitted or specified provisions of the law.

The issue here is not whether the experience letter from the beneficiary's former employer meets the requirement set forth at 8 C.F.R. § 204.5(g)(1), but the issue is whether the beneficiary's experience verified by the former employer's experience letter qualifies the beneficiary for the proffered position. First of all, the Form ETA 750 requires two years of experience in the job offered, that means two years of experience in the position of foreign national collector. Although the employer typed "Financial Institution Employee" in the space for related occupation, the Form ETA 750 does not require any amount of experience in the related occupation. Thus, the labor certification indicates that the employer will not accept experience in any related occupation, including a teller operator, as the qualifying experience for the proffered position. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the DOL. Since that was not done, the director's decision to deny the petition must be affirmed.

The approved labor certification in the instant case describes the job of duties in Item 13 as follows:

Locates customers in Mexico to collect installments and overdue accounts, damage claims, and nonpayable checks: Visits or phones customer and attempts to persuade customer to pay amount due or arranges for payment at later date. Questions neighbors and postal workers at post office to determine new address of customers. May have service discontinued or merchandise repossessed. Keeps record of collections and status of accounts. Retains and supervises the activities of attorneys and investigators in Mexico for location of customers and customer assets, and for filing of legal actions to compel payment and for seizure of assets. Works with banks and other lending institutions in Mexico. Works directly with clients to facilitate repayment and seizure of assets from Mexico.

The experience letter from the beneficiary's former employer does not include a specific description of duties performed by the beneficiary during her employment as a teller operator. Instead the petitioner submitted a general job description for universal bank teller operator or various from Banamex. Per the job description sheet the duties of a teller operator include:

assisting customers in the operations they demand, submitting at the end of day cancelled or not utilized paperwork, requiring documentation of operations of foreign currency and portfolio to hand over for revision and authorization from the authorized personnel, informing clients about loans, credit cards and in general of all products and services that the institution offers, directing clients to the area and/or corresponding official in case these require advising or additional information, requesting to the Internal Administrator, through the respective

teller voucher, daily cash flow, protective seals and diskette-program, formulating/obtaining at end of service the cash count, verifying that made transactions match their control, signing and obtaining internal supervisor's approval, delivering cash count, protective seals and diskette-program to Internal Administrator at end of service for recount and custody, elaborating/obtaining report and transfer index cards through by-sell operations of foreign currency, reporting to the International Department of Treasury the foreign currency money transfer transactions to avoid immobilizations, and controlling and following received promissory notes during the day for custody in vault.

The experience letter does not verify whether or not the beneficiary performed all these duties when she worked for the bank as a teller operator. The beneficiary herself described her duties for this employment that she performed "[a]ll types of customer services (savings accounts, checking accounts, money orders, etc.) Also internal accounting and computer programming." Nonetheless, the AAO concurs with the director's findings that it is clear that the job description pertaining to the beneficiary's past employment at Banamex listed either on the Form ETA 750B by the beneficiary or in the sheet provided by the beneficiary's former employer is not the same as the job duties as required by the approved labor certification. Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite experience for the proffered position prior to the priority date with the experience letter and supporting documents from Banamex. The record does not contain any other evidence to establish the beneficiary's qualifications.

In additional, the record provides inconsistent information pertinent to the beneficiary's qualifications. The beneficiary represented her position with Banamex as Universal Cashier while the employer's letter says she worked as a teller operator. Each of them also gives different descriptions of the duties the beneficiary performed. The submitted Banamex payroll records for the beneficiary indicate dates prior to October 1983, such as March 15, 1981 and after November 1988, such as April 17, 1989, however, both the beneficiary and her former employer claimed that the beneficiary worked from October 1983 to November 1988. These inconsistencies cast doubt on reliability of the beneficiary's statement and the employer's letter. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On the Form ETA 750B the beneficiary also claimed that she had worked as a self-employed foreign national collector since August 1997 to the present (at the time when she signed the form on April 9, 2003). If this experience at least for three years and a half from August 1997 to April 2001 (the priority date) were properly evidenced, the beneficiary could have established her qualifications for the proffered position. However, the petitioner did not submit any documentary evidence to demonstrate the beneficiary's experience for this period. Moreover, the beneficiary provided inconsistent information about the self-employment for this period. On the Form G-325A, Biographic Information, signed on November 24, 2004 and submitted with her adjustment of status application, the beneficiary described her employment last five years as self-employed in Tucson, AZ, U.S.A. as House Keeper from November 1997 to present time. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Neither the petitioner, the beneficiary or counsel submitted any independent objective evidence to resolve these inconsistencies, and none of them even attempted to explain or reconcile such an inconsistency.

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.