

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED]
EAC-05-008-50592

Office: VERMONT SERVICE CENTER

Date: DEC 11 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 petition¹ was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a grocery store. It seeks to employ the beneficiary permanently in the United States as a department manager (deli food manager). 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 failed to establish its continuing ability to pay the beneficiary the proffered wage beginning on 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 13, 2006 denial, the primary issue in this case is whether or not the petitioner has established its ability to pay the proffered wage as of the priority date and continuing to the present.

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 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).

¹ The instant petitioner filed an immigrant petition (EAC-03-092-50696) on behalf of the instant beneficiary based on the same certified labor certification on January 29, 2003. On April 29, 2004, the Vermont Service Center denied the petition due to abandonment because the petitioner failed to respond the request for evidence dated November 24, 2003.

Here, the Form ETA 750 was accepted on September 1, 1999. The proffered wage as stated on the Form ETA 750 is \$24.77 per hour (\$51,521.60 per year). The Form ETA 750 states that the position requires six years of grade school studies, four years of high school studies and two years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on February 16, 1999, the beneficiary claimed to have worked for the petitioner in the proffered position since August 1996. On the petition, the petitioner claimed to have a gross annual income of \$2,600,000, to have a net annual income of \$572,600, and to currently employ 18 workers.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². On appeal counsel submits the petitioner's employee quarterly earnings reports and year to date employee earnings reports for the years 2002-2006. Other relevant evidence in the record includes the petitioner's corporate tax returns for 1998, 1999, and 2001 through 2004, the beneficiary's W-2 forms for 1998 through 2004, and the beneficiary's individual income tax returns for 1996 through 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the evidence submitted previously and on appeal established the petitioner's ability to pay the proffered wage when considering totality of financial and business circumstances.

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 Sonogawa*, 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 petitioner submitted the beneficiary's W-2 forms for 1996 through 2004, and the petitioner's employee quarterly earnings reports and year to date employee earnings reports for the years 2002-2006. These documents show that the petitioner paid the beneficiary during the relevant years as follows: \$13,000 in 1999, \$10,000 in 2000, \$16,500 in 2001, \$25,500 in 2002, \$25,000 in 2003, \$27,000 in 2004, and \$18,000 in 2005. The payroll record also shows that the petitioner paid the beneficiary \$12,000 during the first six

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).

months of 2006 while the proffered wage for this period is \$25,760.80. The petitioner failed to establish its ability to pay through the examination of wages actually paid to the beneficiary. Therefore, the petitioner is obligated to demonstrate that it could pay the difference of \$38,521.60 in 1999, \$41,521.60 in 2000, \$35,021.60 in 2001, \$26,021.60 in 2002, \$26,521.60 in 2003, \$24,521.60 in 2004, \$33,521.60 in 2005 and \$13,760.80 in the first six months of 2006 respectively between wages actually paid to the beneficiary and the proffered wage 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. 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 Chang* at 537.

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 1998, 1999 and 2001 through 2004. Since the priority date in the instant case is September 1, 1999, the petitioner's tax return for its fiscal year 1998 (covering 4/1/1998-3/31/1999) is not necessarily dispositive. The tax returns for 1999 and 2001 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the differences between wages actually paid to the beneficiary and the proffered wage for the relevant years:

- In the fiscal year 1999 (4/1/99-3/31/00), the Form 1120 stated a net income³ of \$(6,137).

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

- In the fiscal year 2001 (4/1/01-3/31/02), the Form 1120 stated a net income of \$(7,092).
- In the fiscal year 2002 (4/1/02-3/31/03), the Form 1120 stated a net income of \$(9,318).
- In 2003,⁴ the Form 1120 stated a net income of \$(8,942).
- In 2004, the Form 1120 stated a net income of \$(10,977).⁵

Therefore, for the years 1999 and 2001 through 2004, the petitioner had negative net income and thus did not have sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage. For fiscal year 2000, the petitioner did not establish that it had sufficient net income to pay the difference between 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. 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.⁶ 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 1999 were \$(23,790).⁷
- The petitioner's net current assets during the fiscal year 2000 were \$(14,098).⁸
- The petitioner's net current assets during the fiscal year 2001 were \$102,345.
- The petitioner's net current assets during the fiscal year 2002 were \$16,562.
- The petitioner's net current assets during 2003 were \$20,153.
- The petitioner's net current assets during 2004 were \$18,713.

⁴ The petitioner filed its 2003 tax return on the form for 2000 and did not indicate the tax period, returns not specifying a fiscal year are deemed to be filed for a calendar year.

⁵ The director erred in stating the petitioner's taxable income of negative \$70,977 in 2004; however, this error does not alter the ultimate outcome of the appeal.

⁶ 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.

⁷ The director erred in stating that the petitioner had the ability to pay the proffered wage in 1999 based on its net current assets; however, this error does not alter the ultimate outcome of the appeal.

⁸ The petitioner did not submit its tax return for the fiscal year 2000. The AAO considers the net current assets at the beginning of the fiscal year 2001 reported on the Schedule L to the Form 1120 for 2001 as the petitioner's net current assets at the end of the fiscal year 2000.

Therefore, while the petitioner's net current assets during the fiscal year 2001 were sufficient to pay the difference of \$35,021.60 between wages actually paid to the beneficiary and the proffered wage during that year, the petitioner did not have sufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage for 1999, 2000 and 2002 through 2004.

The record before the director closed on May 22, 2006 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for calendar year 2005 should have been available. However, the petitioner did not submit its tax return for the calendar year 2005 and the fiscal year 2000, 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 specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for 2000 and 2005. 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 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 except for 2001, 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, its net income or its net current assets.

On appeal, counsel asserted that the petitioner is a grocery store business with two store locations in New York City and has been in business for several years; the petitioner hires and pays several employees for its two stores, and that the beneficiary has been working for several years for the petitioner and received a salary from the petitioner. Counsel's argument concerning the petitioner's longevity and number of employees, cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1985 and employs approximately 18 employees. Its gross income in 2004 was above \$2.7 million and it paid salaries and wages \$170,992 that year. However, considering the number of employees, the petitioner paid an average annual salary of \$9,500 per employee. Although the beneficiary has worked for the petitioner since 1996 in the proffered position, he was paid less than a half of the proffered wage during the years from 1996 to 2006 except for 2004. In addition, in each year from 1998 to 2004 the petitioner had a negative net income (loss). No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that the relevant years were uncharacteristically unprofitable years in a framework of profitable or successful years for the petitioner. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and has failed to establish 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 Department of Labor.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established the beneficiary's qualifications for the proffered position as set forth on the Form ETA 750 prior to 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).

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 deli food manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. EDUCATION
 - Grade School 6 years
 - High School 4 years
 - College 0
- EXPERINCE
 - Job Offered 2 years
 - Related Occupation 0

The duties of the proffered position 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 on February 16, 1999 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he indicated that he attended Dalbanga High School in Borgona, Bangladesh in the field of "Academics," culminating in the receipt of a "Junior High School Degree" in 1982. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been working for the petitioner as a full-time butcher from September 1994 to August 1996 and then as a full-time deli food manager since August 1996. He did not provide any additional information concerning his education and employment background on that form.

Although on Part 14 of the Form ETA 750B, listing documents attached which are submitted as evidence that alien possesses the education, training, experience, and abilities represented, the beneficiary listed "Junior High School Degree" the record does not contain any evidence to demonstrate that the beneficiary met the

educational requirements of 6 years of grade school and 4 years of high school. Therefore, the petitioner failed to establish the beneficiary's qualifications in education.

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) or 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 instant I-140 petition was submitted on October 4, 2004 without evidence pertinent to the beneficiary's requisite two years of experience in the job offered. In response to the director's RFE dated February 22, 2006, the petitioner submitted an experience letter.

The experience letter in the record is on letterhead of the petitioner, was dated April 12, 2006 and signed by Joseph Dolan as the owner of the petitioner. The letter is from the owner of the business, and thus it is a letter from a current employer. The letter verifies that the beneficiary began working as a deli food manager from August 1996 until the present time, i.e. April 12, 2006. 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, which as noted above, is September 1, 1999. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Only the experience from August 1996 to August 1999 can be considered as qualifying experience for the proffered position in the instant case. The experience letter from the petitioner verifies the beneficiary's three years of experience as a deli food manager prior to the priority date and includes a specific description of the duties the beneficiary performed as required by the regulation. However, this experience letter did not verify the beneficiary's full-time employment.

The record contains copies of the beneficiary's W-2 forms for 1996 through 1999 and the beneficiary's individual income tax returns for 1996 through 1999. These documents show that the petitioner paid the beneficiary \$10,675 in 1996, \$19,200 in 1997, \$14,750 in 1998 and \$13,000 in 1999. None of these amounts establish the beneficiary's full-time employment with the petitioner during the years 1996 through 1999.⁹ Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered for the proffered position as required by the ETA 750.

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.

⁹ We note that the proffered wage for the proffered position is \$51,521.60 per year.