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U.S. Citizenship
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Services

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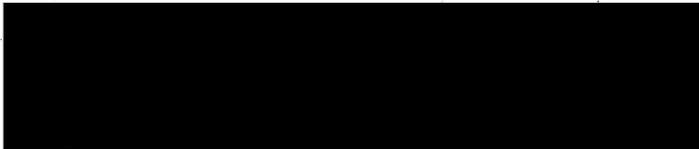
Office: NEBRASKA SERVICE CENTER

Date: DEC 18 2007

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:



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 metal custom and production polishing business. It seeks to employ the beneficiary permanently in the United States as a metal polisher. 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 requirements of the labor certification as of the priority date of February 16, 2001. 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 original April 26, 2007, decision, 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 beneficiary met the experience requirements of the labor certification as of the priority date of February 16, 2001.

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 February 16, 2001. The proffered wage as stated on the Form ETA 750 is \$18.52 per hour or \$38,521.60 annually.

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 appeal¹. Relevant evidence submitted on appeal includes counsel's brief. Other relevant evidence includes a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Statement for an S Corporation and copies of the petitioner's 2003 through 2006 Forms 1120, U.S. Corporation Income Tax Returns. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2002 Form 1120S reflects an ordinary income or net income from Schedule K of -\$519 and net current assets of \$8,832.

The petitioner's 2003 through 2006 Forms 1120 reflect a taxable income before net operating loss deduction and special deductions of \$57,752, -\$47,468, \$6,004, and \$4,752, respectively. The petitioner's 2003 through 2006 Forms 1120 also reflect net current assets of \$4,270, \$6,599, \$2,435, and \$7,883, respectively.

On appeal, counsel states:

Regulations noted at 8 C.F.R. § 205.2 state that a notice of intent to deny must be served on petitioner by any service officer authorized to approve a petition under section of 204 of the act. 8 C.F.R. § 205.2. In the present matter, the CIS never served a notice of intent to deny on either petitioner or beneficiary.

* * *

In the present case, the CIS has denied the I-140. It argues that the petitioner is unable to pay the beneficiary the proffered wage. To support this allegation, the CIS analyses [sic] the submitted financial documentation without analyzing the assets the company owns as proof of its ability to pay. In addition, the CIS alleges the beneficiary does not have the requisite years of experience without taking into consideration the letters of experience submitted for the beneficiary. The CIS analysis is clearly erroneous.

* * *

In the present matter, the petitioner has provided financial information, including, corporate taxes, quarterly tax returns, and DE6s.²

* * *

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).

² Counsel is mistaken. Only the petitioner's tax returns were submitted and are in the record of proceeding.

In determining the petitioner's ability to pay the proffered wage, CIS may 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 present case, beneficiary has been employed by the petitioner since March of 1994 and petitioner has paid beneficiary's wages since that date. As such, this is prima facie proof of the petitioner's ability to pay the proffered wage.³

As an alternative means of determining the petitioner's ability to pay the proffered wages, the CIS may review the petitioner's net current assets. This petitioner is a metal polishing company that owns equipment which may also be taken into consideration when establishing the ability to pay the proffered wage. In the present matter, the petitioner has provided financial information, including, corporate taxes and asset information. In addition, the petitioner presents, attached hereto, a letter detailing the company's additional asset information. These assets combine to give the company an additional over \$90,000. From this total, the petitioner is more than able to pay the beneficiary's proffered wage of \$38,522 per year. . . .

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 Sonogawa*, 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 750, signed by the beneficiary, the beneficiary claims to have been employed by the petitioner from March 1994 to the present. However, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, that corroborates the beneficiary's claim. Therefore, the petitioner has not established that it employed the beneficiary from 1994 to the present.

³ Neither counsel nor the petitioner have provided any evidence that the petitioner employed and paid the beneficiary the proffered wage from March 1994 to the present as stated by counsel. No Internal Revenue Service Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, were submitted. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

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. 623 F.Supp at 1084. 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. 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.

In 2002, the petitioner was organized as an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

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).

In the instant case, the petitioner's net income from Schedule K for 2002 was -\$519. The petitioner could not have paid the proffered wage of \$38,521.60 from its net income in 2002.

In 2003 through 2006, the petitioner was organized as a "C" corporation. For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A, U.S. Corporation Short-Form Income Tax Return. The petitioner's tax returns demonstrate that its net incomes in 2003 through 2006 were \$57,752, -\$47,468, \$6,004, and \$4,752, respectively. The petitioner could have paid the proffered wage of \$38,521.60 in 2003 from its net income, but not in 2004 through 2006.

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.⁴ 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 2002 and 2004 through 2006 were \$8,832, \$6,599, \$2,435, and \$7,883, respectively. (The petitioner has already established its ability to pay the proffered wage from its net income in 2003). The petitioner could not have paid the proffered wage of \$38,521.60 from its net current assets in 2002 and 2004 through 2006.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$38,521.60 based on its income, wages paid, and its equipment. Counsel also contends that the director was obligated to serve a notice of intent to deny upon the petitioner according to the regulation at 8 C.F.R. § 205.2.

Counsel is mistaken. The regulation at 8 C.F.R. § 205.2 deals with the revocation of an approved petition. In the instant case, the petition was never approved. Instead, the director correctly denied the petition under 8 C.F.R. § 103.2(a)(12) which states in pertinent part:

Effect where evidence submitted in response to a request does not establish eligibility at the time of filing. An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. An application or petition shall be denied where any application or petition upon which it was based was filed subsequently.

Counsel's claim that the petitioner has established its ability to pay the proffered wage based on its income and wages paid is without merit. The mere fact that the petitioner has incomes ranging from a low of \$400,000 to a high of \$500,000 and pays wages ranging from a low of \$160,000 to a high of \$180,000 each year is not enough evidence to show that the petitioner can pay an additional salary if its net incomes and net current assets indicate otherwise. In addition, although counsel states that the petitioner has employed the beneficiary since 1994 and has paid the proffered wage to the beneficiary during that time, no evidence was supplied to corroborate that statement.

On appeal, the petitioner submits a letter, dated May 20, 2007, stating that the company has been in business for 54 years and that the value of its equipment should be considered when determining the petitioner's ability

⁴ 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.

to pay the proffered wage of \$38,521.60. However, the equipment described in the petitioner's letter would be considered depreciable, and 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. In addition, neither counsel nor the petitioner explains the significance of the major equipment or how it might be used to pay the proffered wage of \$38,521.60. Furthermore, counsel has not provided a reason supported by pertinent precedent decisions indicating that major equipment may be considered when determining the petitioner's ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has not provided any evidence that unusual circumstances have been shown to exist that parallel those in *Sonogawa*, nor has it been established that 2002 through 2006 were uncharacteristically unprofitable years for the petitioner. In addition, there is no evidence of the petitioner's reputation in the industry. Furthermore, although the petitioner has submitted five tax returns, 2002 through 2006, only one of those tax returns show that the petitioner had sufficient funds to pay the proffered wage of \$38,521.60 without the supplementation of the beneficiary's Forms W-2 or Forms 1099-MISC which were not submitted.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The second issue in this case is whether the beneficiary met the experience requirements of the labor certification as of the priority date of February 16, 2001.

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.

(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 February 16, 2001.

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 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 must possess eight years of grade school and two years of experience in the job offered as a metal polisher. Block 15 has no additional requirements.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of metal polisher must have eight years of grade school and two years of experience in the job offered as a metal polisher.

In the instant case, counsel provided a letter, dated January 29, 2001, from Lara's Manufacture of Metal Pieces, signed by [REDACTED] which states:

On behalf of the mentioned person, I recommend [REDACTED], who was employed by this company from January of 1990 until December of 1993.

These dates are extended within 25 days of the month of September of the present year until the end of the desired month.

In response to a request from evidence,⁵ dated December 8, 2006, seeking additional evidence of the beneficiary's two years of experience, the petitioner submitted a copy of the same letter, dated January 29, 2001, from [REDACTED] Manufacture of Metal Pieces.

⁵ The petitioner was specifically informed that letters from previous employers need to contain the name, address, title of writer, and a specific description of the duties performed as well as the position held by the beneficiary, preferably on the company's letterhead. The writer should be someone who was in authority, such as a supervisor, a president, or the Director of Human Resources.

The letter from [REDACTED] does not meet the regulations at 8 C.F.R. § 204.5(l)(3)(ii)(A) which state:

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.

In the instant case, the letter does not contain the title of [REDACTED] and it does not describe the duties performed by the beneficiary nor does it indicate the beneficiary's position within the company. Therefore, the AAO is unwilling to accept the letter from [REDACTED] as proof that the beneficiary met the experience requirements of the labor certification at the time of filing of the visa petition, February 16, 2001.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal does not overcome the decision of the director.

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.