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U.S. Citizenship  
and Immigration  
Services

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FILE: WAC-05-009-50545 Office: CALIFORNIA SERVICE CENTER

Date: FEB 13 2007

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.

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 landscaping and gardening company. It seeks to employ the beneficiary permanently in the United States as a first-line supervisor/manager of landscaping lawn services (landscape gardener foreman). 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 the beneficiary had the requisite experience as stated on the labor certification petition and 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 denied the petition accordingly.

The record shows that the appeal is properly filed and 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 August 24, 2005 denial, the issues in this case are whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position and whether or not that the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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 petitioner must 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 5, 2001.

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, the petitioner does not submit any additional evidence on appeal. Relevant evidence in the record includes a letter from the beneficiary's prior employer, Suburban Landscape & Maintenance Co. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, the petitioner asserts that the letter from [REDACTED] established that the beneficiary possessed the requisite two years of experience 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).

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 landscape gardener foreman. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Experience	
	Job Offered	2 years
	Related Occupation	Blank

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 does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on February 19, 2001 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, he represented that he has been working as a full time landscape gardener foreman for the petitioner since July 1992. Prior to that, he represented that [REDACTED] a landscaping and gardening service in Van Nuys, California, employed him as a full time landscape gardener foreman from August 1989 to June 1992. He does not provide any additional information concerning his 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 instant I-140 petition was submitted on October 13, 2004 without evidence pertinent to the beneficiary's qualifications as required by the above regulation. The director issued a request for additional evidence (RFE) on May 5, 2005 requesting 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 an experience letter from the beneficiary's former employer.

The issue here in the instant case is whether the petitioner with this letter 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 letter from 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 experience letter in the record is on letterhead of [REDACTED] and was dated June 13, 1992 and signed by [REDACTED] as the owner of the company. This letter stated concerning the beneficiary's work experience in pertinent part that:

[The beneficiary] has been employed full time by [REDACTED] from August, 1989, to the present time as a [REDACTED]. During his employment he has always been reliable and has not missed work other than his earned two week vacations.

The letter is from the owner of the business, and thus it is a letter from a former employer. The letter verifies that the beneficiary was employed as a full time landscape gardener foreman from August 1989 to the present time, i.e. June 13, 1992, for more than two years. However, the experience letter from S [REDACTED] [REDACTED] did not include a specific description of the duties the beneficiary performed as required by the regulation. Therefore, this experience letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case. In addition, without a specific description of the duties the AAO cannot determine whether the beneficiary's more than two years of experience with [REDACTED] b. qualifies him to perform the duties of the proffered position set forth in Item 13 of the Form ETA 750A. The record of proceeding does not contain any evidence to support the beneficiary's qualifications. 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 with the Suburban letter.

Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior at least two years of experience as a landscape gardener foreman, and further failed to establish that the beneficiary is qualified for the proffered position. The petitioner's assertions on appeal fail to overcome the ground of denial in the director's decision.

The second issue is whether or not the petitioner established that it had the ability to pay the proffered wage beginning on the priority date.

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. DOL. See 8 CFR § 204.5(d). As noted previously, the priority date in this case is April 5, 2001. The proffered wage as stated on the Form ETA 750 is \$21.99 per hour (\$45,739.20 per year).

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 did not submit the beneficiary's W-2, 1099 forms or any other compensation documents but the petitioner's incomplete quarterly wage reports for the third and fourth quarters of 2004 and

the first quarter of 2005. These documents show that the petitioner paid the beneficiary \$11,044.00 in the third quarter of 2004, \$8,426.00 in the fourth quarter of 2004, and \$6,204.00 in the first quarter of 2005. The petitioner failed to demonstrate that it paid the beneficiary at the level of the proffered wage for each of these quarters. The petitioner is still obligated to demonstrate that it could pay the beneficiary the full proffered wage of \$45,739.20 each of the years 2001 through 2003, and the difference of \$26,269.20 in 2004 and \$39,535.20 in 2005 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.

However, the petitioner did not submit its tax returns for these years with the initial filing. 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 those relevant years. 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).

Both the regulation and the director's RFE gave notice to the petitioner to submit copies of annual reports or audited financial statements as an alternative. The petitioner submitted its Profit & Loss statements for 2001 through 2004. However, these financial statements are not audited. The petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements

must be audited. As there is no accountant's report accompanying these statements, the AAO cannot **conclude that they are audited statements**. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. In addition, the profit and loss statements show that the petitioner had net income of \$(14,876.08) in 2001, \$16,919.61 in 2002, \$6,816 in 2003 and \$21,311.44 in 2004. Even if these profit and loss statements were audited, none of these years' net income for the petitioner would have had been sufficient to pay the proffered wage of \$45,739.20.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any evidence showing that the petitioner is a sole proprietorship, nor any evidence showing the sole proprietor had addition income or liquefiable assets and personal liabilities to be considered as part of the petitioner's ability to pay if the petitioner in the instant case is a sole proprietorship.

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 AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of qualifying experience from the evidence submitted into this record of proceeding and that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.