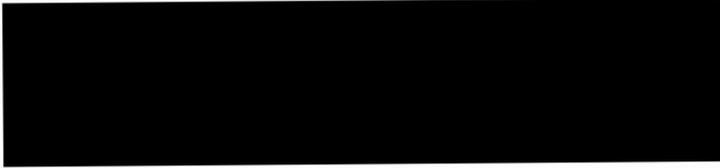




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FILE:



Office: TEXAS SERVICE CENTER

Date: JUN 26 2007

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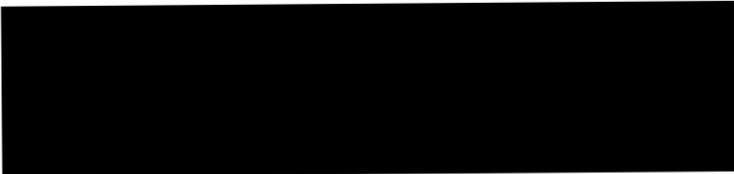
Petitioner:

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto and agro/industrial engine rehauler. It seeks to employ the beneficiary permanently in the United States as an automotive mechanic (auto motor rebuilder). 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 found that there is an unresolved inconsistency between the beneficiary's alleged employment in Mexico and his United States arriving date on the Form I-140. The petition was denied accordingly. The director also invalidated the labor certification based on the same finding.

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 December 13, 2005 denial, the issues in this case are whether or not the petitioner resolved the inconsistency and demonstrated that the beneficiary possessed the requisite two years of experience in the job offered as set forth by the labor certification, and whether or not the petitioner fraudulently or willfully misrepresented the job to DOL in the labor certification process, therefore, invalidating the labor certification.

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. DOL 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 6, 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 appeal¹. Relevant evidence in the record includes an undated experience letter from [REDACTED] with English translation, another letter dated November 25, 2005 from [REDACTED] with English translation and a letter from the translator dated January 10, 2006. The record does not contain any other evidence relevant to the beneficiary's employment history.

On appeal, counsel asserts that the director failed to meaningfully consider the evidence submitted by the petitioner and failed to give reasonable weight to the petitioner's additional evidence by explaining the inconsistency before the denial.

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).

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 automotive mechanic. 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 of the proffered job 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 March 30, 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 auto/industrial engine rebuilder for the petitioner since April 1995. Prior to that, he represented that Taller Mecanico [REDACTED] in Mexico employed him as a full time auto motor rebuilder from March 1984 to September 1989. 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 31, 2005 with an undated experience letter from [REDACTED] as the beneficiary's former employer at Taller Mecanico [REDACTED] in [REDACTED]. The undated experience letter verifies that the beneficiary worked as an auto motor rebuilder from March 1984 to September 1989 for [REDACTED] while the petitioner reported in Part 3 of the Form I-140 petition that the beneficiary last entered the United States in February 1984 and still currently resides in the United States. The director served a notice of intent to deny (NOID) on November 9, 2005 requesting the petitioner resolve the inconsistency by providing objective documentary evidence of the following: copies of the beneficiary's Mexico tax forms for all the years the beneficiary was employed between 1984 to 1989, copies of the beneficiary's paychecks or pay stubs for [REDACTED] between 1984 to 1989 and any supplementary evidence that will establish the beneficiary's employment with [REDACTED] or that an employer-employee relationship existed between 1984 to 1989. In response to the director's NOID, counsel claimed that the Form I-140 erroneously states the incorrect date of entry for the beneficiary, and that the correct date of entry is February 1994. Counsel submitted a corrected Form I-140 with the date of arrival 02/1994 and requested the director correct the Form I-140 with the correct date of entry. Counsel also claimed that the experience letter from [REDACTED] was dated November 25, 2005. On appeal counsel

submits another Form I-140 signed by the representative of the petitioner indicating 02/1994 as the beneficiary's date of arrival, a letter dated November 25, 2005 from [REDACTED] an English translation translated on December 7, 2005 and another English translation translated on January 9, 2006, and a letter from the translator explaining that he/she forgot to translate the date of [REDACTED]'s November 25, 2005 letter on his/her December 17, 2005 translation. Counsel asserts that with this new evidence the petitioner resolved the inconsistency, and therefore, "it is undeniable that the alien beneficiary has experience in his area of expertise in general mechanics and engine adjustment, as well as he was in Mexico during the time that the letter of experience said and that he moved to [the] United States in 02/1994."

The first issue is whether or not the petitioner resolved the inconsistency detailed in the director's NOID and established the beneficiary's requisite experience prior to the priority date with the letter of [REDACTED] under the requirement set forth at 8 C.F.R. § 204.5(g)(1). 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). *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." To resolve the inconsistency counsel claimed that the Form I-140 stated the beneficiary's date of entry erroneously, and the correct date of entry is February 1994. However, counsel did not submit any independent objective evidence, such as a copy of the beneficiary's I-94 card, an entry stamp on the board or visa page from his passport or other legal identification documents. Without any of the independent objective evidence, counsel's attempts to explain or reconcile such inconsistency are not sufficient to resolve the inconsistency. 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).

Counsel's second attempt to resolve the inconsistency was to explain that the experience letter from [REDACTED] was dated November 25, 2005, and that the translator mistakenly did not translate the date for the letter. However, again counsel failed to resolve the inconsistency with independent objective evidence. Counsel did not submit any evidence expressly requested by the director in her NOID, such as copies of the beneficiary's Mexico tax forms for all the years the beneficiary was employed between 1984 to 1989, copies of the beneficiary's paychecks or pay stubs for [REDACTED] between 1984 to 1989 or any supplementary evidence that will establish the beneficiary's employment with [REDACTED] or that an employer-employee relationship existed between 1984 to 1989. These documents will not only verify that the contents of the experience letter from [REDACTED] are true and real and demonstrate that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date, but will also prove that the beneficiary did not enter the United States in February 1984 and further support counsel's request that CIS correct the date of entry as February 1994. 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)).

Therefore, the petitioner failed to resolve the inconsistency with independent objective evidence, and thus failed to establish with regulatory-prescribed evidence the beneficiary's prior at least two years of experience as an automotive mechanic, and further failed to establish that the beneficiary is qualified for the proffered position. Counsel'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 fraudulently or willfully misrepresented the job to DOL in the labor certification process, therefore invalidating the labor certification.

Section 212(a)(6)(C)(i) of the Act provides that "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "[a]fter issuance labor certifications are subject to invalidation by the [CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application."

As discussed above, the AAO concurs with the director's determination that the petitioner failed to resolve the inconsistency with independent objective evidence, failed to establish with regulatory-prescribed evidence the beneficiary's two years of prior experience as an automotive mechanic, and further failed to establish that the beneficiary is qualified for the proffered position. **The petitioner failed to demonstrate the beneficiary's qualifications with the experience letters from [REDACTED] because it failed to resolve the inconsistency of how the beneficiary worked as a full time employee for [REDACTED] in Mexico from March 1984 to September 1989 while he claimed to have stayed in the United States since February 1984.** The petitioner did not submit independent objective evidence, such as copies of the beneficiary's I-94 card, entrance stamps or pages from his passport, etc., to support its assertion that the beneficiary entered the United States in February 1994 instead of February 1984. The petitioner did not submit independent objective evidence, such as copies of the beneficiary's Mexican tax returns, pay stubs or other documents to establish the employer-employee relationship for years 1984 through 1989. However, the record of proceeding does not contain any direct evidence to establish that the petitioner fraudulently or willfully misrepresented a material fact involving the labor certification application to the DOL. **Without investigation results that reveal that [REDACTED] experience letters submitted by the petitioner are fraudulent or a copy of the beneficiary's I-94 card or other entrance records showing the beneficiary entered the United States in February 1984 or anywhere between March 1984 and September 1989, the fact that the petitioner did not submit sufficient evidence to resolve the inconsistency and to establish the beneficiary's qualifications prior to the priority date are not sufficient to infer that the petitioner fraudulently or willfully misrepresented a material fact involving the labor certification application.** The AAO finds that the record does not contain sufficient evidence to conclude that the relevant labor certification in the instant case should be deemed invalid. Therefore, the portion of the director's decision to invalidate the labor certification is withdrawn.

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 its continuing ability to pay the beneficiary the proffered wage beginning on the priority date and continuing to the time when the beneficiary obtains lawful permanent residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 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 6, 2001. The proffered wage as stated on the Form ETA 750 is \$15.98 per hour (\$33,238.40 per year). On the petition, the petitioner claimed to have been established on February 4, 1990, and to currently employ 12 workers. On the Form ETA 750B signed by the beneficiary on March 30, 2001, he claimed to have worked for the petitioner since April 1995.

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 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 any evidence for the beneficiary's compensation from the petitioner, although the beneficiary claimed to have worked for the petitioner since April 1995. Therefore, the petitioner failed to establish its ability to pay the proffered wage from 2001, the year of the priority date, to the present through the examination of wages paid to the beneficiary during these years. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$33,238.40 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 its gross income and gross profit on appeal 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* at 537.

The record contains incomplete copies of the petitioner's federal tax returns for 2002 through 2004. The petitioner's tax returns evidence that the petitioner was structured as a C corporation and its fiscal year is based on a calendar year. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage in 2002 through 2004:

- In 2002, the Form 1120 stated a net income² of \$(26,782).
- In 2003, the Form 1120 stated a net income of \$0.
- In 2004, the Form 1120 stated a net income of \$0.

Therefore, for the years 2002 through 2004, 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

² Taxable income before net operating loss deduction and special deductions on Line 28 of the Form 1120.

the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. However, the petitioner submitted incomplete tax returns for 2002 through 2004 without Schedule Ls. Therefore, the AAO cannot determine whether or not the petitioner had sufficient net current assets to pay the proffered wage in 2002 through 2004. The petitioner failed to demonstrate that it had sufficient net current assets to pay the proffered wage in 2002 through 2004 because it failed to submit the complete tax returns or other regulatory-prescribed evidence for these years.

The priority date in the instant case is April 6, 2001, therefore, the petitioner must establish its ability to pay the proffered wage from 2001. However, the petitioner did not submit its 2001 tax return, nor did counsel explain why the tax return was 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 in her NOID, the petitioner declined to provide copies of its tax return for 2001. 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, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage from 2001, the year of the priority date, to the present through an examination of wages paid to the beneficiary, its net income or its net current assets.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The portion of the director's decision regarding invalidation of the labor certification is withdrawn, however, the petition remains denied.

³According 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.