

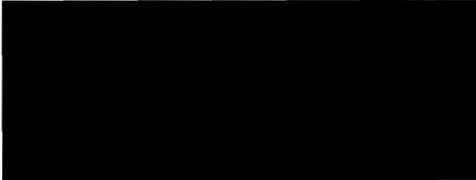
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JUN 28 2007
LIN-04-095-50357

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.

A handwritten signature in black ink, appearing to read "Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (Director), Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a lodging facilities manager (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 had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the petitioner had not established that the beneficiary possessed the specific degree required by the labor certification at the time the Form ETA 750 was accepted. 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 March 14, 2005 denial, the first issue in this case is 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.

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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.00 per hour (\$35,360 per year). The Form ETA 750 states that the position requires an associate's degree in commerce, science, accounting, or business, and two years of experience in the job offered.

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. On appeal, counsel submits a brief with letters from a CPA dated November 8, 2004 and April 5, 2005, the beneficiary's educational transcripts and credentials and an affidavit. Other relevant evidence in the record includes the petitioner's corporate federal tax returns for 2000 through 2004, the petitioner's unaudited financial statements for January 2002 through October 2004, bank statements for the petitioner's business checking accounts covering from January 2001 to November 2004, Form 941 Employer's Quarterly Federal Tax Return for 2001, 2002, 2003 and the first three quarters of 2004, Kansas Quarterly Wage Report & Unemployment Tax Return for 2003 and the first three quarters of 2004, the beneficiary's cancelled pay checks, the beneficiary's bachelor of commerce degree and transcripts from Gujarat University, an evaluation of the educational credentials from A.E.S.F. Inc. and resume, and an experience letter from Days Inn of Warrensburg. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage and the beneficiary's qualifications.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1998, and to have a gross annual income of \$800,000. In response to the director's request for evidence (RFE) dated November 8, 2004, the petitioner claimed to currently employ 8 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that based on the letters from the petitioner's accountant with depreciation and amortization added back to net profits the petitioner had the ability to pay the proffered wage, and that the transcripts submitted demonstrate that the beneficiary possessed an associate degree prior to the priority date, and thus is qualified for the proffered position.

First of all, 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 Form 941 Employer's Quarterly Federal Tax Return for 2001, 2002,

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) and 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).

2003 and the first three quarters of 2004, Kansas Quarterly Wage Report & Unemployment Tax Return for 2003 and the first three quarters of 2004, and the beneficiary's cancelled pay checks. These documents show that the petitioner paid the beneficiary \$3,000 in the second quarter, \$6,000 in the third quarter and \$9,000 in the fourth quarter of 2004. The petitioner did not submit any evidence of the beneficiary's compensation from the petitioner for 2001 through 2003. Thus, the petitioner failed to establish its ability to pay the proffered wage through the examination of wages paid to the beneficiary in 2001 through 2004. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$35,360 in each of years 2001 through 2003 and that it could pay the difference of \$17,360 between wages actually paid to the beneficiary and the proffered wage in 2004.

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). The petitioner's 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. The letters from the petitioner's accountant asserts that depreciation expenses are not actual expenses, and thus should be considered as part of the ability to pay the proffered wage in the instant case. Counsel's 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 copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000 through 2004. Since the priority date in the instant case is April 30, 2001, the tax return for 2000 is not necessarily dispositive. The petitioner's tax returns for 2001 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$35,360 per year from the year of the priority date 2001 to 2003 and the difference between wages actually paid to the beneficiary and the proffered wage in 2004:

- In 2001, the Form 1120S stated a net income² of \$(23,140).
- In 2002, the Form 1120S stated a net income of \$29,632.
- In 2003, the Form 1120S stated a net income of \$8,486.
- In 2004, the Form 1120S stated a net income of \$60,044.

Therefore, for the years 2001, 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage while the net income for 2004 was sufficient to pay the beneficiary the difference of \$17,360 between wages actually paid to the beneficiary and the proffered wage that year.

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.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.

- The petitioner's net current assets during 2001 were \$(16,945).
- The petitioner's net current assets during 2002 were \$15,675.
- The petitioner's net current assets during 2003 were \$(61,191).

Therefore, for the years 2001 through 2003 the petitioner did not have sufficient net current assets to pay the beneficiary the proffered wage of \$35,360 per year.

² 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 1120S 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 line 23 or 17e 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

³ 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.

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 as of the year of the priority date 2001 to 2003 through an examination of wages paid to the beneficiary, its net income or its net current assets.

The record contains the petitioner's unaudited financial statements for January 2002 through October 2004. Counsel'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.

The petitioner submitted bank statements for its business checking accounts covering from January 2001 to November 2004. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

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. The portion of the director's decision that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date is affirmed.

As set forth in the director's denial, the second issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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).

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 lodging facilities manager (manager). In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|---|
| 14. | Education | |
| | Grade School | |
| | High School | |
| | College | Y |
| | College Degree Required | Associates Degree |
| | Major Field of Study | Commerce, science, accounting or business |

The applicant must have two years of experience in the job offered to perform the duties described in Item 13. Item 15 of Form ETA 750A reflects special requirements as “weekend required and varies.”

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended Navgujarat College (Gujarat University) in the field of “Commerce” from 1973 through 1977, culminating in the receipt of a “Bachelor of Commerce” degree. He provides no further information concerning his college educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct. In corroboration of the Form ETA-750B, the petitioner provided the beneficiary’s Bachelor of Commerce degree and transcripts from Gujarat University and a credential evaluation from A.E.S.F. Inc. The director determined that the beneficiary was not qualified for the proffered position because the bachelor of commerce degree indicates that the degree was issued on June 24, 2004, and thus denied the petition accordingly. On appeal counsel asserts that the submitted transcripts indicate that the beneficiary passed the examination in 1975 to 1977 and submits an affidavit from the beneficiary to support his assertions. The transcripts show that the beneficiary attended Gujarat University, took courses and passed the examination for completion of a three-year full-time bachelor of commerce degree program from 1973 to 1977.

A credential evaluation drafted by [redacted] Director of Degree Evaluation Division, A.E.S.F. Inc. on January 11, 2005 was also submitted and stated the following in pertinent part:

The academic credentials of [the beneficiary] indicate that, in the judgment of the undersigned, he has achieved the equivalent of an Associate of Science degree in Business Administration with a major in Accounting an additional thirty (30) academic credit hours toward the Bachelor of Science in Business Administration degree, at a regionally accredited institution in the United States.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). A US associate degree is usually awarded after two years of college studies. The completion of a three years of college studies in India even without conference of a bachelor degree should be considered as the equivalent of a US associate degree. The AAO notes that the required degree for the proffered position is an associate degree instead of a bachelor’s degree, and therefore, the AAO concurs with counsel’s assertion that the transcripts from Gujarat University demonstrate that the beneficiary possessed the requisite associate degree prior to the priority date. Accordingly, the portion of the

director's decision that the beneficiary does not qualify for the proffered position as he did not possess the required degree until after the priority date of April 30, 2001 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 demonstrated with regulatory-prescribed evidence that the beneficiary possessed the requisite two years of experience in the job offered 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).

As previously noted, in the instant case, the proffered position requires two years of experience in the job offered, i.e. lodging facilities manager (manager) in addition to an associate degree. The beneficiary set forth his credentials on Part 15 of the Form ETA-750B, which elicits information on the beneficiary's work experience. The beneficiary represented that he worked as a manager for Days Inn in Warrensburg, Missouri from August 1999 to August 2000. Prior to that, he represented that H.L.S. d/b/a Days Inn of Elberton in Georgia employed him as an assistant manager from January 1998 to July 1999. 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) 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 record contains an experience letter from A.C.C.I. d/b/a Days Inn of Warrensburg. This experience letter is on letterhead of Days Inn and was dated April 16, 2001 and signed by Harry Patel as the owner of the motel. This letter certifies that the beneficiary worked as a manager from August 1999 to August 2000. However, the letter certifies only one year of experience as a manager which does not meet the two years of experience requirement for the proffered position as set forth on the Form ETA 750. In addition, the letter does not verify the beneficiary's full-time employment. The record of proceeding does not contain any other 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.

Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior two years of experience as a lodging facilities manager, and further failed to establish that the beneficiary is qualified for the proffered position.

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.