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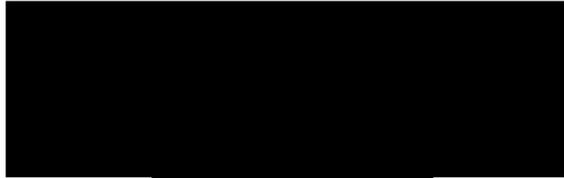
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

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FILE:

WAC 04 246 53245

Office: CALIFORNIA SERVICE CENTER

Date: MAR 29 2007

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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

The petitioner is a construction clean-up business. It seeks to employ the beneficiary permanently in the United States as a clearing supervisor. 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 the beneficiary met the experience requirements of the labor certification as of the priority date of the visa petition and that the petitioner had not established its continuing ability to pay the proffered wage as of the priority date of April 25, 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 July 11, 2005 denial, the issues in this case are whether or not the beneficiary met the experience requirements of the proffered job as specified by the Form ETA 750 and whether the petitioner has established its continuing ability to pay the proffered wage as of the priority date of April 25, 2001.

On appeal, counsel submits a statement and indicates that a brief would be submitted within thirty days. However, in response to a fax, dated March 7, 2007, counsel states that he did not file a brief or evidence in support of the appeal as indicated on Form I-290B, Notice of Appeal to the Administrative Appeals Office. Therefore, a decision will be determined based on the record, as it is currently constituted.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

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.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

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 April 25, 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 two years of experience in the related occupation of maintenance clean up. 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 clearing supervisor must have two years of experience in the related occupation of maintenance clean up.

In the instant case, counsel submitted an undated letter from [REDACTED], S.A. stating that the beneficiary had been employed by [REDACTED] S.A. for six years. The letter failed to state the duties of the beneficiary or provide the dates of the beneficiary's employment. The letter was signed by [REDACTED] SubManager.

In response to a request for evidence, counsel submitted a letter, dated June 17, 2005, from the petitioner stating that the beneficiary is "presently employed on a full-time basis with our company in the position of Clean Up Supervisor according to the terms and conditions of the labor certification. . . . [The beneficiary] is responsible for supervising and coordinating daily clean up activities of helpers, laborers, and material movers." The letter failed to provide the dates of employment for the beneficiary, but was signed by [REDACTED] President of the petitioner.

On appeal, counsel states:

The District Director erred in his decision of July 11, 2005, denying I-140 visa petition based on applicant's failure to submit additional evidence as requested on March 25, 2005.

Applicant requested an extension to [sic] time to submit such evidence in order to allow the experience verification documents to be obtained from Mexico and to allow the employer time to retrieve its records from storage.

Please accept the evidence as requested March 25, 2005, and adjudicate this application based on its merits.

In the instant case, neither the letter from Embotelladora Aguascalientes, S.A. nor the letter from the petitioner meet the requirements of 8 C.F.R. § 204.5(l)(3)(i) and (ii)(A). *See above*. The letter from Embotelladora Aguascalientes, S.A. fails to provide the duties or the dates of the beneficiary's employment, and the petitioner's letter fails to provide the dates of the beneficiary's employment as a clean up supervisor. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Neither letter provided as proof of the beneficiary's experience establishes that the beneficiary has the necessary two years of experience as required by the labor certification. Therefore, the petition may not be approved.

The second issue in the instant case is whether the petitioner has established its ability to pay the proffered wage of \$53,705.60 at the time of filing and continuing until the beneficiary obtains lawful permanent residence.

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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$25.82 per hour or \$53,705.60 annually.

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 submitted on appeal includes counsel's statement. Other relevant evidence in the record includes a copy of the front page of the petitioner's 2004 Form 1120, U.S. Corporation Income Tax Return, a copy of the beneficiary's June 17, 2005 pay stub, copies of 2001 through 2004 Forms W-2, Wage and Tax Statements, issued by the petitioner for the beneficiary, and a copy of an unaudited income statement and balance sheet for the twelve months ending December 31, 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2004 Form 1120 reflects a taxable income before net operating loss deduction and special deductions or net income of -\$53,513. Schedule L was not provided; therefore, the AAO is unable to determine the petitioner's net current assets in 2004.

The petitioner's 2004 unaudited income statement and balance sheet reflect a net income of \$35,288.05 and net current assets of \$60,205.35.²

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 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

The Forms W-2 issued by the petitioner for the beneficiary reflect wages paid to the beneficiary of \$17,083 in 2001, \$18,436 in 2002, \$20,186.50 in 2003, and \$22,985.60 in 2004.

The beneficiary's June 17, 2005 pay stub reflects wages paid year to date of \$14,553.35.

Counsel submits no additional evidence on appeal.

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 750B, signed by the beneficiary on April 18, 2001, the beneficiary claims to have been employed by the petitioner from March 1987 to April 2001. In addition, counsel has submitted Forms W-2 issued by the petitioner for the beneficiary for the years 2001 through 2004. Therefore, the petitioner has established that it employed the beneficiary from 2001 through 2004.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$53,705.60 and the actual wages paid to the beneficiary in the pertinent years (2001 to the present). Those differences are \$36,622.60 in 2001, \$35,269.60 in 2002, \$33,519.10 in 2003, and \$30,720 in 2004. As the petitioner only submitted its 2004 tax return, the AAO is unable to determine if it had sufficient funds to pay the differences of \$36,622.60, \$35,269.60, and \$33,519.10, respectively, in 2001 through 2003. The petitioner could not have paid the difference of \$30,720 between the proffered wage of \$53,705.60 and the actual wages of \$22,985.60 paid to the beneficiary in 2004 from its net income.

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

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. Therefore, in the instant case, the financial statements will not be considered when determining the petitioner's ability to pay the proffered wage of \$53,705.60.

(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.

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.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 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. As the petitioner failed to submit its 2004 Schedule L, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$30,720 between the proffered wage of \$53,705.60 and the actual wages paid to the beneficiary of \$22,985.60 in 2004. In addition, since the petitioner failed to provide its 2001 through 2003 tax returns, the AAO cannot determine its ability to pay the proffered wage in those years.

As stated above, 8 C.F.R. § 204.5(g)(2) states the petitioner must demonstrate the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. In the instant case, the petitioner has not established its ability to pay the proffered wage in any of the pertinent years.

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.

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.

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.