

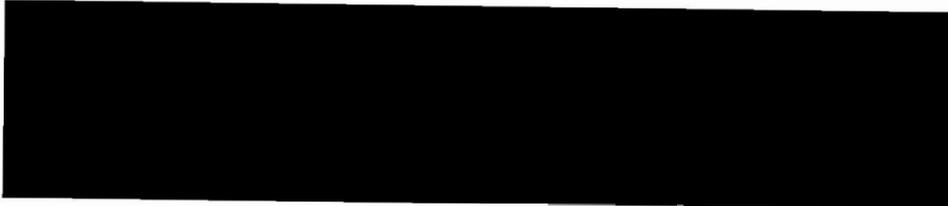
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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FILE:



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Office: TEXAS SERVICE CENTER

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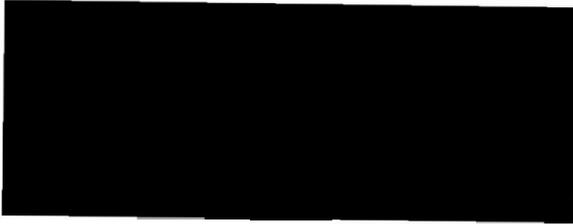
Petitioner:

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 Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a gas station/convenience store. It seeks to employ the beneficiary permanently in the United States as a retail store manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. The procedural history of this case is documented in 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 decision of denial the issues in this case are whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and whether the petitioner has demonstrated that the beneficiary has the qualifications that the Form ETA 750 stated as necessary qualifications.

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 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.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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 occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 Department of Labor. 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 29, 2002. The proffered wage as stated on the Form ETA 750 is \$36,625 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

The Form I-140 petition in this matter was submitted on August 26, 2004. On the petition, the petitioner stated that it was established on August 14, 2001 and that it employs five workers. The petition states that the petitioner's gross annual income is \$4,100,587 and that its net annual income is \$41,398. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Atlanta, Georgia.

On the Form ETA 750B, signed by the beneficiary on March 1, 2002, the beneficiary claimed to have worked for the [REDACTED] in East Bernard, Texas from September 15, 1999 to September 23, 2001.

The Form ETA 750B instructs the beneficiary to,

List all jobs held during the last three (3) years [and] any other jobs related to the occupation for which the alien is seeking certification

However, the beneficiary claimed no other employment, qualifying or otherwise, on the ETA 750B.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains copies of the petitioner's 2002 and 2003 Form 1120, U.S. Corporation Income Tax Returns, and Form W-2 Wage and Tax Statements. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The record also contains a letter dated February 21, 2005 from counsel. Counsel names, in answer to a question posed in a December 4, 2005 request for evidence, two other alien employees for whom the instant petitioner also petitioned.

Further still, the record contains a photocopy of a letter dated October 5, 2001, and a photocopy of a letter dated January 12, 2006. The record does not contain any additional evidence pertinent to the beneficiary's claim of qualifying employment experience.

The petitioner's tax returns show that it is a corporation, that it incorporated on August 14, 2001, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$58,112. At the end of that year the petitioner had current assets of \$200,651 and current liabilities of \$15,224, which yields net current assets of \$185,427.

During 2003 the petitioner reported taxable income before net operating loss deductions and special deductions of \$41,398. At the end of that year the petitioner had current assets of \$165,474 and current liabilities of \$83,202, which yields net current assets of \$82,272.

The W-2 forms submitted include 2002 and 2003 forms showing that the petitioner paid wages of \$11,404 and \$2,040 to the beneficiary during those years, respectively.

The October 5, 2001 photocopied letter is on letterhead of [REDACTED] Stop in East Bernard, Texas. It states that the beneficiary worked as a manager for that company, obtaining 24 months of experience from September 15, 1999 to September 23, 2001. The signature on that letter is illegible and the signatory is not otherwise identified, either by name or by his or her position with that company. The numerals indicating that the beneficiary gained 24 months of experience have been hand-altered. A handwritten mark was placed below that amendment to acknowledge it. Who acknowledged that amendment is unclear.

The January 12, 2006 letter is not on letterhead and is signed by [REDACTED] who states that he was the supervisor at [REDACTED] Truck Stop during the time the beneficiary worked there as a manager. That letter reiterates that the beneficiary worked in that capacity from September 15, 1999 to September 23, 2001. The writer also states, twice, that he provided the 2001 employment verification letter. The signature on the January 12, 2006 letter appears distinctly different from the signature, allegedly placed by the same person, on the October 5, 2001 letter. The writer of the January 12, 2006 letter also stated that he made a correction to the October 5, 2001 letter and initialed it. The mark acknowledging the amendment to the October 5, 2001 letter does not appear to be in the same hand as the signature on the January 12, 2006 letter.

The director denied the petition on December 15, 2005. In that decision the director found that the petitioner had not demonstrated its ability to pay the proffered wage and had not demonstrated that the beneficiary has the requisite employment experience as listed on the Form ETA 750. The director commented on the alteration to the October 5, 2001 employment verification letter and the fact that the author of that letter and

his position with the beneficiary's former employer had not been identified, although 8 C.F.R. § 204.5(l)(3)(ii)(A) requires that the name and title of the authors of such letters be specified. The director also questioned the existence of both the petitioner and [REDACTED] the beneficiary's former employer.

On appeal, counsel submitted evidence sufficient to demonstrate that the petitioner and the beneficiary's former employer exist. That issue will not be further addressed. Counsel also stated that the petitioner has submitted evidence sufficient to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

As to the evidence of the petitioner's qualifying employment experience, counsel stated that the two letters provided demonstrate that the beneficiary has the requisite employment experience as specified on the Form ETA 750.

This office will first address the issue of whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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 examine whether the petitioner employed 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 established that it paid the beneficiary \$11,404 during 2002 and \$2,040 during 2003. The petitioner must demonstrate the ability to pay the balance of the proffered wage during those years.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

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 CIS should have

considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically² shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$36,625 per year. The priority date is April 29, 2002.

During 2002 the petitioner paid the beneficiary \$11,404. The petitioner must demonstrate the ability to pay the \$25,221 balance of the proffered wage. During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$58,112. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner paid the beneficiary \$2,040. The petitioner must demonstrate the ability to pay the \$34,585 balance of the proffered wage. During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of \$41,398. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The petition in this matter was submitted on August 26, 2004. On that date the petitioner's 2004 tax return was unavailable. On December 4, 2004 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2004 tax return was still unavailable. The petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2004 and later years.

² The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petitioner has demonstrated the ability to pay the proffered wage during both of the salient years, 2002 and 2003.³ The petitioner, therefore, has sufficiently demonstrated its continuing ability to pay the proffered wage beginning on the priority date and that basis for the decision of denial has been overcome. The remaining issue is whether the petitioner demonstrated that the beneficiary has the employment experience requisite to the proffered position as stated on the Form ETA 750.

In the decision of denial the director noted the apparent alteration of the October 5, 2001 employment verification letter and that the writer of that letter was unidentified.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

In response to the doubts voiced by the director, the petitioner, on appeal, submitted the January 12, 2006 employment verification letter. The author and signatory of that letter reiterated the employment claim made on the first letter. The author also stated that he had provided, and signed, the October 5, 2001 letter. The difference between the signatures on the two letters is unexplained by independent objective evidence, and the AAO cannot conclude that the same person signed both letters.

Because of the assertion that the same person signed both letters, it appears that at least one of the letters submitted is inauthentic. Rather than assuaging the doubts the first letter raised, the second letter has greatly increased them. It does not constitute the "independent objective evidence" required by *Matter of Ho*, 19 I&N Dec. 582. The evidence of the beneficiary's previous employment experience is unreliable and does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

³ In the request for evidence the service center requested that the beneficiary name any other alien workers for whom it has petitioned. The petitioner complied. Typically, this office would require a petitioner to show the ability to pay the proffered wages of all alien workers for whom petitions are pending or have recently been approved. As the service center imposed no such requirement, did not rely on the other petitions in its decision pertinent to the petitioner's ability to pay the proffered wage, and did not include any evidence pertinent to the other petitions in the record, this office will exercise its discretion not to consider the other two petitions in today's decision.