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U.S. Citizenship  
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Services

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FILE:

WAC 04 260 53543

Office: CALIFORNIA SERVICE CENTER

Date: MAY 22 2007

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the California Service Center denied the petition. The matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an audio and video sales and service company.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as an electronics technician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position based on discrepancies between the beneficiary's claimed dates of previous employment in the Philippines, and his dates of entry into the United States as documented on the I-140 and I-485 petitions submitted to the record. The director noted in his decision that the beneficiary did not appear to have the requisite four years of work experience in the job offered, because other documentary evidence indicated that he had less than four years of work experience prior to his 1996 entry into the United States. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case has been discussed in these proceedings previously and is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on November 26, 2001.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>2</sup>. On appeal, counsel submits a brief and additional documentation. The additional documentation includes a printout of what appears to be counsel's computerized database with the beneficiary's entry date into the United States indicated as January 1, 1996. Counsel also submits a declaration from its paralegal Rey Hilario with regard to how the entry date of January 1, 1996 was erroneously inserted into the I-485 and I-140 petitions and then not corrected. Counsel also submits a declaration from the beneficiary that states he reviewed the forms for spelling and names and addresses, and that he assumed that counsel had correctly completed the "myriad of forms" that he had to sign. In the beneficiary's declaration, he notes three other exhibits to establish his presence in the Philippines prior to January 1, 1997, his presently claimed entry date into the United States.

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<sup>1</sup> The petitioner's tax return for 2001 indicates the petitioner's principal business is retail, sports equipment, while its tax returns for 2002 and 2003 indicate the petitioner's principal business is retail, karaoke equipment.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

These exhibits include a sworn affidavit from [REDACTED], that states [REDACTED] saw the beneficiary at the Q-Zar Christmas party in The Philippines on December 18, 1996. The second exhibit is a photo of two persons next to a post with Q-Zar information on it. The photo has an electronically generated date on its surface. The beneficiary states that the photo is dated November 13, 1996 and shows him on the Q-Zar premises. The third exhibit is described by the beneficiary as a legal instrument that he witnessed, signed and dated on November 12, 1996 in Cavite, The Philippines.

With the initial petition, counsel also submitted a letter of work verification signed by [REDACTED] Operation Manager, Q-Zar Laser Games, Mandaluyung City, The Philippines. In her letter dated August 17, 2001, Ms. [REDACTED] stated that the beneficiary was employed by Q-Zar from "June 1992 up to October 1996" on a fulltime basis as an electronics technician. The AAO notes that the I-140 and I-485 petitions both state that the beneficiary's entry date in to the United States was January 1, 1996.

In his brief, counsel states that the inconsistencies noted by the director as to the beneficiary's entry date into the United States and the subsequent discrepancy with the dates of employment noted by the beneficiary's former employer in the Philippines were caused by human error. Counsel states that his firm incorrectly entered the beneficiary's entry date into the United States in its forms filling database program, identified as Immigration Tracker, by one digit. Instead of putting in January 1, 1997 in the database, the date of January 1, 1996 was inserted in the database. Counsel states that based on the insertion of the typo, all of the beneficiary's Citizenship and Immigration Services (CIS) forms contain an incorrect date of entry. Counsel refers to [REDACTED] statement submitted on appeal that he was working on other applications simultaneously while preparing the beneficiary's forms and entered the employment history dates from a different client file. Counsel notes that this was the second human data entry error in the preparation of the instant petition. Counsel further notes that the inconsistent entry dates are typographical errors and not a willful misrepresentation of the facts and that the supporting documentation is not fraudulent. Counsel states that the beneficiary was the unfortunate subject of poorly reviewed and prepared legal documentation, and that independent corroborating evidence<sup>3</sup> shows that the inconsistencies in the record are human error and not fraudulent filings.

On appeal, counsel asserts that the documentation submitted to the record on appeal, proves that the beneficiary had obtained the requisite four years of work experience for the proffered job prior to filing the Form ETA 750.

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 electronics technician. In the instant case, item 14 describes the requirements of the proffered position as follows:

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<sup>3</sup> Counsel apparently refers to the documents submitted to the record on appeal .

- |                         |         |
|-------------------------|---------|
| 14. Education           |         |
| Grade School            | C       |
| High School             | C       |
| College                 | 0       |
| College Degree Required | (blank) |
| Major Field of Study    | (blank) |

The applicant must also have 4 years of experience in the job offered, the duties of which 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 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 experience working as an electronics technician for the petitioner from December 1996 to the date he signed the Form ETA 750, Part B, namely, November 6, 2001.<sup>4</sup> The beneficiary also represented that he had worked for Q-Zar in Manila, Philippines from June 1992 to October 1996 as an electronics technician. Finally the record contains a letter written by Debbie Tan that states the beneficiary worked for Q-Zar from June 1992 up to October 1996. The beneficiary does not provide any additional information concerning his employment background on that form.

The record of proceeding also contains a Form G-325A, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's last occupation abroad, he represented that he had worked for Q-Zar in the Philippines from January 1992 to December 1995 and for the petitioner from April 1997 to the date he signed the G-325A, namely December 20, 2004. The beneficiary also represented that he had lived as [REDACTED] in La Puente, California since January 1996. The beneficiary signed this document above a warning for knowingly and willfully falsifying or concealing a material fact.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

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

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<sup>4</sup> It is noted that the petitioner's IRS Forms 1120S indicate that the petitioner was not incorporated until January 21, 2000.

As previously stated, the letter of work verification contained in the record indicates that the beneficiary worked for QZAR from June 1992 to October 1996. This final date conflicts with the information contained on the G-325A submitted with the beneficiary's I-485 petition as well as with the entry dates listed on the Forms I-140 and I-485 as to when the beneficiary entered the United States. As the director correctly noted, the Form I-485, and the I-140 petition indicate the beneficiary entered the United States on January 1, 1996 thus contradicting the claimed date of termination of his employment with Q-Zar in the Philippines on October 1996. It is noted that the information provided on the beneficiary's G-325A does not contain information as to the beneficiary's claimed date of entry, but this document contains information, most likely computer generated, that conflicts with the beneficiary's claimed dates of employment in the Philippines. The G-325A also differs with the claims made by counsel on appeal that the beneficiary actually entered the United States on January 1, 1997. The G-325A document signed by the beneficiary supports the earlier entry date of January 1, 1996 as documented by the I-140 and I-485 petitions.

Counsel's assertions with regard to how the January 1, 1996 entry date was erroneously inserted into counsel's database and thus into the beneficiary's I-140 and I-485 petitions are not viewed as persuasive. 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). While human error can always be a factor in the provision of information on petitions, in the instant petition, the beneficiary appears to have provided information as to his employment history and his residence in the United States as of January 1, 1996 that reinforces the date of entry claimed on the beneficiary's I-140 and I-485 petition, namely, January 1, 1996. Furthermore the information on the beneficiary's G325A directly conflicts with the beneficiary's employment history indicated on the Form ETA 750. Thus the record remains inconsistent.

Furthermore, two pieces of documentary evidence submitted on appeal, namely, the photograph of the beneficiary near Q-Zar premises and the signed property agreement, appeared to have the altered dates on them. The photograph appears to have the electronic inserted year partially scratched out, while the dates on the property agreement appear to have been written over. On appeal, counsel makes no comment or clarification as to why the dates on these two documents appear to be altered. Therefore, neither document substantively establishes the beneficiary's presence in the Philippines in late 1996 or his employment with Q-Zar at that period of time. Of more probative weight would be documentation as to wages earned, or termination of employment in late 1996. Thus, the documentation submitted by counsel on appeal along with the beneficiary's declaration are given no weight in these proceedings.

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." It further 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.

*Id.* At 591-592

The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired four years of work experience as an electronics technician prior to the 2001 priority date from the evidence submitted into this record of proceeding and thus the petitioner has not

demonstrated that the beneficiary is qualified to perform the duties of the proffered position. Thus, the director's decision shall be affirmed, and the petition must be denied.

Beyond the decision of the director, the AAO notes that the petitioner has not established its ability to pay the proffered wage as of the 2001 priority date and continuing to the present time. 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).

With regard to the petitioner's ability to pay the proffered wage, 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).

Here, the Form ETA 750 was accepted on November 26, 2001. The proffered wage as stated on the Form ETA 750 is \$18.76 per hour (\$39,020.80 per year).

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 September 1992, does not indicate the number of its employees, and indicates that it has a gross annual income of \$201,222, and an annual net income of -\$32,258. On the Form ETA 750B, signed by the beneficiary on November 6, 2001, the beneficiary claimed to have worked for the petitioner since December 1996.

With regard to the petitioner's ability to pay the proffered wage, the record contains the petitioner's Federal corporate income tax returns, IRS Forms 1120S for tax years 2001, 2002, and 2003. The record also contains the petitioner's DE-6 Form, Quarterly Wage and Withholding Report, for the final quarter of 2004 that indicate the petitioner had one employee [REDACTED], who appears to be the petitioner's owner and manager. The record also contains [REDACTED]'s W-2 form for tax year 2004 that indicates he was paid \$25,200 for tax year 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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 has established that it employed and paid the beneficiary. Although the beneficiary in his declaration on appeal states that he has worked for the petitioner since January 1997, and the Form ETA 750 indicates that the beneficiary began working for the petitioner on December 1996, the petitioner has submitted no evidence as to any such employment of the beneficiary. Furthermore the petitioner's DE-6 forms for tax year 2004 only indicate one employee, and the petitioner submitted no documentation such as IRS Form 1099-MISC for any relevant tax year to establish any non-employee compensation. It is noted that the petitioner's tax returns show no salaries or wages paid, or costs of labor for tax years 2001 and 2002; while the petitioner's 2003 tax return shows only \$300 paid in salaries and wages. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$39,020.80 per year from the priority date:

- In 2001, the Form 1120 stated a net income<sup>5</sup> of \$22,204.
- In 2002, the Form 1120 stated a net income of -\$32,200
- In 2003, the Form 1120 stated a net income of \$14,499.

Therefore, for the years 2001 to 2003, the petitioner did not have sufficient net income to pay the proffered wage of \$39,020.80.

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.<sup>6</sup> 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 \$45,073.
- The petitioner's net current assets during 2002 were \$55,803.
- The petitioner's net current assets during 2003 were \$28,271

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<sup>5</sup> 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. See *Instructions for Form 1120S, 2006*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions, income, or additional adjustments, shown on its Schedules K for tax years 2001, 2002, and 2003, the petitioner's net income is found on Schedule K of its tax returns.

<sup>6</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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, for the years 2001 and 2002, the petitioner did have sufficient net current assets to pay the proffered wage of \$39,020.80. However, during tax year 2003, the petitioner's net current assets were not sufficient to pay the entire proffered wage of \$32,020.80.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax years 2001 and 2002.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary receives lawful permanent residence.

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.