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FILE:



Office: TEXAS SERVICE CENTER  
SRC 05 055 51436

Date: **JUL 17 2008**

IN RE:

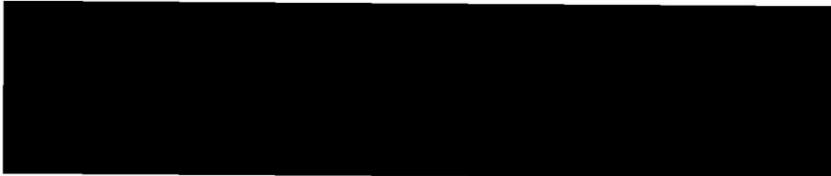
Petitioner:

Beneficiary:



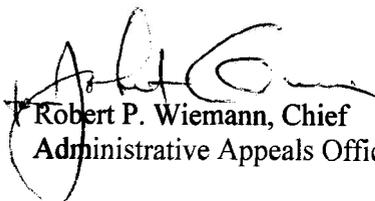
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Chief  
Administrative Appeals Office

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

The petitioner is a dry cleaning business. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's March 26, 2005 denial, 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 noted discrepancies in the tax returns submitted by the petitioner and determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. 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.

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 DOL. *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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 5, 2001. The proffered wage as stated on the Form ETA 750 is \$11.12 per hour (\$23,129.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> On appeal, counsel submits a brief; a copy of an Interoffice Memorandum dated May 4, 2004 from William R. Yates, Associate Director of Operations, Citizenship and Immigration Services (CIS), to Service Center Directors and other CIS officials, entitled *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (Yates Memorandum); a previously submitted letter dated February 2, 2005 from the petitioner's CPA regarding costs paid for outside services; receipts, bank statements and cancelled checks; the petitioner's previously submitted IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2001, 2002, and 2003; and the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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 1997 and to currently employ two 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, signed by the beneficiary on April 1, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner's net income in each relevant year exceeds the prevailing wage and, therefore, pursuant to the Yates Memorandum, the petitioner has demonstrated its ability to pay the proffered wage. Counsel further asserts that the petitioner outsources all of its alteration tailor work and that the Form I-140 petition was incorrect when it stated that the petitioner employs two employees and that the alteration tailor position was an old position.

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 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 not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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

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<sup>1</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). 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).

(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 receipts and wage expense is misplaced. 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 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 Chang* at 537.

The record before the director closed on February 14, 2005, with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to deny (NOID). The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003 and 2004, as shown below.

- In 2001, the Form 1120S stated net income<sup>2</sup> of \$41,794.00.
- In 2002, the Form 1120S stated net income of \$21,368.00.
- In 2003, the Form 1120S stated net income of \$21,629.00.
- In 2004, the Form 1120S stated net income of \$24,031.00

Therefore, for the years 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage of \$23,129.60. For the years 2001 and 2004, the petitioner had sufficient net income to pay the proffered wage.

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<sup>2</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 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 (2001-2003) or line 17e (2004) of Schedule K. *See* Instructions for Form 1120S, 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 shown on its Schedule K for 2001, 2002 and 2003, the petitioner's net income is found on line 23 of Schedule K of its tax returns. In 2004, the petitioner's net income is shown on line 21 of page one of the petitioner's Form 1120S. Thus, counsel's assertion that the petitioner's net income in each relevant year exceeds the prevailing wage is incorrect. For the years 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</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 tax returns demonstrate its end-of-year net current assets for 2002 and 2003, as shown in the table below.

- In 2002, the Form 1120S stated net current assets of \$3,302.00.
- In 2003, the Form 1120S stated no net current assets.<sup>4</sup>

Therefore, for the years 2002 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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 the years 2001 and 2004.

On appeal, counsel asserts that the petitioner outsources all of its alteration/tailor work and that the Form I-140 petition was incorrect when it stated that the petitioner employs two employees and that the alteration/tailor position was an old position.<sup>5</sup> He submits a previously submitted letter dated February 2, 2005 from the petitioner's CPA indicating that the petitioner's tax returns "included in Cost of Sales (Schedule A Line 2)" the amounts paid to others for outside services. The accountant states that "[a]pproximately 40% of the total are for alteration/tailor services." Counsel also submits receipts, bank statements, and canceled checks to support his claim.

In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that other worker may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. On Schedule A, Line 2 of the petitioner's IRS Form 1120S for 2002 and 2003, the petitioner listed purchases of \$83,720 and \$87,725, respectively. The petitioner has supported the expenditures with copies of canceled checks and receipts showing payments to [REDACTED] Cleaners for alteration services. However, the first page of IRS Form 1120S for [REDACTED], submitted on appeal indicates that [REDACTED] had no income in 2004 and paid no salaries or wages in 2004, despite the petitioner's claim that it paid [REDACTED] for outside services in 2004. 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

<sup>3</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.

<sup>4</sup> Because the petitioner's total receipts for the tax year and total assets at the end of the year were less than \$250,000.00, the petitioner was not required to complete Schedule L to its 2003 IRS Form 1120S.

<sup>5</sup> A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The petitioner's proof of payment to [REDACTED] for outside alteration tailor services is deemed unreliable based on the inconsistencies in the evidence. Therefore, the petitioner has not established that it had the ability to pay the proffered wage through wages paid to others for alteration services.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The director also determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director noted discrepancies in the tax returns submitted by the petitioner. Specifically, the director noted that the address listed for the petitioner on its tax returns and the address listed for the beneficiary's prior employer, Prestige Cleaners, on its tax returns are identical. Therefore, the director noted that since it is not clear that the petitioner and Prestige Cleaners are separate companies, the experience letter submitted by Prestige Cleaners to verify the beneficiary's prior experience cannot be used.

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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

On appeal, counsel submits corporate documentation, utility bills, a business license, an insurance policy, a security system billing statement, and bank statements for [REDACTED]; corporate documentation, a business license, utility and rent billing statements, an operating permit, and the first page of IRS Form 1120S for 2004 for [REDACTED]; a letter dated June 18, 2005 from [REDACTED], CPA, indicating that the "address listed on the return is the mailing address" and that the "address is not the physical location of the business." Other relevant evidence in the record includes a letter dated July 13, 2001 from [REDACTED], Manager of Prestige Cleaners, indicating that the beneficiary was employed as an alteration tailor from June 1995 to July 11, 2001. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the petitioner and [REDACTED] are two separate entities and that they "shared a common mailing address for some time." Counsel states that [REDACTED] is "owned by a family member of [the petitioner]" and that the petitioner used the mailing address of [REDACTED] to properly receive its mail.

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

14. Education

Grade School	blank
High School	blank
College	blank
College Degree Required	blank
Major Field of Study	blank

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and need not be recited in this decision. Item 15 of Form ETA 750A reflects the required hours for the proffered job.

The beneficiary set forth her credentials on Form ETA 750B and signed her 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, she represented that she worked as an alteration tailor for Prestige Cleaners in Atlanta, Georgia from June 1995 to the date she signed the Form ETA 750B on April 1, 2001. She does not provide any additional information concerning her 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 employment over the last five years, she represented that she worked as an alteration tailor for Prestige Cleaners in Atlanta, Georgia from June 1995 to July 2001 and that she worked as an alteration tailor for Regal Cleaners in Woodstock, Georgia from August 2001 to the date she signed the Form G-325A.

The regulation at 8 C.F.R. § 204.5(l)(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.

The evidence submitted by counsel on appeal clearly demonstrates that the petitioner and [REDACTED] are separate entities. However, pursuant to a letter dated July 13, 2001 from [REDACTED], Manager of Prestige Cleaners, the beneficiary was employed with Prestige Cleaners as an alteration tailor from June 1995 to July 11, 2001. [REDACTED] was not incorporated until February 22, 1996. The petitioner has not explained how the beneficiary was employed by Prestige Cleaners from June 1995 to February 1996 when the business did not exist. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The letter dated July 13, 2001 from [REDACTED], Manager of Prestige

Cleaners, supporting the beneficiary's work experience is deemed unreliable based on the inconsistencies in the evidence.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired the required two years of experience from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.