

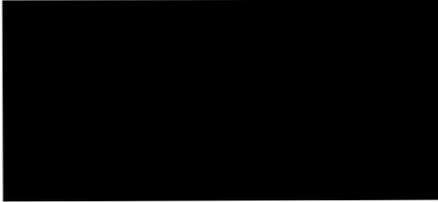
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U.S. Citizenship
and Immigration
Services

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FILE: LIN 07 075 53218 Office: NEBRASKA SERVICE CENTER Date: **OCT 10 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 director, Nebraska Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile repair shop. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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 it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2004 priority date of the visa petition, and had not established the beneficiary had the requisite work experience stipulated on the ETA Form 750. In his decision, the director noted that the petitioner had submitted a letter of work verification that did not list the title or name of writer or provide a specific description of the duties performed by or the dates of employment of the beneficiary. The director further noted that the letter was also not generated on the claimed employer's letterhead. The director denied the petition accordingly.

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

As set forth in the director's January 24, 2007 denial, the two issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether or not the petitioner has established that the beneficiary has the two years of requisite work experience stipulated by the ETA Form 750.

In these proceedings, the AAO will first examine the petitioner's ability to pay the proffered wage and then examine whether the petitioner has sufficiently established the beneficiary's previous work experience for two years as an auto mechanic.

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. . . . 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 the [Citizenship and Immigration Services].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for

processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In the instant matter, the Form ETA 750 was accepted on June 25, 2004. The proffered wage as stated on the Form ETA 750 is \$41,810 per year. The Form ETA 750 states that the position requires eight years of grade school, four years of high school, and two years of experience in the proffered job.

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 relevant evidence in the record, including new evidence properly submitted on appeal.¹

Relevant evidence submitted on appeal includes counsel's brief and a copy of an affidavit dated February 20, 2007 from [REDACTED], the petitioner's owner and manager.

[REDACTED] states that the petitioner has been in business since 1985, growing from a small one-man shop to a company that employs seven full-time employees, including three mechanics and four administrative staff members. Mr. [REDACTED] also states that the petitioner has eight automotive service bays, half of which on the average are idle due to the lack of qualified mechanics. Mr. [REDACTED] states that the United State Department of Labor has consistently recognized the profession of auto mechanic as a shortage occupation in the petitioner's region. The petitioner's owner also states that Loudoun county in northern Virginia is one of the faster growing counties in the United States and the increase in population and development of new businesses in Loudoun county means an expanding need for auto service providers. Mr. [REDACTED] states that the petitioner presently has between three or four automotive bays idle. He also states that the addition of one or two more mechanics to the petitioner's operation can only mean more income at a much higher rate of profit to the petitioner.

Mr. [REDACTED] then notes that in tax year 2005, on average, the petitioner had four mechanics on the payroll, and that if the petitioner's annual gross income of \$644,691 was divided by the number of the petitioner's mechanics, the average annual gross income brought to the petitioner by each mechanic would be more than \$160,000. Mr. [REDACTED] states that in other words, each mechanic already employed brings more than three times his wages to the petitioner by way of gross income, and that the profit margin of service provided by each additional mechanic is higher also because the petitioner's overhead expenses remain constant.

Counsel also submits the petitioner's IRS Form 1120S, U.S. Income Tax Return for S Corporation, and four photographs of the interior and exterior of the petitioner's business operations. With the initial petition, the petitioner submitted its IRS Form 1120S for tax year 2005.²

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 Based on the Schedules K submitted with this tax return, the original two shareholders with 50 percent

Counsel also submitted a copy of the petitioner's IRS Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return for 2005, as well as the petitioner's W-3 Transmittal of wage and Tax Statement for tax year 2005. This document indicates the petitioner issued W-2 Forms for thirteen employees in tax year 2005, and that two employees received wages greater than the proffered wage. The petitioner also submitted a Form 941, Employer's Quarterly Federal Tax Return, for tax year 2005 that indicated in the last quarter of 2005 the petitioner paid wages and tips of \$74,366.23 to six employees and paid \$32,894.68 to six employees for the third quarter of 2006. The record contains no further evidence of the petitioner's ability to pay the proffered wage.

On appeal, counsel states that the director's analysis of the petitioner's net income in his decision is not applicable to the instant petition based on the petitioner's owner's comments. Counsel states that the nature of the petitioner's business, its overall stability and financial wellbeing should be the basis for any determination of the petitioner's ability to pay the proffered wage. Counsel notes that the petitioner, after more than twenty years in business, with a gross annual income of close to \$650,000 in tax year 2005, has demonstrated that its **overall financial stability is sound and in good health**. Counsel states that because the nature of the petitioner's operation that is so mechanic-dependent and because of the petitioner's access to sufficient resources, including its business line of credit, the company's viability and continued ability to pay salaries to its mechanics, including the beneficiary, is strongly assured.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1985,³ has gross annual income of \$655,000, net annual income of \$20,000 and currently employs seven workers. On the Form ETA 750, signed by the beneficiary on April 29, 2004, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel refers to the petitioner's line of credit as a basis for the company's continuing viability. The AAO does not find counsel's assertion to be persuasive. First, the record contains no evidence of any claimed line of credit. But more importantly, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a

interest in the petitioner were superseded by the present sole shareholder, [REDACTED]. The tax return contains information that all three shareholders made a Section 1377(A)(2) Election in the tax return.

³ The petitioner's tax returns for 2004 and 2005 indicate the petitioner's date of incorporation as an S corporation was January 1, 1998.

contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

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. The record indicates that the petitioner has never employed the beneficiary. Thus, the petitioner has to establish its ability to pay the entire wage of \$41,810 for the 2004 priority year and during 2005 from either its net income or net current assets.

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 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*, 719 F. Supp. at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$41,810 per year from the priority date:

- In 2004, the Form 1120S stated a net income⁴ of -\$9,599.
- In 2005, the Form 1120S stated a net income of \$20,535.

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net income to pay the proffered wage of \$41,810.

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, including real property that counsel asserts should be considered. 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.⁵ 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.

⁴Where 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) and 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 has no additional income or deductions shown on its Schedule K for tax years 2004 and 2005, the petitioner's net income is found on line 21, of the Form 1120S.

⁵According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- The petitioner's net current assets during 2004 were \$4,502.
- The petitioner's net current assets during 2005 were \$13,567.

The petitioner has not established that it has the ability to pay the proffered wage of \$41,810 during tax years 2004 and 2005 based on its net current assets. Therefore from the date the Form ETA 750, was filed with the Department of Labor, the petitioner has 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.

On appeal, the petitioner's sole shareholder and president states that the addition of more employees working as auto mechanics will raise the gross profits of the petitioner, and thus guarantee that the petitioner can pay the beneficiary the proffered wage. The owner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. The

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

The AAO will now examine the second issue raised by the director, namely, whether the petitioner established that the beneficiary has the requisite two years of relevant work experience prior to the 2004 priority date.

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 June 25, 2004.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (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 auto mechanic. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education
 - Grade School 8
 - High School 4
 - College None
 - College Degree Required
 - Major Field of Study

The applicant must also have 2 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 worked as an auto mechanic for [REDACTED] Bisto-Yek Metrie Jay, Tehran, Iran from April 1996 to the April 29, 2004, the date he signed the ETA Form 750, part B. He does not provide any additional information concerning his employment background on that form.

With the petition, the petitioner submitted a letter in Persian with an English language translation with no certification as to the translation's accuracy. The letter of work verification was not on any letterhead paper. The English language document stated that the beneficiary had been actively cooperating with the car repair workshop since 1996, and his job performance had met full satisfaction. The car repair workshop's address was identified as "[REDACTED] Car-Repair Workshop, Jay 21-meter St. Tel: 6898902." Both the foreign language document and the English language document have a blue stamp on them with no translation provided. The writer of the letter is not identified, nor are the beneficiary's work duties described in any detail. In the director's decision, he noted these omissions. The director then determined that the petitioner's letter of work verification was not sufficient to establish that the beneficiary met the two years of work experience stipulated on the ETA Form 750, and denied the petition.

On appeal, counsel states that the initial letter of work experience was the wrong letter and was submitted due to a clerical error in counsel's office. Counsel states a different letter of experience was submitted to the U.S. Department of Labor with the ETA Form 750. Counsel submits this letter to the record. This letter is dated April 4, 2004, and is on letterhead with the name "[REDACTED]" and the address is noted as "[REDACTED]. Tehran/Iran." The letter is signed by [REDACTED] and states that the beneficiary has been working at the repair shop since April 1996, and is highly skilled in engine repairs in Iranian and foreign made automobiles. This translation and the Persian language document that are copies of the pertinent documents both have a seal similar to the original seal on the petitioner's first letter of work verification.

The petitioner also submits a letter dated January 27, 2007, on a different letterhead for the [REDACTED] Repair Shop that states the beneficiary has been working for the shop at the sedan car and pickup section since March 1996, and that his special field of activity is engine repair including repair and replacement of Delco, Carburetor and Injector. The writer, [REDACTED] Manager, states that the beneficiary also holds a Technical and Vocational Skill Certification in the field of car repair training received on August 3, 2006. The petitioner also submitted a Persian language document with another document entitled "Official Translation" that describes the beneficiary's certificate from the Iranian Ministry of Labor and Social Affairs for Petrol Sedan Cars Repairman II Training, received after 900 hours of training. This document is dated November 12, 2006.

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.

The AAO does not find counsel's explanation of the initial letter of work verification submitted with the I-140 petition to be persuasive. With regard to the two subsequent letters of work verification submitted to the record on appeal, the translations of both the petitioner's initial letter of work experience and the two additional letters do not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

None of the letters of work verification submitted to the record were certified translations. The contents of the first letter do not appear to be completely translated, and the lack of certified translations of the subsequent letters of work verification raise questions as to the accuracy of the additional letters. Thus the AAO does not view any of the three letters submitted to the record as sufficient to establish the beneficiary's two years of work experience as an auto mechanic as stipulated by the ETA Form 750. The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that he 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 with regard to the petitioner's ability to pay the proffered wage or the beneficiary's qualifications.

ORDER: The appeal is dismissed.