U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 1 2 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Unskilled, Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

The petitioner is in the business of abatement and removal of hazardous waste. It seeks to employ the beneficiary permanently in the United States as an asbestos handler. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The petition was amended to seek the beneficiary's classification as an unskilled, other worker pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). This category provides immigrant visas for qualified aliens who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered from the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 30, 2001. The beneficiary's salary as stated on the labor certification is $23.15 per hour, or $48,152 per year.

The director deemed the initial evidence, being the petitioner's Form 1120, U.S. Corporation Income Tax Return, insufficient to establish the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated December 11, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted for 2001 the petitioner's federal income tax return with all schedules and attachments, its annual report, or audited financial statement, as well as Wage and Tax Statements (Forms W-2) or Form 1099, as evidence of wage payments to the beneficiary. The RFE specifically requested Form 941 or other proof of the name, salary, position, and termination of such employee as the beneficiary might replace. Other terms of the RFE exacted proof of one month of experience in the job offered and of qualifying experience or training.

The petitioner responded with its "Compiled Financial Statements for the Year Ended December 31, 2001 and the Independent Accountants' Compilation Report" (2001 unaudited compilation). It claimed net income of $315,185 and net current assets of $229,331, both equal to, or greater than, the proffered wage.[1] Also, Local 78

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[1] The difference of current assets minus current liabilities equals net current assets. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and

of Asbestos, Lead, and Hazardous Materials Laborers provided the beneficiary's Member Work History for October 25, 1998 to November 13, 2002 (Local 78 history).

The director determined that the 2001 unaudited compilation did not comply with 8 C.F.R. § 204.5(g)(2) and did not establish the ability to pay the proffered wage at the priority date and, in a decision issued April 7, 2003, denied the petition.

On appeal, counsel submits the petitioner's 2001 Form NYC3L, General Corporation Tax Return (2001 state tax return). This return reflects federal taxable income before net operating loss deduction and special deductions of $11,078, less than the proffered wage. A fragment of the 2001 Form 1120A, Short Form Income Tax Return of a U.S. Corporation, includes Part III, the petitioner's balance sheet. It reveals current assets of $3,125, current liabilities of $493,577, and the difference is net current assets, a deficit of ($490,452), less than the proffered wage. Neither the Local 78 history nor any other source establishes that the petitioner paid wages to the beneficiary at any time.

Counsel submits the 2001 unaudited compilation again and contends that it proves the ability to pay the proffered wage at the priority date because it shows net income of $315,185 at the priority date. The accompanying report of the certified public accountant (CPA) notes that the 2001 unaudited compilation only reflects representations of management. If the petitioner has recourse to financial statements, the regulation plainly and specifically requires audited financial documents. *See* 8 C.F.R. § 204.5(g)(2). Others are not persuasive evidence of the ability to pay the proffered wage.

Counsel asserts that Citizenship and Immigration Services (CIS), formerly the Service or INS, approved two (2) petitions on no other evidence, attaches one (1) approval notice (Form I-797), in favor of this petitioner, but does not identify the petitioner in the other. Counsel submits no other brief or proof. Counsel infers that CIS must approve the instant petition because of two (2) other approvals.

The AAO has neither record before it and is not bound by previous errors, if they occurred. Counsel asserts that equity favors the petitioner, since it relied on previous approvals of petitions. The AAO has no authority to apply the doctrine of equitable estoppel to stay a component of CIS from undertaking a lawful course of action that a statute or regulation empowers. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335,338 (BIA 1991). Only the courts may determine equitable estoppel. The AAO has only that authority specifically granted to it by the Secretary of the United States Department of Homeland Security (DHS). *See* DHS Delegation Number 0150.1 (effective march 1, 2003); *see also* 8 C.F.R. §2.1 (2004). The jurisdiction of the AAO extends only to those matters described in 8 C.F.R. § 103.1(f)(3)(E)(iii), in effect on February 28, 2003. They do not include the petitioner's claim, if counsel relies on the doctrine of equitable estoppel.

If, in the alternative, counsel insists that CIS is bound by either approval, it must be noted that neither record is now before the AAO, nor can the AAO determine if the circumstances and quantum of evidence are precisely the same. Counsel does not provide the published citation of either approval. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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salaries payable within one year or less. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the period.

The AAO notes that the I-140, RFE, and response to the RFE presumed that the petitioner would fill an existing position with the beneficiary. The response to the RFE, however, withheld the identity of the former employee, documentation that the position was vacant, and copies of Form 941. The petitioner did not verify the replacement of any such former employee.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Though beyond the scope of the director's decision, it appears that the petitioner failed to qualify the beneficiary for the position as stated in the Form ETA 750 as of the petition's priority date. The Form ETA 750 in Part A, block 15, indicated that the position of asbestos handler required a specialized training course, a certification and license, and their renewal from the City of New York, the State of New York, and the Environmental Protection Agency. Though beyond the scope of the director's decision, the proceedings, including the Local 78 record, contain no evidence of the specified training course, certification, license, or renewal from the named sources. For this additional reason, the petition may not be approved.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

After a review of the 2000 federal tax return, 2001 state tax return, 2001 unaudited compilation, and Local 78 history, it is concluded that the petitioner has not established either that it had sufficient available funds to pay the salary offered as of the priority date of the petition, continuing until the beneficiary obtains lawful permanent residence, or that the beneficiary has the necessary qualifications that the petitioner specified on Form ETA 750.

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.