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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 2 4 2005

LIN-02-267-51639

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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:

[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

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. In connection with information obtained during an investigation and interview of the petitioner and beneficiary, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain revoked.

The petitioner is a car rental company. It seeks to employ the beneficiary permanently in the United States as an office manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date and revoked the petition accordingly.

On appeal, counsel submits a brief and new evidence.

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

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $25.55 per hour, which amounts to $53,144 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on August 19, 1998, to have a gross annual income of $137,000, and to currently employ 6 workers. In support of the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001.

The director approved the petition on October 7, 2002. In connection with a benefits fraud assessment received by the local Chicago office on June 30, 2003, an investigation was initiated on September 26, 2003 after interviews were conducted of the petitioner, and the beneficiary and his spouse. Prior to that, on August 28, 2003, a benefits fraud assessment officer visited the petitioner's premises and spoke to [redacted] (Mr [redacted] an employee with Avis car rental located at the address provided by the petitioner on its petition. The officer asked to speak with the petitioner's owner, [redacted] Mr. [redacted] for the beneficiary and was informed that Mr. [redacted] ould not return until the following day and that M[redacted] did not know the

beneficiary. Mr[redacted]ated he had been employed with the petitioner since October 2002 and was the petitioner's only employee. The following day when the benefit fraud assessment officer returned to the petitioner's premises, she was told that Mr. Holowinski left his attorney's business card for her.

At the interview held on September 26, 2003, Mr.[redacted]submitted a copy of the petitioner's corporate tax return for 2002 and explained that he owned a shoe distribution business in addition to owning and operating the petitioning entity's business. Mr.[redacted] stated that he had not placed the beneficiary on the petitioner's payrolls yet because his attorney failed to advise him that the beneficiary had employment authorization and could start working. He also stated that he would hire him as soon as he terminated Mr.[redacted] employment, indicating that he would like the beneficiary to run the car rental business while he focuses on the shoe distribution business. The investigator questioned Mr.[redacted] after the representation made on the petition that he employed six employees in 2001 when it seemed that only Mr.[redacted]worked for the petitioner. Mr.[redacted]explained that he had a high turn over rate and gave first names for five employees stating that he could not recall their last names.

The investigator interviewed the beneficiary, who explained that he is president of Cleanmax, Incorporated (Cleanmax), a building maintenance company he began in October 1998, which he operates out of his home. He stated that he used subcontractors for various assignments. The investigator also interviewed the beneficiary's spouse, who signed the employment experience letter from Cleanmax under her maiden name although she had been married for several months at that time. She explained that she had not changed her name at that point in time.

The investigator concluded that the beneficiary's position was misrepresented in his employment experience letter because he was not an office manager, as was represented, but was instead the owner. Additionally, the investigator noted that the wages reflected on its tax returns were not consistent with employment of six employees, the names of whom the petitioner's owner could not recall. The investigator noted that the petitioner failed to employ the beneficiary after receiving notification of the petition's approval. The investigator also noted that the beneficiary and Mr.[redacted]are friends after having been roommates six years ago, and that the beneficiary's representations about his use of subcontractors at Cleanmax seemed improbable based upon the description of duties he provided for their work. Thus, the investor indicated she suspected fraud in the petition and recommended additional investigation.

Pursuant to the benefit fraud assessment's findings, the director issued a notice of intent to revoke the petition on January 7, 2004. The director noted "several discrepancies of facts that call into question the petitioner's ability to pay the [pr]offered wage as well as the beneficiary's experience." The director noted that the petitioner did not employ six workers at one time as indicated on the petition and that the beneficiary's position as president at Cleanmax did not clearly qualify him with skills related to an officer manager position.

In response, the petitioner submitted excerpts from the Department of Labor's Occupational Outlook Handbook (OOH) indicating that a top executive at a small company would engage in office management. Additionally, the petitioner submitted a letter from Mr.[redacted]that states the following, in pertinent part:

> This letter is to confirm that [the beneficiary] officially started his work for my company as of 1-02-2004 at my Skokie office located at[redacted] Also FYI I took over second AVIS office at[redacted]in Niles where [the beneficiary] will be managing and focusing on growth of both office [sic] under my supervision after completing of his computer system training.

The petitioner also submitted a copy of the front of a paycheck from the petitioner to the beneficiary in the amount of $1,812.60; a paystub detail showing employment of the beneficiary from January 4, 2004 through January 17, 2004; a copy of a Form W-4 employee's withholding allowance certificate; correspondence showing that the petitioner obtained a uniform for the beneficiary in December 2003; and photographs of the beneficiary in uniform behind an AVIS rental car desk.

Counsel's accompanying letter asserted that since the petitioner has expanded his franchise rental car business to two locations, that shows an ability to pay the proffered wage. Additionally, counsel asserted that the petitioner's turnover rate in staff underscores his need to permanently hire the beneficiary.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 1, 2004, revoked the petition. The director noted that the petitioner did not employ six workers at one time as it represented to Citizenship and Immigration Services (CIS) and thus brought the whole credibility of the petition into question. The director stated that the beneficiary was being paid the proffered wage rate as of January 2004 but this did not evidence the petitioner's ability to pay the proffered wage beginning on the priority date in April 2001. The director noted that the petitioner waited until fifteen months after the petitioner's approval and ten months after the beneficiary's approval of employment authorization to commence his employment with the petitioner. The director also noted that "even the pre-employment processing or ordering the beneficiary's uniform and nametag was initiated almost two months after the petitioner and beneficiary were interviewed by [CIS]."

In his decision, the director also stated the following, in pertinent part:

> This delay in actually employing the beneficiary further underscores the petitioner's unwillingness or financial inability to hire him until the termination of another worker's employment and certainly is not a convincing argument for the petitioner's ability to pay the beneficiary as of the priority date.
>
> The petitioner's letter also states that the petitioner took over a second location, one 'where (the beneficiary) will be managing and focusing on growth of both office[s] under my supervision.' Counsel argues that the petitioner's ability to expand its business is evidence of its ability to pay the beneficiary. Whether it does or not, the beneficiary's intended role in this expansion of the petitioner's operations must also take into account the ETA-750, 'Application for Alien Employment Certification,' that was filed with this petition. This ETA-750 was only certified for the beneficiary to be the office manager for one specific office, not two offices. Furthermore, that same ETA-750 was certified by the Labor Department for the beneficiary to supervise the [sic] '3-4' employees. However, the submitted evidence does not establish that the petitioner ever employed such a number of workers at one time, even at one location.

On appeal, counsel asserts that the grounds set forth on the revocation are not grounded in legal authority, and specifically states that the beneficiary's start date with the petitioner has no bearing on the petitioner's continuing ability to pay the proffered wage and cannot generate a negative inference. Counsel also asserts that the director failed to discuss the petitioner's regulatory-prescribed evidence, such as its tax returns or to assign sufficient significance to the beneficiary's current employment with the petitioner according to the terms of the ETA 750A. Finally, counsel again asserts that the discrepancy with respect to the petitioner's number of employees also does not impact its ability to pay the proffered wage since "CIS found that [the p]etitioner's financials were sufficient

to support six employees. The fact that [the p]etitioner actually employed fewer than six employees at any one time further substantiates the ability to pay." Counsel states that many of the petitioner's employees dot not maintain their employment through the completion of training and his personnel roster is in a constant state of flux. Counsel asserts that "the approved I-140 petition cannot be rescinded based upon [CIS'] proposed anticipation that [the b]eneficiary will work outside the scope of his approved petition" because the petitioner's "innocuous statement" about his business expanding was merely "about company growth and expectations for the future." The petitioner submits no new evidence on appeal.

The petitioner's tax returns reflect the following information for the following years:

	2001	2002
Net income[1]	$54,267	$56,618
Gross receipts or sales	$136,925	$95,303
Compensation of officers	$13,000	$0
Salaries and wages	$27,270	$11,457
Current Assets	$10,926	$17,962
Current Liabilities	$1,653	$1,821
Net current assets	$9,273	$16,141

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 did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002. It did demonstrate that upon hiring the beneficiary in 2004, it began to pay the beneficiary the proffered wage rate.

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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, contrary to counsel's assertions on appeal, 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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

[1] Ordinary income (loss) from trade or business activities as reported on Line 21.

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.[2] 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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001, the petitioner shows a net income of $54,267 and net current assets of $9,273. The petitioner's net income is greater than the proffered wage of $53,144, and would, therefore, demonstrate the ability to pay the proffered wage out of its net income. In 2002, the petitioner shows net income in the amount of $56,618 and net current assets of $16,141. The petitioner's net current income is again greater than the proffered wage of $53,144, and would, therefore, demonstrate its ability to pay the proffered wage out of its net income.

The petitioner submitted evidence sufficient to demonstrate its continuing ability to pay the proffered wage in 2001 and 2002. The remaining issues involve discrepancies in information and representations made throughout the proceedings.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The AAO finds the petitioner's explanation concerning its representation that it employed six employees on the petition plausible since a high turnover rate is found in many industries including the car rental one. However, the petitioner could have simply submitted personnel documentation to illustrate the hiring and subsequent turn over of various employees, especially during the timeframe it submitted the petition with its representation that it employed six staff members[3]. The additional problem in this case is that the terms of the Form ETA 750A indicate that the beneficiary would supervise 3-4 employees, but again no evidence was submitted concerning those other employees allegedly on the petitioner's payroll at some point in time. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese*

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

[3] If those employees merely began training and left, as counsel asserted, there must be documentation concerning their hiring and commencement of orientation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

However, in terms of the director's conclusion that the petitioner was going beyond the scope of the parameters of the proffered position because of an intended expansion and inclusion of the beneficiary in those plans, the AAO cannot concur. The new office is in the same metropolitan area and does not contradict the terms of the labor certification since the beneficiary would still be an office manager. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment). This part of the director's decision is withdrawn.

The AAO also concurs with counsel that the delay in actually employing the beneficiary cannot be used to draw a negative inference in the petitioner's continuing ability to pay the proffered wage. However, the director was drawing a negative inference concerning the petition's credibility and the petitioner's intent to actually offer permanent employment to the beneficiary from which the beneficiary would derive lawful permanent residence. The AAO agrees with the director that both the petitioner and the beneficiary were aware of the petition's approval and the beneficiary's employment authorization and their failure to commence employment appears suspect with respect to the intent of both parties to undergo a permanent employment relationship so the beneficiary could become a lawful permanent resident. The Fraud Benefit Assessment officer was concerned that due to the nature of the beneficiary and Mr. [redacted] friendship, the immigrant petition was filed just to give the beneficiary lawful permanent residence and not because the petitioner required an office manager. Since the director stopped short of making an actual fraud determination, the AAO considers the circumstances unclear enough that fraud is too severe of a finding. Additionally, the director never made a finding that either the petitioner or the beneficiary, by fraud or willful misrepresentation of a material fact, sought to procure an immigration benefit. In terms of the language used by the director in his decision, however, the number of employees on the petitioner's staff does not go to the issue of the petitioner's ability to pay the proffered wage.

Despite the shortcoming of the director's decision, the Form ETA-750A clearly indicates that the proffered position involves supervision of 3-4 employees and that is within the purview of the AAO. The record of proceeding reflects that the petitioner is not in compliance with the terms of the Form ETA 750 and has not established that the employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966). 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).

The AAO finds that the director had good and sufficient cause to revoke the approval of this petition as the petitioner has not established that it employed six employees at the time of filing the petition or that the beneficiary would supervise 3-4 of those employees. The petitioner's sole employee, who the petitioner intends to terminate and replace with the beneficiary, provided testimony to the investigator that he was the petitioner's only employee and had been the only employee since 2002. The petitioner did not provide any evidence that the beneficiary would actually be supervising other employees. *Matter of Ho*, 19 I&N Dec. at 591 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." *Matter of Ho*, 19 I&N Dec. at 591-592 (BIA 1988) also 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."

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 director's decision on November 5, 2003 is affirmed in part and withdrawn in part. The petition is revoked.