U.S. Department of Homeland Security
20 Mass, N.W. Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: WAC 02 094 56324 Office: CALIFORNIA SERVICE CENTER Date: DEC 15 2005

IN RE: Petitioner: [redacted]
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:

[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 immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) affirmed the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reconsider and reopen. The motion will be granted. The petition will remain dismissed.

The petitioner is a diamond wholesaler. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and, it seeks to employ the beneficiary permanently in the United States as a diamond cleaver. The director determined that the petitioner had not established that the beneficiary had the requisite experience as stated on the labor certification, and, it denied the petition accordingly. On appeal, and on another issue present in the case that was beyond the decision of the director, the AAO affirmed the director's decision. It also determined that petitioner had not demonstrated that it had the ability to pay the beneficiary on the priority date of the visa petition. The AAO dismissed petitioner's appeal of the director's decision.

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, 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. 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).

The Form ETA 750 was accepted on March 28, 1997. The proffered wage as stated on the Form ETA 750 is $2,000.00 per month ($24,000.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form 1120 tax return; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The director issued a notice of intent to deny the petition on August 28, 2002. In it the director recounted the description of the occupation "diamond cleaver" and the minimum requirements from the certified ETA Form

750. The director indicated that with the petition, the petitioner had submitted a letter from Mani Exports that stated that the beneficiary worked there from April 1991 to March 1997. The director requested and received an investigation report from the Mumbai, India consulate to confirm this statement of employment experience at "Mani Exports." That investigation report said in pertinent part that upon inquiry to the manager of Mani Exports, the manager stated that the partnership had no proof that the beneficiary had ever worked at the company. The director therefore concluded that "... It appears that the experience letter submitted is fraudulent and the beneficiary does not have the required experience."

In response, counsel submitted a letter dated September 26, 2002, with attachments mentioned in the letter that are documents offered to refute the investigative report. Counsel indicated she was providing copies of three affidavits, summary of salary, payment vouchers and the payroll of Mani Exports. The three affidavits are not part of the transmittal and, upon review of the record of proceeding, are not in the transmittal of documents although mentioned in the cover letter.

The director denied the petition on November 21, 2002, finding that the beneficiary "... had not met the minimum requirements at the time the request for certification was filed."

On December 19, 2002, counsel for petitioner appealed the denial stating that the "... service failed to consider the evidence submitted in response to the RFE [request for evidence, actually in this case a notice of intent to deny]." In a brief submitted to support the appeal counsel contends that the director did not consider the three affidavits since they were not mentioned in the decision. As mentioned, the record shows that the affidavits were not present in the record of proceeding. Reasonably, if counsel expressed a concern about the review of the affidavits or any other evidence, the evidence should have been included as submittals upon appeal. 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)).

Upon review of the record of proceeding, the AAO on January 14, 2004, dismissed the appeal. The decision pointed out that the affidavits mentioned above were not present in the record of proceeding. The Form ETA 750 was accepted on March 28, 1997. Also, the appeal was dismissed based upon the record of proceeding finding that the petitioner failed to demonstrate its "continuing ability to pay the proffered wage beginning on the priority date," and, that the evidence submitted did not credibly demonstrate that the beneficiary is eligible for the proffered position.

On February 13, 2004, the petitioner filed a motion to reconsider and reopen the decision of the AAO. Counsel submits a brief and additional evidence.

Counsel submits copies of petitioner's 1997, 1998, 1999, 2001 and 2002 U.S. federal tax returns, and evidence that includes three affidavits dated September 23, 2002.

The first document is an affidavit by [redacted] which is dated September 23, 2002. It is on [redacted] Exports" letterhead. [redacted] identified himself as a partner o[redacted] He confirmed the beneficiary's employment as "diamond cleaver" from June 1994 to July 31, 1997. He stated that he is supplying " ... copies of the pay vouchers issued by [redacted] and signed by Ketan as well as payrolls records." The one translated pay voucher supplied does not appear to relate to the original foreign language pay voucher attached immediately behind it in the documents submission. The copy provided is only partially legible. The other referenced documents are 16 un-translated documents as signed by [redacted]

There are duplicate copies of a listing of salary and dates for the period "1-6-94 through 31-7-1997"[1] for [redacted] Patel stamped as "a true copy". It is in English. There is no affidavit to support it. It does not support the beneficiary's contention mentioned below that he was employed by Mani Exports at least until November 28, 2001.

According to the beneficiary's Form ETA 750B signed November 28, 2001, he commenced employment "04/1994 and noted that he was employed by Mani Exports to "present." In contradistinction to the above, according to a job verification letter submitted by Mani Exports dated June 10, 1997, he commenced employment in June of 1994. According to [redacted] affidavit the beneficiary worked as a "diamond cleaver" to July 31, 1997, but according to the beneficiary's Form ETA 750B signed November 28, 2001, he was still working at Mani Exports. There is a clear inconsistency presented by this affidavit and the employment dates provided by the beneficiary.

There are also four more un-translated documents provided as evidence, again with no information concerning their preparation. All that is readable in English on these documents, that are presumably either a summary of salary, payment vouchers or the payroll of Mani Exports, are date stamps on each page ("May, April, June and July 1997"). Again, if the beneficiary stated he was employed at Mani Exports at least to November 28, 2001, these incomplete documents do not support his statement of work experience on the Form ETA 750B he signed.

There are no translator certificates provided for any of the above documents. The un-translated documents submitted by the petitioner do not comply with the terms of 8 C.F.R. § 103.2(b)(3) that requires (in pertinent part) that "any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation ...." Documents that cannot be read and reviewed have little probative value. Since this, according to counsel, is the second submission of the same Indian language documents, it is unclear why they were not translated or what they were introduced to demonstrate.

Presuming the documents are what counsel says they represent, they allegedly show sixteen weeks of wages paid to the beneficiary from May through July of 1997. This period is less than the two years of experience required by the certified Form ETA 750. 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). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel submitted an affidavit made by [redacted] at is dated September 23, 2004. It is not on '[redacted]' letterhead. [redacted] identifies himself as an export assistant for [redacted] "since 1 year." He stated that he spoke to the consulate investigator, and, "he did not know exactly" what was in the job verification given by [redacted] for the beneficiary. It is not clear why this affidavit is given. He does not know if and when the beneficiary employed with Mani Exports.

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[1] June 1, 1994 to July 31, 1997.

The affidavit submitted of [redacted] is dated September 23, 2002. It is not on [redacted] letterhead. [redacted] identifies himself as a diamond assorte [r][2] for Mani Exports. He recounts his conversation with the consulate investigator. The pertinent part of his partially obscured statement is as follows:

> He [the consulate investigator] then asked me if [redacted] work [ed][3] for Mani Exports. I told him that I just joined the Company a fe [w] months ago. So I do not know the dates when Ketan worked for Man [I] Exports. He then asked how I knew that [redacted] worked for Man [i] Exports if I only worked there a few months. I replied that I kno [w] [redacted]

The affidavit of [redacted] does not contradict the investigation report above mentioned. Based upon Mr [redacted] statement on September 23, 2002, the beneficiary was not working for [redacted] and he does not know the dates when the beneficiary worked there. It is contradictory that he would then say he does know that the beneficiary worked there. Since he does not know on what dates the beneficiary was employed, this affidavit has little probative value.

The petitioner's has not overcome the negative implications of the beneficiary's veracity raised by the investigation report, and, the doubts raised concerning the beneficiary's work experience as discussed above. Beyond the decision of the director, even if the AAO would disregard the investigation report because of the statements above noted offered in rebuttal, the record of proceeding still does not contain evidence that the beneficiary meets the requirements of the certified ETA 750. The beneficiary by the evidence presented does not have two years of experience in the job occupation of diamond cleaver based upon an examination of the record..

On the second issue presented in the case on appeal, in determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $24,000.00 from the priority date of March 28, 1997:

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[2] The copy is obscured.

[3] Missing letters from the statement are provided.

- In 1997, the Form 1120 stated taxable income of $22,623.00.
- In 1998, the Form 1120 stated taxable income of $1,473.00.
- In 1999, the Form 1120 stated taxable income of $28,960.00.
- In 2000, the Form 1120 stated taxable income of $15,909.00.
- In 2001, the Form 1120 stated taxable income of $19,353.00.
- In 2002, the Form 1120 stated taxable income of $9,253.00.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time for the years 1997, 1998, 2000, 2001 and 2002 for which the petitioner's tax returns are offered for evidence.

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.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's 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.

Examining the Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 1997, petitioner's Form 1120 return stated current assets of $1,126,244.00 and $777,363.00 in current liabilities. Therefore, the petitioner had $350,881.00 in net current assets. Since the proffered wage was $24,000.00, this sum is more than the proffered wage.
- In 1998, petitioner's Form 1120 return stated current assets of $1,048,799.00 and $692,204.00 in current liabilities. Therefore, the petitioner had $356,595.00 in net current assets. Since the proffered wage was $24,000.00, this sum is more than the proffered wage.
- In 1999, petitioner's Form 1120 return stated current assets of $1,413,113.00 and $877,434.00 in current liabilities. Therefore, the petitioner had $535,679.00 in net current assets. Since the proffered wage was $24,000.00, this sum is more than the proffered wage.
- In 2000, petitioner's Form 1120 return stated current assets of $838,441.00 and $465,771.00 in current liabilities. Therefore, the petitioner had $372,670.00 in net current assets. Since the proffered wage was $24,000.00, this sum is more than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of $1,993,115.00 and $1,593,870.00 in current liabilities. Therefore, the petitioner had $399.245.00 in net current assets. Since the proffered wage was $24,000.00, this sum is more than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of $1,233,493.00 and $613,167.00 in current liabilities. Therefore, the petitioner had $620,326.00 in net current assets. Since the proffered wage was $24,000.00, this sum is more than the proffered wage.

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

Therefore, for the years 1997 to 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

To summarize the above discussion, there are two issues present in this case: first, whether or not the petitioner has come forward with evidence according to the regulation at 8 C.F.R. § 204.5(g)(2) to show the ability to pay the proffered wage as of the priority date; and second, whether or not the petitioner has credibly demonstrated with probative evidence that the beneficiary had the requisite experience as stated on the certified Alien Employment Application.

There is insufficient taxable income generated by the business in four out of five years to pay the proffered wage. There is sufficient liquidity demonstrated by the positive net current assets figures presented to determine that the petitioner has the ability to pay the proffered wage since it could in each year incur short-term debt to pay the wage of $24,000.00 that would be more than offset by its liquidity (net current assets).

However, based upon the evidence submitted in this case as found in the record of proceeding, petitioner failed to credibly demonstrate with probative evidence that the beneficiary had the requisite experience as stated on the certified Alien Employment Application. 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 petition remains denied.