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**U.S. Citizenship
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Services**

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: **MAR 04 2005**

IN RE:

Petitioner:
Beneficiary:

[Redacted]

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

The petitioner is an office-building owner. It seeks to employ the beneficiary permanently in the United States as a building maintenance supervisor. 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 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 and that the petitioner had not established that the beneficiary met the experience requirements as stated on the Form ETA 750. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$29.50 per hour or \$61,360 annually.

The petitioner is an individual. With the petition, the petitioner, through counsel, submitted copies of the first two pages of the owner's 2000 Form 1040, U.S. Individual Income Tax Return. Contrary to counsel's assertions, there was no initial evidence of the beneficiary's experience. The petitioner's 2000 tax return reflected an adjusted gross income of \$1,346,230.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 28, 2003, the director requested additional evidence pertinent to that ability and requested additional evidence pertinent to the beneficiary's experience. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide

copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date of April 27, 2001. The director also specifically requested that the petitioner provide copies of its most recent Forms 941, Employers Quarterly Federal Tax Form, for all employees to include names and social security numbers of the employees. The director further requested profit/loss statements for the period of January 1, 2001 through December 31, 2001, copies of bank statements for twelve consecutive months to include the priority date of April 27, 2001, copies of documentation that validates the petitioner's business address and telephone number, copies of public advertisements and/or brochures about the company describing the type of business and services offered, photographs of the business, a copy of an organizational diagram of the organization identifying all current employees by name and position with detailed job descriptions, copies of owner's/shareholder's Individual income tax return for 2001, copies of recurring monthly household expenses, evidence to establish the level of equity that is held within currently held properties, and value of stocks, bonds, mutual funds. With regard to the beneficiary's experience, the director requested that the petitioner submit evidence that the beneficiary met the two-year experience requirement as stated on the Form ETA 750. The petitioner was informed that the evidence must be in the form of letter(s) from current or former employers giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of employment and specific duties.

In response, the petitioner submitted a letter stating that the request for evidence had been lost, but that he was including photos of properties owned by petitioner and the sub-division he is developing, tax returns, bank statements, and documents showing line of credit. Again, no evidence of the beneficiary's experience was submitted. A 2001 Form 1120, U.S. Corporation Income Tax Return, for [REDACTED] MD, PC, was submitted along with a copy of what appears to be the first two pages of the owner's 2001 Form 1040, U.S. Individual Income Tax Return, pictures of the petitioner's business, and copies of bank statements. The petitioner's monthly expenses were not submitted. The 2001 Form 1120 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$11,273.52 and net current assets of -\$7,412.03. The 2001 individual tax return was not clearly legible. The bank statements reflected a credit line of \$200,000, a total access account checking account reflected a balance of \$163,438.53 as of December 31, 2001, a credit line of \$10,000, and a loan for \$240,000.

The director determined that the evidence was insufficient to establish the ability to pay the proffered wage or to establish that the beneficiary met the experience requirements as of the priority date of April 27, 2001, and, on August 20, 2003, he denied the petition accordingly.

On appeal, counsel submits a letter from [REDACTED] dated September 17, 1998, stating that the beneficiary was employed at [REDACTED] from March 4, 1997 through September 15, 1998, a letter from [REDACTED] Limited, dated March 10, 2001, stating that the beneficiary was employed by [REDACTED] Limited from November 1998 through December 1999, copies of the first two pages of the petitioner's 2001 and 2002 Forms 1040, U.S. Individual Income Tax Returns, a letter from the petitioner, and copies of pictures and tax assessments for the property the beneficiary will maintain. The petitioner's 2001 income tax return reflected an adjusted gross income of \$634,461. The petitioner's 2002 income tax return reflected an adjusted gross income of \$759,854. Counsel states:

The labor certification was filed on April 27, 2001 by [REDACTED] on behalf of [REDACTED]. Two years experience in job offered as Building Maintenance Supervisor or in a related occupation is required on Item 14 of ETA 750 Part A. The petitioner submitted letters by [REDACTED] two previous employers in Pakistan to the Service to establish that beneficiary met this requirement. . . .

This labor certification was filed by [REDACTED] not by Dr. [REDACTED] P.C. The Service requested all the financial information on Dr. [REDACTED] P.C. This is clearly an error by the Service. We have included Dr. [REDACTED]'s federal tax returns in 2001 and 2002 and bank statements in 2003. The proffered wage is \$29.50 or \$61,360/year. Dr. [REDACTED]'s 2001 and 2002 federal tax returns showed that he had an annual income of \$636,461 in 2001 and \$759,854 in 2002.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner has not established that he employed the beneficiary at a salary equal to or greater than the proffered wage in 2001 and 2002.

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).

The petitioner is an individual. Therefore the petitioner's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Individual petitioners must show that they can pay the proffered wage out of their adjusted gross income or other available funds. In addition, individuals must show that they can sustain themselves and their dependents.

In the instant case, the petitioner supported a family of six. In 2001, after paying the beneficiary's salary (\$61,360), the petitioner would have had \$573,101 remaining to support a family of six. In 2002, after paying the beneficiary's salary (\$61,360), the petitioner would have had \$698,494 to support a family of six. With these remaining amounts, it appears that the petitioner can most likely afford to pay the proffered wage; however, the request for evidence specifically requested a listing of the owner's/shareholder's recurring monthly expenses, including but not limited to mortgage or rental payments, automobile payments, installment loans, credit card payments, routine household expenses (utilities, cable, telephone), property taxes, vehicle registration fees, and life insurance and medical premiums. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been

established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Since the petitioner failed to provide a statement of monthly expenses for the years 2001 and 2002, the AAO cannot determine if the petitioner was able to pay the proffered wage and support his family of six.

The remaining issue in this case is whether the beneficiary meets the experience requirements as stated on the Form ETA-750.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 27, 2001.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 contained the only information appearing in these sections. This information appears as follows:

Education	College Degree Required	
Experience Job Offered 2Yrs.	Related Occupation 2 Yrs.	Related Occupation Maintenance Manager

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of building maintenance supervisor must have two years of experience as a maintenance manager.

On appeal, counsel states that the petitioner previously submitted two letters to establish that the beneficiary met the experience requirements as listed on the ETA 750.

Contrary to counsel's assertions, the two letters from the beneficiary's prior employers were not provided until a brief was filed on appeal.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

As always, the burden of proving eligibility for the benefit sought remains entirely 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.