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

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 09 2006
EAC-04-095-52190

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 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 a floors installation firm. It seeks to employ the beneficiary permanently in the United States as a linoleum floor layer. 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 the petitioner had not established that the beneficiary possessed the requisite experience and denied the petition accordingly.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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

> *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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 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 priority date in the instant petition is April 26, 2001. The proffered wage as stated on the Form ETA 750 is $16.58 per hour, which amounts to $34,486.40 annually.

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 also have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750B, signed by the beneficiary on April 15, 2001, the beneficiary claimed to have worked for the petitioner beginning in January 2000 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on March 6, 2002.

The I-140 petition was submitted on February 13, 2004. On the petition, the petitioner claimed to have been established on April 1, 1996, to currently have 11 employees, and to have a gross annual income of $1,128,105.00. With the petition, the petitioner submitted supporting evidence.

In a decision dated September 27, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and the evidence did not establish that the beneficiary possessed the requisite experience required to perform the position of linoleum floor layer. Thus, she denied the petition.

On appeal, counsel submits additional evidence.

On the I-290B, signed by counsel on October 25, 2004, counsel checked the box indicating that he would be sending evidence to the AAO within 30 days. He also checked the box indicating that he needed an additional period of time (90 days) to submit evidence. Counsel submitted additional evidence on February 22, 2005.

Counsel states on appeal that the petitioner had sufficient income to pay the beneficiary's prevailing wage and the beneficiary's letter of experience was erroneously translated. Counsel submits a statement from the petitioner's Certified Public Accountant and a properly translated letter of experience.

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).

The first issue is whether the petitioner has the ability to pay the proffered wage as stated in the Form ETA 750 as of the petition's priority date.

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, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 15, 2001, the beneficiary claimed to have worked for the petitioner beginning in January 2000 and continuing through the date of the ETA 750B.

The record contains a copy of the beneficiary's 2002 Income Tax Return. The 2002 Income Tax Return does not indicate that the beneficiary received any income in the form of wages or salaries. The record does not contain any Form W-2, Form 1099, or other evidence of compensation from the petitioner.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.,* 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001. Since the petitioner only submitted its tax return for 2001, it is the only one available in the record.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns show the following amounts for taxable income on line 28: $14, 958.00.

The petitioner's 2001 tax return shows the amount for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	$14,958.00	$34,486.40*	-$19,528.40

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus,

the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's 2001 tax return yield the following amounts for net current assets: -$63,484.00 for the end of 2001.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
2001	-$63,484.00	$34,486.40

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

Counsel states that, based on the statement from the petitioner's Certified Public Accountant, the petitioner had sufficient income to pay the proferred wage. According to the accountant: "Based on our review of [the petitioner's 2001 income tax and accounts receivable listing], the company had accounts receivables in the amount of $38,270, which are not reflected in the 2001 tax return due to the account basis (cash) used in preparing the tax return. However, when using accrual basis accounting, these accounts receivables would be considered 'liquid' assets, providing these amount were fully collectible. Hence, if using the accrual basis of accounting the company appears to have $42,206 (Cash balance of 3,936 – shown on tax return and $38,279 of accounts receivables) in liquid assets (accrual basis) as of December 31, 2001."

The petitioner's choice of tax accounting methods accords income either to the year during which it was earned or the year during which it was received. The accountant implied that the petitioner reports income when it is received, consistent with cash convention, but urges that the amount on the tax return be amended to include income earned during 2001 but not received during that year, which would be consistent with accrual. The petitioner's choice of accounting methods has attributed income to various years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner's present purpose. In addition, the petitioner did not submit its accounts receivable listing as evidence. Moreover, even if CIS agrees with the accountant and adds $38,270.00 to the petitioner's end of year net current assets, the amount would still be insufficient.

In her decision, the director correctly stated the petitioner's net income in 2001, and correctly calculated the petitioner's year-end net current assets for that year. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

The other issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of linoleum floor layer. On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the experience requirements of the offered position:

Experience		
Job Offered	Yrs	2
Related Occupation	Yrs	N/A
Related Occupation (specify)		None
Other Special Requirements		None

The issue is whether the beneficiary met the experience requirement stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. According to the original translation of a letter of recommendation from [redacted], a hardware store where the beneficiary was employed, the beneficiary worked as a customer service person from 1995 to 1998. Based on this evidence, the director determined that the petitioner failed to show that the beneficiary possessed the required experience because the beneficiary was a customer service person and because the letter failed to describe the duties performed.

On appeal, counsel submits a properly translated version of the letter of recommendation from [redacted] According to the new translation, the beneficiary worked as a vinyl layer at the hardware store. The new translation shows that the beneficiary had at least 2 years of experience working as a vinyl layer and the position title of vinyl layer sufficiently conveys the duties that the beneficiary performed. Thus, the petitioner has overcome this portion of the director's decision.

Despite that fact that the petitioner has shown that the beneficiary met the petitioner's qualifications for the position, it has failed to overcome the decision of the director regarding its ability to pay the proffered wage.

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.