U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 09 2006
SRC-03-118-51912

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be dismissed.

The petitioner is a convenience store/service station. It seeks to employ the beneficiary permanently in the United States as a retail store manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.[2]

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 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. *See* 8 CFR § 204.5(d). 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).

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[1] The petitioner filed an identical petition (SRC-05-086-51056) on behalf of the same beneficiary under the name of Sheam, Inc. (the same Federal employer identification number and the same address) with the Texas Service Center on February 2, 2005 while the instant appeal is pending with the AAO.

[2] 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 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.

Here, the Form ETA 750 was accepted on April 18, 2001. The proffered wage as stated on the Form ETA 750 is $8.00 per hour or $14,560.00 per year.[3] The Form ETA 750 states that the position requires four (4) years of experience in the job offered and the beneficiary will supervise one to three employees.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. On the petition, the petitioner claimed to have been established in 1999, to have gross annual income $1,903,186 and currently to employ 3 workers. On the Form ETA 750B, signed by the beneficiary on March 21, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted its Form 1120S U.S. Income Tax Return for an S Corporation for 2001 pertinent to the ability to pay the proffered wage.

On August 5, 2004, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence (RFE) pertinent to that ability. 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. The director specifically requested the petitioner's tax returns for 2002 and 2003 or annual reports or audited financial statements for 2002 and 2003, and all the Forms W-2 for the beneficiary.

In response, the petitioner submitted its tax returns for 2002 and 2003. The director denied the petition on November 10, 2004, finding that it does not appear that any employees exist for the beneficiary to manage, and that the petitioner has failed to establish the ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner established its ability to pay the proffered wage in 2001 through 2003 with its net income or net current assets.[4]

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, neither the petitioner nor the beneficiary claimed and submitted evidence that the petitioner employed and paid the beneficiary any compensation during the years in question. Therefore, the petitioner has not established that it paid the beneficiary the proffered wage in 2001 through 2003.

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*

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[3] Based on working 35 hours per week as indicated on Form ETA 750A.

[4] The petitioner also submitted a motion to reopen/reconsider but the director erroneously determined it to be a motion of the 485 denial and rejected it.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, 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. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537

The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2003. The tax returns in the record demonstrate the following financial information concerning the petitioner's ability to pay the proffered wages of $14,560 per year.

> In 2001, the Form 1120S stated net income[5] of $18,092.
> In 2002, the Form 1120S stated net income of $26,597.
> In 2003, the Form 1120S stated net income of $22,772.

The above information shows that for the years 2001 through 2003, the petitioner had sufficient net income to pay the proffered wage. Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of its net income.

The portion of the director's decision that the petitioner has failed to establish the ability to pay the proffered wage is withdrawn.

The second issue that needs to be discussed is whether the petitioner established 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. 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

[5] Ordinary income (loss) from trade or business activities as reported on Line 21 of Form 1120S.

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).

CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese 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).

The certified Form ETA 750 in the instant case states that the position of retail store manager requires four (4) years of experience in the job offered, that the manager will report to the president of the company and supervise one to three (1-3) employees and perform duties as follows:

> To manage and direct business operations – scheduling of workers, purchasing of supplies and merchandise, making and preparing deposits, ordering of gas loads, maintaining pumps, hoses and nozzles, customer relations, cashiering, stocking, inventory, lotto, general bookkeeping and accounting.

On the Form ETA 750B, the beneficiary set forth his work experience. He listed his experience as a full time gas station "Manager" at M/S Eastern Trading Corporation in Comilla, Bangladesh from February 1996 to August 1997 and at M/S M.A. Hakim & Sons in Comilla, Bangladesh from September 1997 to October 2000. In the meantime, the beneficiary provided his education information on Item 11 as follows: Payalgacha M.L. High School from January 1968 to December 1972 and Kabi Nazrul Govt. College from June 1972 to June 1974. The record shows that the beneficiary was born in 1958. If the information provided by the beneficiary on ETA 750 was correct, he would have attended his high school at the ages from ten to fourteen and graduated from college at sixteen. The beneficiary did not explain the education system in his own country, nor did he explain how he could have managed to attend both high school and college during June 1972 through December 1972. Although the proffered position does not specify educational requirements, these representations raise a question concerning the reliability of the beneficiary's statements about his working experience cited above. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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) of 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.

See also 8 C.F.R. §§ 204.5(l)(3)(ii)(A) and (B).

The instant I-140 petition was submitted on March 18, 2003 with two letters concerning the beneficiary's qualification as required by the above regulation: a photocopy of a letter from Quamrul Islam, director of M/S Eastern Trading Corporation dated August 4, 2001 advising that the beneficiary was employed full time as a manager from February 1996 to August 1997 in their gas station in Comilla, Bangladesh; and the other from

[redacted] Managing Director of M/S. M.A. Hakim & Sons dated August 6, 2001 with original signature verifying that the beneficiary was employed in their gas station as a full time manager from September 1997 to October 2000.

As previously noted the certified ETA 750 indicates that the beneficiary will manage and direct the petitioner's business operations by supervising 1 to 3 employees. However, the petitioner did not submit any documents showing the petitioner employs one to three employees to be supervised by the beneficiary. The submitted tax returns show that the petitioner paid salaries and wages of $78,000 in 2001, but the petitioner did not indicate how many employees were working for it that year. The petitioner did not pay any salaries and wages in 2002 and 2003. There was no compensation of officers paid in the years 2001 through 2003. There is no evidence to support the petitioner's arguments that employee salaries were paid as retained earnings either. Therefore, the petitioner did not establish that there were one to three employees in 2001 through 2003 to be supervised by the beneficiary. Furthermore, the petitioner failed to establish that the position of retail store manager with supervision of one to three employees existed at the time of filing the labor certification application, and the job offer continues to be a realistic one in 2002 through 2003. Counsel claims on appeal that: "[t]here are at least three full-time workers on three shifts at this busy, profitable and continuously operating gas station/convenience store." Counsel also said, "the petitioning corporation is a family run and owned business. Three family members have been working the business and choose whether to take salary or not." However, counsel does not submit any evidence to support his assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

In fact, contrary to counsel assertion, the tax returns and Affidavit from [redacted] submitted with appeal shows that the business is 50% owned by [redacted] and 50% by his sister [redacted] affidavit also indicated that they decided "to hire a Manager so that [he] could devote more of [his] time to [his] seven other investments and business ventures and not be 'stuck' in this business." Supposing that there are three members of the family-owner working for the business in three shifts, and the beneficiary would be scheduled to replace [redacted] for the 11pm-7am shift as delineated on the Form ETA 750, the affidavit does not explain how the beneficiary would supervise the other two family members (one of them is 50% owner) in other shifts while he is working for the 11-7 shift. The affidavit does not provide any independent objective evidence that at least one non-owner family member works for the business without any compensation or dividends.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence submitted by the petitioner that demonstrates that the job offer was not realistic at the time filing and continue to be unrealistic to the present.

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. The petition remains denied.