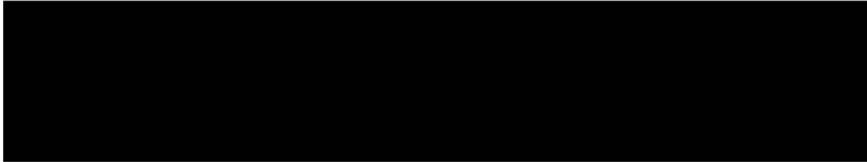


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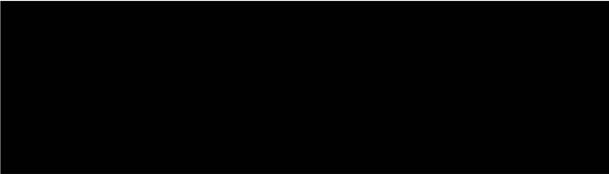
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Other Worker pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3).

ON BEHALF OF PETITIONER:



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 Acting Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a paint manufacturer. It seeks to employ the beneficiary permanently in the United States as a paint-manufacturing technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The acting 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 it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The acting director denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the acting director's decision of denial the sole issues in this case are whether the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and whether it has demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved Form ETA 750 labor certification.

Section 203(B)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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

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

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 Department of Labor. 8 C.F.R. § 204.5(g)(2) 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). Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.02 per hour, which equals \$22,921.60 per year. The Form ETA 750 states that the position requires three months of experience in the job offered.

On the petition, the petitioner stated that it was established on March 1, 1992 and that it employs four workers. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Newton, Kansas.

On the Form ETA 750, Part B the beneficiary, who signed that form on April 25, 2001, stated that he had worked as a technician from 1981 to 1986 for Irang Corporation, a paint manufacturer in Tehran, Iran.

The instructions to the Form ETA 750B require that the beneficiary "List all jobs held during the past three (3) years [and] any other jobs related to the occupation for which the [beneficiary] is seeking certification" The beneficiary listed no other qualifying experience on that form.

In the instant case the record contains (1) portions of the petitioner's 2003 and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) unaudited financial statements from May 2005, (3) and a printout of the petitioner's accounts receivable showing that at the end of May 2005 the petitioner had receivables of \$6,832.42. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The record also contains a letter dated July 11, 2005 from the petitioner's president and a letter dated July 11, 2005 from the president of the Irang Corporation in Tehran, Iran. The record does not contain any other evidence relevant to the beneficiary's claim of qualifying employment experience.

The petitioner's tax returns show that it is a corporation, that it incorporated on March 1, 1992, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions¹ of \$21,076. At the end of that year the petitioner had current assets of \$157,916 and current liabilities of \$11,723, which yields net current assets of \$146,193.

¹ Taxable income before net operating loss deduction and special deductions is located at Line 28 of the Form 1120,

During 2004 the petitioner declared taxable income before net operating loss deductions and special deductions of \$4,425. At the end of that year the petitioner had current assets of \$179,965 and current liabilities of \$10,365, which yields net current assets of \$169,600.

The July 11, 2005 letter from the petitioner's president states that the petitioner has employed the beneficiary since February 7, 2005.

The July 11, 2005 letter from the president of Irang Corporation in Iran states that the beneficiary worked as a paint technician for that company from 1981 to 1986. The person who signed that letter as president of Irang Corporation also signed the July 11, 2005 letter from the petitioner as its president.

On April 25, 2005 the acting director issued a request for evidence. The acting director asked that the petitioner provide evidence of its continuing ability to pay the proffered wage beginning on the priority date, including 2001 and 2002.

The acting director denied the petition on September 12, 2005. The acting director noted that, notwithstanding the request of April 25, 2005, the record contains no evidence pertinent to the petitioner's ability to pay the proffered wage during 2001 and 2002.

The acting director further noted that the beneficiary's employment verification letter was dated July 11, 2005 and purported to have been issued by an existing company in Iran. The acting director observed that the signatory is the petitioner's president, who appears to live in the United States.

On appeal, counsel stated that he would provide evidence of the ownership of the beneficiary's alleged previous employer in Iran. Counsel also asserted that the petitioner had provided the petitioner's 2001 and 2002 tax returns in response to the request for evidence. Counsel did not then provide copies of those returns and the record does not contain copies of them.

On that appeal counsel requested an additional 60 days to submit a brief and/or evidence. No additional evidence or argument was received, either with the appeal or subsequently. On April 13, 2007 this office sent counsel a facsimile transmission asking whether he had submitted any such additional information, argument, or documentation. Counsel did not respond to that facsimile.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 no evidence was submitted to show that the petitioner paid any wages to the beneficiary.

U.S. Corporation Income Tax Return and, of the figures on that tax return, is the figure most analogous to net income. This office considers that figure to be net income for the purpose of determining a petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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, 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically² shown on lines 16(d) through 18(d). 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.

The proffered wage is \$22,921.60 per year. The priority date is April 30, 2001.

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to show its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. The record contains no copies of annual

² The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

reports, federal tax returns, or audited financial statements pertinent to 2001 or 2002. The petitioner has not demonstrated the ability to pay the proffered wage during 2001 or 2002.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of \$21,076. That amount is insufficient to pay the annual amount of the proffered wage. At the end of that year, however, the petitioner had net current assets of \$146,193, an amount greater than the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared taxable income before net operating loss deductions and special deductions of \$4,425. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$169,600. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2004.

The petition in this matter was submitted on September 27, 2004. On that date the petitioner's 2005 tax return was unavailable. On April 25, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. The petitioner is relieved of the burden of showing its ability to pay the proffered wage during 2005 and later years at this point in the proceedings.

The evidence does not establish that the petitioner was able to pay the proffered wage during 2001 or 2002. Therefore, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis, which has not been overcome on appeal.

The remaining issue is whether the petitioner has demonstrated that the beneficiary has the three months of experience necessary to qualify him for the proffered position pursuant to the terms of the approved labor certification.

To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service 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 *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

The employment verification letters provided, one from the petitioner in Kansas and the other from the petitioner's alleged former employer in Iran, are both signed by the same person. The service center, understandably, found this circumstance suspicious. The decision of denial stated that without corroborating evidence the beneficiary's employment verification letters are insufficiently credible.

On appeal counsel stated that he would provide evidence that the petitioner's owner also owns the paint factory in Iran. Such evidence, if found credible, might have demonstrated that the petitioner's owner is able to confirm the beneficiary's claim of employment in Iran. That evidence, however, was never produced.

This office concurs that, absent any such corroborating evidence, the beneficiary's employment verification letters are unconvincing.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite three months of experience. The petition was correctly denied for this additional reason, which has not been overcome on appeal.

The petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and failed to demonstrate that the beneficiary is qualified for the proffered position. The petition may not, therefore, be approved. 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.