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]

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FILE: SRC 06 099 50805 Office: TEXAS SERVICE CENTER Date: NOV 21 2007

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: SELF-REPRESENTED

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. The appeal will be dismissed.

The petitioner is a stained glass design business. It seeks to employ the beneficiary permanently in the United States as a commercial and industrial designer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards, nor had it established that the beneficiary had the qualifications set forth on the Form ETA 750 as of the priority date. Therefore, the director denied the petition.

The record contains a Form G-28, Notice of Entry of Appearance as Attorney or Representative, which attempts to authorize Reverend [redacted]z to act on behalf of the petitioner. However, [redacted] has stated for the record that he is not an attorney. He is also not recognized as an authorized or accredited representative pursuant to 8 C.F.R. § 292.1(a)(4).[1] Further, [redacted] is not, as he claims on appeal, a "reputable individual" authorized to represent the petitioner pursuant to 8 C.F.R. § 292.1(a)(3) in that the record does not indicate that he has a pre-existing relationship with the petitioner,[2] nor has the AAO in its discretion granted [redacted] permission to represent the petitioner before this office. *See* 8 C.F.R. §§ 292.1(a)(3)(iii) and (iv). Thus, the petitioner shall be treated as self-represented. All representations in the record will be considered, but the decision in this matter will only be provided to the petitioner.

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

The issues in this case are whether the petitioner has demonstrated an ability to pay the proffered wage from the priority date onwards, and whether it has demonstrated that as of the priority date, the beneficiary had the qualifications listed on the Form ETA 750.

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 relevant 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

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[1] *See* the U.S. Department of Justice, Executive Office for Immigration Review website at http://www.usdoj.gov/eoir/statspub/raroster.htm for the list of accredited organizations and representatives.

[2] [redacted] did submit a statement indicating that he has a pre-existing relationship with the beneficiary in that he is the beneficiary's friend. However, this office notes that the beneficiary does not have standing in this matter, and nothing in the record indicates that [redacted] has a pre-existing relationship with the petitioner.

> 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 is accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the Form ETA 750 for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $15.00 per hour, 40 hours per week, or $31,200 annually. The Form ETA 750 states that the position requires four years of high school and two years of experience carrying out the duties of the proffered position.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[3]

The petitioner did not submit any documentary evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage. The petitioner did indicate that it submitted its tax returns in response to the director's February 27, 2006 Request for Evidence. Also the appeal brief indicates that on appeal the petitioner resubmitted its tax returns covering the tax years since the priority date. However, there are no tax returns in the record, nor does the record contain any other documents which help to substantiate the petitioner's ability to pay the wage.

There is no direct evidence in the record as to whether the petitioner is structured as a C corporation, an S corporation, a sole proprietorship, etc. On the petition, the petitioner indicated that it was established on September 1, 1980, that it currently employed 3 employees and that its gross annual income is $171,171.61. On the Form ETA 750, signed by the beneficiary on April 21, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition subsequently based on that Form 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, Citizenship and Immigration Services (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).

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[3] 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 this 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).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 this case, the record does not indicate that the beneficiary worked for the petitioner in the past.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient. It is also insufficient for the petitioner to show that it paid wages in excess of the proffered wage.

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* stated:

> 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 Chang* 719 F. Supp. at 537.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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] Generally, if the total of a petitioner's end-of-year net current assets and the wages paid to the beneficiary (if any) are

[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

equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner did not provide any of its tax returns or any other regulatory-prescribed documentation to support the claim that it has the ability to pay the proffered wage out of its net income, out of its net current assets or out of any other of its available funds.

Thus, the petitioner has not demonstrated an ability to pay the proffered wage from the priority date onwards, and CIS is obliged to deny the petition for this reason.

This office also finds that the record does not demonstrate that the beneficiary is qualified to perform the duties of the proffered position in accordance with the terms set forth on the Form ETA 750.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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, Madany 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).

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of its filing date which as noted above is April 30, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In this case, Items 14 and 15 of the Form ETA 750A set forth the minimum education, training, and experience that an applicant must have for the position of commercial and industrial designer. Item 14 indicates that the applicant must have four years of high school to qualify for the proffered position. Item 15 indicates that to qualify the applicant must also have two years of experience in the proffered position. The duties of the proffered position are delineated at Item 13 of the Form ETA 750A as follows:

> Design and create glass into decorative windows, prepare stained glass, glass coloring, and sand blasting; cut linens painted figures and cutting glass, supervise team of workers in the preparation of stained glass, proper placement of glass pieces to make decorative stained windows.

Item 15 of the Form ETA 750A reflects that there are no other special requirements needed to qualify for the proffered position.

The beneficiary set forth his credentials on the Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Item 15, eliciting information of the beneficiary's work experience, the beneficiary indicated that he performed the duties listed at Item 13 of the Form ETA 750A while employed by [redacted] from November 1986 through May 1996. Specifically, the beneficiary indicated that from November 1986 through October 1992, he worked full-time as a stained glass designer making complicated design structures for various kinds of window glass cutting and paint linen figures,

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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.

including stained glass designs used in church windows. The beneficiary indicates that he was promoted to leading and building director for the same company during October 1992. In this position, which he held full-time until May 1996, his duties included supervising and carrying out the stained glass design process from the cutting of glass, through the painting steps, firing, polishing, leading, beveling, and use of a wheel carved glass. The beneficiary does not provide any additional information concerning his employment background on that form.

Regarding the documentation needed to support the petitioner's claims that the beneficiary is qualified to perform the duties of the proffered position, the regulation at 8 C.F.R. § 204.5(l)(3) provides in relevant 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 occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Further, in his February 27, 2006 Request for Evidence (RFE), the director specified that the petitioner needed to submit experience letters from the beneficiary's previous or current employers which list the *exact dates* of the beneficiary's qualifying experience.

Regarding this experience, the beneficiary submitted a notarized affidavit from his father [redacted] dated January 6, 2006. The affidavit indicates that [redacted] is a stained glass company run by the beneficiary's family. The affidavit attests that for three years the beneficiary worked for this company at the apprentice level, and then for six years the beneficiary was in charge of the design section in the company, and worked as glass cutter, finisher, lead appliqué worker and artistic drawer. The affidavit fails to indicate the dates of the beneficiary's employment. Thus, this affidavit may not be used to support the finding that as of the April 30, 2001 priority date the beneficiary had two years of experience in the proffered position, including supervising a team of stained glass design workers and the other job duties listed at Item 13 of the Form ETA 750A. The beneficiary's father also failed to list his title within the company [redacted], as required at 8 C.F.R. § 204.5(l)(3)(ii)(A). There is no other documentation in the record to support the petitioner's claim that the beneficiary had the experience required for the proffered position as of the priority date.

At Item 11 of the Form ETA 750A, the beneficiary represented that he attended high school for just over eight years from September 1978 through December 1986 at Centro Academico ASED in Cali, Colombia. The petitioner submitted no documentation relating to the claim that the beneficiary had completed four years of high school as required by the Form ETA 750. [5]

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[5] Regarding the petitioner's failure to provide the required documentation to support the claim that the beneficiary had completed four years of high school, this office notes that the AAO may deny a petition which fails to comply with the technical requirements of the law based on such failure even where the director did not identify this failure as one of the grounds for denial in his decision. *See Spencer Enterprises, Inc. v.*

In sum, the petitioner failed to provide a letter from the beneficiary's employer in Mexico or elsewhere which includes the name, address and title of that employer, as well as the dates during which the beneficiary gained relevant work experience. The notarized affidavit from the beneficiary's father which fails to specify his father's title at [redacted] and fails to list the dates of the beneficiary's employment is not sufficient to demonstrate that as of the priority date the beneficiary had two years of qualifying experience carrying out the duties of the proffered position. *See* 8 C.F.R. § 204.5(l)(3).

Thus, the record does not demonstrate that, as of the priority date, the beneficiary had acquired two years of experience as a commercial and industrial designer with duties as set forth on the Form ETA 750.

The record also contains no documentary evidence that the beneficiary has a high school diploma as required by an applicant for the proffered position according to the terms of the Form ETA 750 as certified. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(B).

As such, the petitioner has not shown that the beneficiary is qualified, in terms of his past work experience or in terms of his educational background, to carry out the duties of the proffered position. CIS is obliged to deny the petition for both these additional reasons.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. That burden has not been met.

**ORDER**: The appeal is dismissed.

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*United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews cases on a *de novo* basis).