U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 15 2008
SRC 06 146 52263

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.

Kevin S. Poulos for

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 construction company. It seeks to employ the beneficiary permanently in the United States as a bricklayer/supervisor. 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 2001 priority date of the visa petition and that the petitioner had not established that the beneficiary had the two requisite years of previous work experience in the proffered position. The director denied the petition accordingly.

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. Although counsel submitted a Form I-290B and stated that he was submitting a brief to the AAO within thirty days, the AAO had not received any further materials. The AAO sent a fax to counsel dated December 19, 2007, requesting a copy of any brief submitted previously. In response counsel submitted the petitioner's Form 1120X, amended tax return for tax year 2004, and copies of the petitioner's checking account statement from the Bank of America for August 2003. Both documents were already a part of the record. Therefore the AAO will review the petition based on the record as presently constituted.

As set forth in the director's denial, the two issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the beneficiary had the requisite two years of previous work experience as a bricklayer/supervisor prior to the 2001 priority date.

The petitioner filed the instant petition in the skilled worker classification. 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).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is $31 per hour ($64,480 per year). The Form ETA 750 states that the position requires two years of work experience in the related occupation.

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 upon appeal[1]. On appeal, counsel submits an I-290B that states the petitioner does have sufficient income to pay the proffered wage and the beneficiary has sufficient work experience. The record also contains the petitioner's Forms 1120A for tax years 2001 to 2005,[2] as well as a bank statement from the Bank of New York for August 2003 for the petitioner's businesslink checking account. This document indicates an ending balance of $1,748.76.

The record also contains a letter from [redacted], the petitioner's owner dated May 23, 2006. In his letter, [redacted] explained that the petitioner's gross income dropped in 2003 by approximately 50 percent due to loss of income based on bad debts. [redacted] further explained that many creditors did not pay the petitioner after jobs were completed. [redacted] also notes that the petitioner's gross income for 2004, based on strengthened credit policies, almost doubled. [redacted] stated, that due to the loss on gross income in tax year 2003, he and the other officer of the petitioner did not withdraw any salary in 2003. [redacted] also submitted a Cost of Goods Sold Worksheet for his 2003 tax return that indicated other costs, on line 2, of $24,700. A second undated statement from [redacted] submitted to the record indicates that the beneficiary did not receive any wages in tax year 2003 or 2004. Finally, the record contains a letter of previous work experience written by [redacted], Human Resources, Wander Star Construction, Inc., Corona, New York. In his letter, [redacted] stated that the beneficiary worked for Wander Star Construction, Inc. in 1999-2000, and performed the duties of a bricklayer.[3]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation, and uses IRS Forms 1120-A short form for its federal tax returns. On the petition, the petitioner claimed to have been established in April 13, 1998, to have a gross annual income of $181,580, a net annual income of $127,482 and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on April 25, the

---

[1] 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).

[2] The record contains the petitioner's amended Form 1120-A tax return for tax year 2004.

[3] The AAO will discuss this letter of work experience when it examines whether the petitioner established that the beneficiary has the requisite two years of work experience in the proffered position of bricklayer/supervisor.

beneficiary claimed to work for the petitioner as of the date he signed the Form ETAB, but did not indicate the date he commenced working for the petitioner.

On appeal, as previously stated, counsel asserts that the petitioner has sufficient income to pay the proffered wage and that the beneficiary has the requisite work experience in the proffered position.

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, 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).

The AAO notes that the director requested further evidence from the petitioner on April 27, 2006, with regard to the petitioner's ability to establish its ability to pay the proffered wage in tax year 2003. The director in his request stated that the petitioner could submit additional evidence of its ability to pay the proffered wage, such as copies of bank account records, payroll records, or profit-loss statements. In response, the petitioner submitted one bank statement for August 2003. The director's and counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions). Fourth, the petitioner only submitted one bank statement for the entire 2003 tax year, which only establishes the petitioner's balance for that one month.

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 the instant case, the record is not consistent as to when the petitioner employed and paid the beneficiary. On the Form ETA Part B, the beneficiary did not indicate when he started working for the petitioner, although he indicated he was working for the petitioner at the time he signed the Form ETA 750 in 2001. The petitioner only indicates that the beneficiary was paid no wages in tax years 2003 and 2004. The petitioner provided no further evidence of any wages or compensation provided to the beneficiary during the relevant period of time from April 2001 to the present. Thus the petitioner did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2005.

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). 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 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 Chang* at 537

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $64,480 per year from the priority date:

- In 2001, the Form 1120-A stated a net income[4] of $10,696.
- In 2002, the Form 1120-A stated a net income of $13,308.
- In 2003, the Form 1120-A stated a net income of -$4,745.
- In 2004, the Form 1120-X stated an amended net income[5] of $36,318.
- In 2005, the Form 1120-A stated a net income of $42,898.

Therefore, for the years 2001 to 2005, the petitioner did not have sufficient net income to pay the proffered wage of $64,000.

---

[4]The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 24 of the Form 1120-A.

[5] On line 3, of Part 1, Income and Deductions of its 2004 Form 1120X, the petitioner indicated taxable income of $36,318. The petitioner's initial 2004 Form 1120 tax return is not in the record; however, the state of New York income tax return for tax year 2004 contained in the record indicates the petitioner reported federal taxable income before net operating loss (NOL)and special deductions of $41, 063. The AAO is using the lower amount of taxable income identified on the petitioner's amended 2004 tax return in these proceedings.

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.[6] A corporation filing a Form 1120-A tax return shows its year-end current assets on Part II, Balance Sheets per books, lines 1 through 6. Its year-end current liabilities are shown on lines 13 through 14. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are 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.

In the instant petition, the petitioner only filled out Schedule L, balance Sheet per books, Part III for its 2001 tax returns. Therefore the AAO can only examine the petitioner's net current assets for tax year 2001.

The petitioner's net current assets during tax year 2001 were $17,411.

Therefore, for the year 2001, the petitioner did not have sufficient net current assets to pay the proffered wage. As previously stated, the petitioner did not provide sufficient information on its tax returns as to its net current assets for tax years 2002 to 2005. Therefore, the AAO can not determine whether the petitioner had the ability to pay the proffered wage based on the petitioner's net current assets for tax years 2002 through 2005.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel's brief assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The AAO will now examine the second issue raised by the director in his decision, namely whether the beneficiary had the requisite two years of previous work experience as a bricklayer/supervisor as stipulated by the Form ETA 750.

---

[6] 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 expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

As stated previously, the petitioner, in response to the director's request for further evidence, the petitioner submitted a letter of work verification written by [redacted], Human Resources, Wander Star Construction., Corona, New York. In his letter, [redacted] stated that the beneficiary worked for Wander Star Construction in 1999-2000, and performed the duties of a bricklayer.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (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*, *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).

In addition, the regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (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.

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of bricklayer/supervisor. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education

Grade School	(Blank)
High School	(Blank)
College	(Blank)
College Degree Required	(Blank)
Major Field of Study	(Blank)

The applicant must also have 2 years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on 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. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for the petitioner as of April 25, 2001, the date the beneficiary signed the Form ETA 750, Part B; however, the beneficiary did not indicate when he began working for the petitioner. The beneficiary also indicated that he worked for Wander Star Construction, Inc. in New Jersey, from August 1997 to October 1999 as a bricklayer/supervisor. He does not provide any additional information concerning his employment background on that form.

Thus, the record contains conflicting evidence with regard to the beneficiary's prior experience as a bricklayer/supervisor. First, the dates of the beneficiary's employment with Wander Star Construction, Inc. are inconsistent in the record. The Form ETA 750 states the beneficiary worked from August 1997 to October 1999, while [redacted] letter indicates the beneficiary worked at Wander Star Construction from "1999-2000."

While the director stated in his decision that the dates in [redacted] letter could only be interpreted as December 1999 to January 2000, it is not clear how the director reached this conclusion. The AAO notes that the dates provided by [redacted] can be interpreted differently than how the director described. Nevertheless, the record does not contain any explanation from the petitioner as to what these dates mean, or clarification concerning the specific starting and ending dates of employment in 1999 and 2000. Furthermore the dates provided by [redacted] are not consistent with the dates of previous employment with Wander Star Construction, Inc. noted by the beneficiary on the Form ETA 750, namely August 1997 to October 1999. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." The petitioner provided no further explanation for the discrepancy in the record as to the beneficiary's previous employment with Wander Star Construction, Inc.

The AAO notes that the regulation at 8 C.F.R. § 204.5(l)(3) stipulates inter alia, that letters of work or training verification should be signed by employers or trainers. The AAO also notes that [redacted] letter fails to provide a description of the training received by the beneficiary, and does not establish that the beneficiary worked as a bricklayer/supervisor while at Wander Star Construction, Inc. Therefore, the AAO gives no weight to [redacted]' letter of work verification. Thus, the petitioner has not established that the beneficiary has the two requisite years of work experience as a bricklayer/supervisor prior to the 2001 priority year date. Therefore, the petitioner cannot establish that the beneficiary is qualified to perform the duties of the proffered position.

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, with regard to whether the petitioner has the ability to pay the proffered wage or whether the beneficiary is qualified to perform the duties of the proffered position.

ORDER: The appeal is dismissed.