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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 0 6 2010

SRC 07 189 53319

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 remanded to the director for further consideration.

The petitioner is an automobile transmission repair company. It seeks to employ the beneficiary permanently in the United States as an automotive master mechanic. 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 beginning on the priority date of the visa petition. Therefore, the director denied the petition.

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.

According to the director's December 28, 2007 denial, the single issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 either 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 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, Application for Alien Employment Certification, as certified by the DOL 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 27, 2001. The proffered wage as stated on the Form ETA 750 is $10.90 per hour ($22,672 per year). The Form ETA 750 states that the position requires

two years of experience in the proffered position, and eight years of grade school and two years of high school.

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.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of $247,845.00, and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on April 16, 2001, the beneficiary did not claim to have worked for the petitioner. The Forms W-2, Wage and Tax Statement, in the record indicate that the beneficiary worked for the petitioner from 2001 through 2007.

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, U. S. Citizenship and Immigration Services (USCIS) 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 during a given period, USCIS 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. The Forms W-2 in the record establish that the petitioner paid the beneficiary: $12,250 in 2001, ($10,422 less than the proffered wage); $14,040 in 2002, ($8,632 less than the proffered wage); $14,040 in 2003, ($8,632 less than the proffered wage); $14,310 in 2004, ($8,362 less than the proffered wage); $14,740 in 2005, ($7,932 less than the proffered wage); $23,169 in 2006, (more than the proffered wage); and $22,672 in 2007, (exactly 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).

proffered wage). Thus, the petitioner has established its ability to pay the wage of $22,672 in 2006 and 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage from the priority date onwards, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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. Similarly, showing that the petitioner paid wages in excess of the proffered wage is not sufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] 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." *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on line 24 of the Form 1120-A, U.S. Corporation Short-Form Income Tax Return, or line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on September 24, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2006 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2005 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001-2005, as shown in the table below.

- In 2001, the Form 1120-A stated net income of $25,352.
- In 2002, the Form 1120-A stated net income of $3,392.
- In 2003, the Form 1120-A stated net income of -$109.
- In 2004, the Form 1120 stated net income of $1,183.
- In 2005, the Form 1120 stated net income of $1,926.

The petitioner has established that it had sufficient net income to pay the proffered wage in 2001. Net income added to the amount which the petitioner paid the beneficiary each year from 2002 through 2005 is less than the proffered wage. Thus, the petitioner has not established an ability to pay the wage in 2002-2005 through its net income added to the amount which it actually paid the beneficiary in those years.

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, USCIS will review the petitioner's assets. However, the petitioner's total assets will not be considered in the determination of the ability to pay the proffered wage. 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, USCIS 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.[2] A corporation's year-end current assets are shown on page 2, part III of the Form 1120-A, lines 1 through 6, and its year-end current liabilities are shown at lines 13 and 14 of part III. On the Form 1120, a corporation's year-end current assets are shown on Schedule L, lines 1 through 6, and its

[2]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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

year-end current liabilities are shown on lines 16 through 18 of the Schedule L. 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2002-2005, as shown in the table below.

- The 2002 Form 1120-A reflects net current assets of $19,855.
- The 2003 Form 1120-A reflects net current assets of $20,035.
- The 2004 Form 1120 reflects net current assets of $20,555.
- The 2005 Form 1120 reflects net current assets of $21,096.

Therefore, the petitioner has established that when the amount which it paid the beneficiary each year is added to its net current assets, it had the ability to pay the wage during the years 2002-2005.

The petitioner has already established that it had the ability to pay the wage in 2001, 2006 and 2007.

Therefore, the petitioner has established that it has the continuing ability to pay the beneficiary the proffered wage from the priority date onwards.[3]

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[3] The AAO notes that the Forms W-2 in the record indicate that the beneficiary properly used a tax identification number in lieu of a Social Security Number (SSN) from mid-2003 onwards. However, the earlier Forms W-2 in the A-file indicate that from 2001 through mid-2003, the beneficiary used a Social Security Number (SSN) issued to an individual other than himself. The AAO must underscore that the misuse of another's SSN may lead to fines and/or imprisonment. This office acknowledges that there is no evidence in the record that, for example, the beneficiary knowingly and willfully attempted to deceive the Commissioner of Social Security as to his true identity or knowingly used the means of identification of another person; or that the petitioner knowingly employed an individual who was not authorized to work. The AAO also makes no finding regarding other elements of the crimes described below. However, this office does note the following.

With regard to Social Security laws and regulations, the Omnibus Reconciliation Act of 1981 states that an individual who "willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2)" of the Social Security Act has committed a felony. Anyone convicted of violating this provision, Section 208(a)(6) of the Social Security Act, shall be fined or imprisoned for not more than 5 years, or both. *See* Social Security Online, the official website of the U.S. Social Security Administration, http://ssa-custhelp.ssa.gov (accessed December 15, 2009).

Also, in October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) which states that an individual who "knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any

Beyond the decision of the director, the record fails to demonstrate that as of the priority date the beneficiary had acquired the two years of experience as an automotive master mechanic needed to perform the duties of the proffered position. *See Spencer Enterprises, Inc. v. 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)(which notes that the AAO reviews appeals on a *de novo* basis).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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 Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that a beneficiary must have for the proffered position of automotive master mechanic. In this case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8 years
	High School	2 years
	College	none required
	College Degree Required	none required
	Major Field of Study	not applicable
	Other Special Requirements	not applicable

The applicant must also have two years of experience in the job offered, the duties of which are delineated at item 13 of the Form ETA-750A as:

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unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law" has committed a Federal offense.

Under the Immigration Reform and Control Act of 1986 (IRCA), if an employer unknowingly hires an alien who is not authorized to work, or if the alien becomes unauthorized while employed, the employer must discharge the worker upon discovery that the alien is not authorized to work. 8 U.S.C.A. § 1324a(a)(2). Employers who do not do so may be subject to civil fines and to criminal prosecution. 8 U.S.C.A. §§ 1324a(e)(4)(A) and 1324a(f)(1).

IRCA also makes it a crime for an alien who is not authorized to work to subvert the employer verification system by tendering fraudulent documents. 8 U.S.C.A. § 1324c(a). Thus, it prohibits aliens from using or attempting to use any forged, counterfeit, altered, or falsely made document or any document lawfully issued to or with respect to a person other than the possessor for purposes of obtaining employment in the United States. 8 U.S.C.A. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b).

> The applicant for this position will be required to repair automatic transmissions in automobiles. Raise automotive vehicle, using jacks or hoists, and remove transmission (sic) using mechanic's handtools (sic). Disassemble transmission unit and replace broken or worn parts, such as bands, gears, seals, and valves. Adjust pumps, bands, and gears as required, using wrenches. Install repaired transmission. Adjust operating linkage and test operation on road. Verify idle speed of motor, using equipment, such as tachometer, making required adjustments.

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 part 11, where the beneficiary is to list the schools that he has attended, he indicated that he had completed three years of high school in Nayarit, Mexico. At part 15, where the beneficiary is to list his relevant work experience, he stated that he worked as an automatic transmission mechanic at Transmissiones American, Guadalajara, Jalisco, Mexico from 1987 through 1993. He did not provide any additional information concerning his employment background which is relevant to the proffered position.

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.

The petitioner submitted a letter which states that the beneficiary has "worked for [the petitioner] since September 1993 until present. He works 40 hours per week. [The beneficiary] worked from 1987 to 1993 under Transmissiones American in Guadalajara, Jalisco-Mexico. Transmissiones American is not (sic) longer in business." The letter is signed by the petitioner's owner and provides the petitioner's address and telephone number.

The petitioner's owner failed to provide any description of the beneficiary's duties from 1993 until the priority date. Thus, it is not clear from the record whether the beneficiary had acquired two years of full-time work experience in the proffered position by the priority date as required by the ETA 750.

The director did not indicate in the notice of decision that the experience letter submitted by the petitioner was deficient. The AAO hereby remands the matter to the director that he might request an experience letter from the petitioner which delineates the beneficiary's duties such that the director might make a determination as to whether the beneficiary had gained at least two years of experience in the proffered position before the priority date of April 27, 2001. The director shall then render a new decision which takes into account any additional evidence provided by the petitioner.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.