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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

Date: MAY 03 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and now is 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 drywall mechanic supervisor. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to submit sufficient evidence to demonstrate its ability to pay the proffered wage and failed to submit sufficient evidence that the beneficiary had the required experience as of the priority date. 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.

As set forth in the director's March 10, 2009 denial, the issues in this case are whether the petitioner can pay the proffered wage from the priority date onwards and whether the beneficiary had the required amount of experience as of the priority date.

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 AAO maintains plenary power to review each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Concerning the petitioner's ability to pay the proffered wage, 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.

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[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).

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 30, 2001. The Form I-140 was filed on May 2, 2008. The proffered wage as stated on the Form ETA 750 is $18.09 per hour ($37,627 per year).

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the Form I-140, the petitioner states that it was founded in 1994 but did not specify how many workers it employs. According to the tax returns in the record, the petitioner's fiscal year is the same as the calendar year. On the Form ETA 750B, signed by the beneficiary on April 16, 2001, the beneficiary stated that he began working for the petitioner in April 1997.

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, United States 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. On appeal, counsel stated that the petitioner paid the beneficiary "off the books" since the beneficiary did not have a social security number. The petitioner submitted no evidence that it employed or paid the beneficiary any wages during the relevant time period.

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, 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010). 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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 USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial*, 696 F. Supp. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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, 558 F.3d 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,* 719 F.Supp. at 537 (emphasis added).

The record before the director closed on February 18, 2009 with the receipt by the director of the petitioner's submissions in response to the request for evidence. The petitioner submitted its 2001 through 2007 tax returns:

- In 2001, the Form 1120S stated net income[2] of -$69,042.
- In 2002, the Form 1120S stated net income of $34,858.
- In 2003, the Form 1120S stated net income of $46,565.
- In 2004, the Form 1120S stated net income of $26,174.
- In 2005, the Form 1120S stated net income of $27,064.
- In 2006, the Form 1120S stated net income of $48,120.
- In 2007, the Form 1120S stated net income of $32,772.

USCIS electronic records show that the petitioner filed two other Form I-140 petitions, both with April 2001 priority dates, which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offer to each beneficiary is realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). Both of these additional filings have April 2001 priority dates. Although the petitioner's net income was sufficient to cover the beneficiary's proffered salary in 2003 and 2006, the record does not demonstrate that the petitioner had the ability to pay the proffered wage to the instant beneficiary in the other pertinent years or the additional beneficiaries of the other petitions filed by the petitioner in all of the relevant years. Therefore, the petitioner cannot establish its continuing ability to pay from the priority date onward.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the

[2] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2008, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed November 3, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K for 2002, 2004, 2006, and 2007, the petitioner's net income is found on Schedule K of its tax returns for those years.

petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 2001, the Form 1120S stated net current assets of -$204,730.
- In 2002, the Form 1120S stated net current assets of -$168,837.
- In 2003, the Form 1120S stated net current assets of -$123,258.
- In 2004, the Form 1120S stated net current assets of -$99,610.
- In 2005, the Form 1120S stated net current assets of -$79,931.
- In 2006, the Form 1120S stated net current assets of -$45,303.
- In 2007, the Form 1120S stated net current assets of -$50,117.

The petitioner's negative net current assets in each year are insufficient to establish the petitioner's ability to pay the proffered wage for either the beneficiary or the other sponsored beneficiaries.

On appeal, the petitioner submitted a profit and loss statement for 2008 and a letter dated November 9, 2007 from [redacted], the petitioner's accountant. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. As there is no accountant's report accompanying the profit and loss statement, the AAO cannot conclude that it represents an audited statement. Similarly, the letter from [redacted]ates that he has prepared tax returns for the company since 2002 and he states that in 2001, he "ha[s] been given to understand" that the petitioner made certain outlays for heavy equipment and machinery, but he does not state that he has any first hand knowledge of such investment or that the statement is based on any documentation or anything other than a representation of management. He also states that "since, 2002, the company has been profitable in every year and is in sound financial health at the present time." While the petitioner's tax returns reflect positive net income after 2001, the amounts of net income as noted above are not sufficient in all years to pay the proffered wage to all of the sponsored workers. As the financial statement is not clearly audited as required by 8 C.F.R. § 204.5(g)(2), and the CPA letter does not reference reliance on any specific documents or anything other than

[3] 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.

management's representations, these documents cannot be used to establish the petitioner's ability to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary or the other sponsored beneficiaries the proffered wage as of the priority date through an examination of wages paid (no evidence submitted), its net income or net current assets.

On appeal, counsel additionally asserts that under PERM, "the final rule continues to reaffirm the current regulation that the prevailing wage must be paid either from the time permanent residency is granted or from the time the alien is admitted to take up certified employment." He attaches the "PERM Labor Certification – Timing of Payment of the Prevailing Wage."[4] While the petitioner is not required to pay the beneficiary the proffered wage until the beneficiary obtains permanent residence, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that the petitioner must establish its continuing ability to pay the proffered wage from the priority date onward. The regulation at 8 C.F.R. § 204.5 applies to petitions for employment based immigrants and sets forth the required evidence to establish eligibility.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the

[4] New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Here, the labor certification was filed in April 2001 on Form ETA 750, so the PERM regulations do not apply.

beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner submitted no evidence to liken its situation to *Sonegawa* including evidence of reputation, and submitted insufficient evidence to establish that it had one off year. Instead, the petitioner's tax returns show that the petitioner has had negative net current assets in all of the years in question and had a net income greater than the individual beneficiary's proffered wage in only two years. The petitioner additionally sponsored two other workers with 2001 priority dates. The petitioner must establish its ability to pay for all sponsored workers. On appeal, counsel states that the petitioner's gross income should be considered in addition to the amount of wages paid and payments made to contractors and subcontractors. Reliance on the petitioner's gross receipts and wage expense is misplaced. *See K.C.P. Food,* 623 F.Supp. at 1084; *see also Taco Especial,* 696 F. Supp. 2d at 881. The petitioner's tax returns reflect that in most years the petitioner does not appear to have employed its workforce directly, but instead relies on subcontractors: in 2007, the petitioner paid $138,686 in wages; in 2006, the petitioner paid $209,060 in wages; in 2005, the petitioner paid $187,980 in wages; in 2004, the petitioner paid $199,770 in wages; in 2003, the petitioner paid $44,484 in wages; in 2002, the petitioner paid $60,235 in wages; and in 2001, the petitioner paid $126,881 in wages. Subcontractor costs and labor costs in each year were notably higher than the wages paid to employees directly.

While the AAO acknowledges that the petitioner has paid large amounts to subcontractors, in this case, based on the sizeable subcontractor costs, it is unclear that the petitioner would actually employ the beneficiary. *See Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003); *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992).[5]

[5] The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In determining whether there is an "employee-employer relationship," the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden,* 503 U.S. at 322-23 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by

> which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958); *Clackamas,* 538 U.S. 440. As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In considering whether or not one is an "employee," U.S. Citizenship and Immigration Services (USCIS) must focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; New Compliance Manual at § 2-III(A)(1).

The *Clackamas* court considered the common law definition of the master-servant relationship, which focuses on the master's control over the servant. The court cites to definition of "servant" in the Restatement (Second) of Agency § 2(2) (1958): "a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other's control or right to control." *Id.* at 448.

Section 220, Definition of a Servant, in full states:

Here, the petitioner failed to state on Form I-140 how many people it employs. The petitioner's tax returns reflect that most of its workforce is subcontracted. From the record, it is not clear that the petitioner will employ the beneficiary directly. In any further filings, the petitioner must address this issue. Without resolution of this issue, the AAO cannot adequately determine whether the totality of the circumstances would apply to the petitioner.

With regard to the beneficiary's experience, the second basis for the director's denial, to be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House,* 16 I&N 158 (Act. Reg. Comm. 1977). 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). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

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(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
    a. The extent of control which, by the agreement, the master may exercise over the details of the work;
    b. Whether or not the one employed is engaged in a distinct occupation or business;
    c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the director of the employer or by a specialist without supervision;
    d. The skill required in the occupation;
    e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
    f. The length of time for which the person is employed;
    g. The method of payment, whether by the time or by the job;
    h. Whether or not the work is a part of the regular business of the employer;
    i. Whether or not the parties believe they are creating the relation of master and servant; and
    j. Whether the principal is or is not in business.

The Restatement additionally lists factors for consideration when distinguishing between servants and independent contractors, "the first of which is 'the extent of control' that one may exercise over the details of the work of the other." *Id. (citing* § 220(2)(a)). The court also looked to the EEOC's focus on control in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and that the EEOC considered an employer can hire and fire employees, assign tasks to employees and supervise their performance, can decide how the business' profits and losses are distributed. *Id.* at 449-450.

> (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.
>
> (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 Form ETA 750 states that two years of experience in the position offered as a drywall mechanic supervisor is required. On the Form ETA 750B, signed by the beneficiary on April 16, 2001, the beneficiary stated that he worked for [redacted] as a drywall mechanic supervisor from October 1999 to August 2000 and for the petitioner beginning in April 1997 and continuing until the date the labor certification was signed in April 2001 as a drywall mechanic supervisor, however, nothing documents this experience. The petitioner submitted a letter from [redacted], Accounts Manager for [redacted], stating that the beneficiary was employed as a drywall finisher from October 1999 to June 2000 and again from September 2001 to November 2002. The letter is insufficient to demonstrate any experience in the position offered as the position offered is a drywall supervisor. The letter states that he was employed only as a "drywall finisher." Also, as noted by the director, the length of the experience is less than the required two years. The experience after September 2001 is after the priority date and cannot establish that the experience was obtained by the priority date. In addition, the letter did not specify whether the beneficiary was employed in a full-time or part-time capacity as Form ETA 750B indicates that the beneficiary was working multiple jobs during this time period. Counsel states on appeal that the beneficiary "is in the process of obtaining evidence to prove he possesses over two years [of experience]." No additional evidence was submitted to address this basis for the petition's denial. The evidence is insufficient to establish that the beneficiary has the required two years of experience in the position offered as of the priority date.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.