

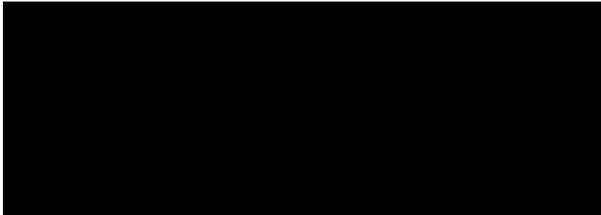


U.S. Citizenship
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FILE:

EAC-04-052-51638

Office: VERMONT SERVICE CENTER

Date: MAR 24 2006

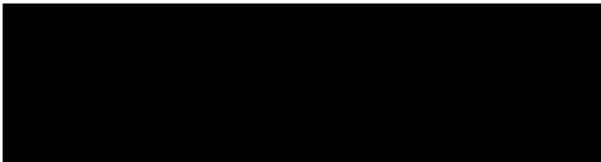
IN RE:

Petitioner:
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:



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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a metal/iron shop. It seeks to employ the beneficiary permanently in the United States as a metal fabricator. 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 priority date of the visa petition. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.¹

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$16.73 per hour (\$34,798.40 per year). The Form ETA 750 states that the position requires 2 years experience in the job offered.

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 AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

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 on January 1, 2000, to have a gross annual income of \$131,839, to have a net annual income of \$10,416, and to currently employ 4 workers. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to have worked for the petitioner since August 1998.

With the petition, the petitioner submitted the following documents pertinent to the ability to pay the proffered wage: the beneficiary's W-2 forms for 2001 and 2002, and the petitioner's form 1120 tax returns for 2001 and 2002.

The director denied the petition on August 9, 2004, finding that the evidence submitted with the petition did not establish that the petitioner had the ability to pay the proffered wage at the time of filing.

On appeal, counsel asserts that the petitioner had sufficient income to pay the proffered wage and submits additional evidence to support the assertion.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 petitioner established that it employed and paid the beneficiary \$15,660 in 2001, \$16,800 in 2002, and \$22,260 in 2003. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date through 2003. Instead, the petitioner paid partial wages. The petitioner is still obligated to demonstrate that it could pay the differences of \$19,138.40 in 2001, \$17,998.40 in 2002 and \$12,538.40 in 2003 between the wages actually paid to the beneficiary and the proffered wage.

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 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.

Counsel asserts on appeal that the depreciation of \$5,850 for 2002 should be added back to net income as a part of the petitioner's ability to pay the proffered wage. Counsel's assertion is misplaced. 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* at 537

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the differences of \$19,138.40 in 2001, \$17,998.40 in 2002 and \$12,538.40 in 2003 between the wages actually paid to the beneficiary and the proffered wage from the priority date.

In 2001, the Form 1120 stated net income² of \$10,416.

In 2002, the Form 1120 stated net income of \$17,156.

In 2003, the Form 1120 stated net income of \$29,273.

Therefore, for the years 2001 through 2002, the petitioner did not have sufficient net income to pay the differences between the wages paid and the proffered wage while its net income was sufficient to pay the difference between the wage paid and the proffered wage in 2003.

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.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 petitioner had current assets of \$10,605 and current liabilities of \$0, therefore, the net current assets were \$10,605, which is sufficient to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2001. However, the petitioner's current assets during 2002 were \$9,007 and the current liabilities were 28,145, therefore, the net current assets were \$(19,138), a negative figure. The petitioner had insufficient net current assets in 2002 to pay the difference the wages paid and the proffered wage.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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.

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 difference between the wage paid and 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 asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that the petitioner's net income together with money in the bank were sufficient to pay the proffered wage in 2001. Counsel refers to a 1992 decision issued by the AAO concerning balances in a petitioner's bank account. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Counsel's reliance on the balance in the petitioner's bank account in the instant case 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) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel also refers to the May 4, 2004 Memorandum from William R. Yates concerning using other sources to prove the ability to pay the proffered wage. The AAO notes that the purpose of the memorandum is to provide guidance to adjudicators on when a request for evidence (RFE) is not required or should not be issued according to the regulation at 8 C.F.R. § 204.5(g)(2). It is not the regulation for adjudicators to determine the ability to pay but just guidance to decide whether a RFE should be issued. The memo states in pertinent part that: "[i]n certain instances, petitioners may submit a financial statement in lieu of initial evidence and/or additional evidence such as (1) profit/loss statements, (2) bank account records, or (3) personnel records. ... Acceptance of these documents by CIS is **discretionary**." In the instant case, the petitioner did not demonstrate that 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 was available. Therefore, counsel's argument that the director abused her discretion by not accepting the other sources counsel provided is without merit.

Counsel's 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 any office within the employment system of the Department of Labor.

Beyond the director's decision, the petitioner did not demonstrate that the beneficiary possessed the requisite experience prior to the priority date, therefore, is not qualified for the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 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 appeals on a de novo basis).

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 or seasonal nature, for which qualified workers are not available in the United States.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. 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. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). 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). The certified Form ETA 750 in the instant case states that the position of metal fabricator requires two (2) years of experience in the job offered.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The beneficiary set forth his experience on Form ETA-750B, signed by the beneficiary on April 26, 2001. On Part 15, eliciting information of work experience, he claimed to have worked for the petitioner since August 1998; was unemployed from May to August 1998; worked as a full time carpenter for [REDACTED] Co. from March to April 1998; was unemployed from December 1997 to February 1998, and worked full time as a metal fabricator for [REDACTED] from September 1995 to November 1997. He provides no further information concerning his work experience background on this form, which is signed by the beneficiary under a penalty of perjury that the information was true and correct.

In corroboration of the Form ETA-750B, the instant petition was filed with an affidavit from [REDACTED] (Mr. [REDACTED]) pertinent to the beneficiary's qualification. Mr. [REDACTED] states in pertinent part that:

I met [the beneficiary] at the company I was working for [REDACTED] CORP., located at [REDACTED], Newark, N[.] J[.] 07107. [The beneficiary] was already working for the company when I started to work there. I worked for the above mentioned company in the [s]ummer of 1995 through August 1998. My position with the company was that of a [p]ainter and welder. [The beneficiary]'s position was that of a [w]elder for which he had lots of experience. He taught me how to weld well. He worked for [REDACTED] all the time I worked there doing the most important jobs done in the department I worked.

Mr. [REDACTED]'s letter neither comes from a former employer nor a former trainer. The letter does not include a specific description of the duties performed by the alien or the training received. The petitioner did not

confirm whether the evidence required by the regulation is available or not, nor explain the reasons if it is unavailable. Therefore, the letter does not meet the requirements set forth at 8 C.F.R. § 204.5(g)(1).

Furthermore, Mr. [REDACTED] letter is dated November 29, 2003. In his letter, Mr. [REDACTED] describes himself as 21 years old. Per the letter he would be 13 years old at most when he started to work as a painter and welder in the summer of 1995 which casts doubts upon the credibility of the evidence.

In addition, Mr. [REDACTED] letter contains many inconsistencies. First, Mr. [REDACTED] names the company as [REDACTED] located at [REDACTED] Newark, NJ while the beneficiary listed similar experience on Form ETA 750B as the company [REDACTED] at [REDACTED]. Second, the beneficiary claimed to start the job in September 1995 on the Form ETA 750B while Mr. [REDACTED] states when he started in the summer of 1995 the beneficiary was already working there. The beneficiary claimed that he ended working there in November 1997 followed by unemployment from December 1997 to February 1998, employment with [REDACTED] as a carpenter from March 1998 to April 1998 and unemployment again from May 1998 to August 1998. However, Mr. [REDACTED] verifies that the beneficiary worked for that company at least until August 1998.

Because of these defects, Mr. [REDACTED]'s letter will be given little weight in these proceedings. "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of the proffered position since the record of proceeding does not contain regulatory-prescribed evidence of the beneficiary's two years of qualifying employment experience.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.