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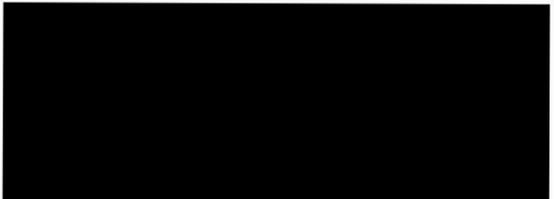
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 01 2006
WAC 04 038 51674

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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, Chief
Administrative Appeals Office

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

The petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as an executive secretary and administrative assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary met the experience requirements of the labor certification as of the priority date of the visa petition. 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 3, 2005 denial, the only issue in this case is whether or not the beneficiary met the experience requirements of the proffered job as specified by the Form ETA 750.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(ii) *Other documentation – (A) General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 6, 2001.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess two years of experience in the job offered. Block 15 requires that the beneficiary be fluent in Urdu, Hindi, Gujrati, and English due to the fact that 95% of the clients are of Indian origin and speak only Urdu, Hindi, and Gujrati.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of executive secretary and administrative assistant must have two years of experience in the job offered. The applicant must also be fluent in Urdu, Hindi, Gujrati, and English.

In the instant case, counsel submitted a letter, dated October 6, 2000, from Prasad Educational Center stating that Prasad Educational Center employed the beneficiary from "1992 until now" as a secretarial tutor/office administrator/supervisor. The letter explained that the beneficiary's responsibilities at Prasad Educational Center "included taking normal tutorial for full-time secretarial class, carrying out administrative work for office, conducting exams, and supervising the whole school for external exams, held by Commercial Education Society of Australia."

Counsel also submitted a letter, dated October 25, 2000, from Futuretec Fiji Limited stating that Futuretec Fiji Limited employed the beneficiary on a part-time basis as a sales and marketing manager "since February 1996." In response to a request for evidence, dated October 26, 2004, the director of Futuretec Fiji Limited provided another letter, dated November 2, 2004, explaining that Futuretec Fiji Limited employed the beneficiary twenty hours a week and that Prasad Educational Center, a sister company, employed the beneficiary twenty hours per week also from February 1996 through October 2000, four years and eight months. The director denied the petition noting that the letters were not clear or specific with regards to the beneficiary's duties or how those duties relate to the position of executive secretary and administrative assistant.

On appeal, counsel submits a copy of the job description for an administrative clerk under the *Dictionary of Occupational Titles*, and asserts that the actual job description listed on the labor certification and the job description provided for an administrative clerk under the *Dictionary of Occupational Titles* is almost identical.

The *Dictionary of Occupational Titles* (DOT) was created by the Employment and Training Administration, and was last updated in 1991. It is included on the Office of Administrative Law Judges web site because it is a standard reference in several types of cases adjudicated by the Office of Administrative Law Judges, especially labor-related immigration cases. The DOT, however, has been replaced by the O*Net.

It should be noted that CIS utilizes the *Occupational Outlook Handbook* instead of the DOT when reviewing job titles and duties. However, in the instant case, the AAO will discuss the DOT and the job titles mentioned by counsel.

While counsel asserts that under DOT, the job description for an administrative clerk and the actual job description listed on the labor certification are almost identical, counsel failed to note that the Specific Vocational Preparation (SVP) number for an administrative clerk is only 4, requiring a minimum of three months to a maximum six months of specific preparation, which is not sufficient preparation to meet the requirements of a skilled worker. See section 203(b)(3)(A)(i) of the Act. The petitioner could not employ the beneficiary as a skilled worker with less than two years of experience.

On appeal, counsel also contends that "the duties performed by the beneficiary with Prasad's Educational Center as a Secretarial Tutor/Office Administrator and Supervisor from December, 1992 through October 2000 are directly related" to the position offered. Counsel further claims that the beneficiary "was a tutor, giving tutorial classes to students who wanted to be secretaries. Furthermore, the job description mentioned on the updated letters from Prasad's Educational Center clearly stated that she was responsible for performing administrative duties." Counsel is mistaken. The updated letters simply stated that "[h]er responsibilities

included taking normal tutorial for full-time Secretarial Class, carrying out administrative work for office, conducting exams and supervising the whole school for external exams, held by Commercial Education Society of Australia.” 20 C.F.R § 656.21(a)(iii)(A) & (B) state:

(iii) (A) Documentation of the alien's paid experience in the form of statements from past or present employers setting forth the dates (month and year) employment started and ended, hours of work per day, number of days worked per week, place where the alien worked, detailed statement of duties performed on the job, equipment and appliances used, and the amount of wages paid per week or month. The total paid experience must be equal to one full year's employment on a full-time basis. For example, two year's experience working half-days is the equivalent of one year's full time experience. Time spent in a household domestic service training course cannot be included in the required one year of paid experience.

(B) Each statement must contain the name and address of the person who signed it and show the date on which the statement was signed. A statement not in the English language shall be accompanied by a written translation into the English language certified by the translator as to the accuracy of the translation, and as to the translator's competency to translate.

In this case, simply stating that the beneficiary was a secretarial tutor and did administrative work is not a sufficient description of the beneficiary's prior job duties. The AAO will not make assumptions regarding job titles, as many businesses may have occupations with the same job titles, but the duties of those jobs may be entirely different. It is also noted that the record of proceeding does not contain any evidence of the beneficiary's fluency in Urdu, English, Hindi, and Gujrati. While the record does show that the beneficiary took classes in English in high school and a course in English in 1991 (received a diploma in November 1991), this does not equate to fluency in English. Furthermore, simply because the beneficiary was born in Fiji, this fact is not sufficient evidence to show fluency in Urdu, Hindi, and Gujrati. Therefore, the petitioner has not established that the beneficiary met the requirements of the labor certification under Block 14 and 15 at the priority date.

Beyond the decision of the director, there is another issue relevant to the instant case. That issue is whether the petitioner has established its ability to pay the proffered wage of \$29,120 at the time of filing and continuing until the beneficiary obtains lawful permanent residence.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is April 6, 2001. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour or \$29,120 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's brief, copies of the petitioner's 2001 through 2003 Forms 1120, U.S. Corporation Income Tax Returns, copies of the petitioner's 2004 bank statements, and copies of pay check stubs for the beneficiary from July 2004 through December 2004. Other relevant evidence in the record includes copies of the petitioner's 2001 and 2002 bank statements. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2003 tax returns reflect taxable incomes before net operating loss deduction and special deductions or net incomes of -\$1,118, \$3,550, and \$3,521, respectively. The petitioner's 2001 through 2003 tax returns also reflect net current assets of \$2,565, \$8,061, and \$12,764, respectively.

The beneficiary's July 2004 through December 2004 pay stubs reflect wages paid to the beneficiary at the proffered wage rate of \$14.00. From July 22, 2004 through December 22, 2004 the beneficiary earned \$11,200.

Counsel notes that the petitioner has an average of \$16,000 per month in its bank account; and, therefore, has revolving cash to pay the beneficiary her wages.

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, 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 1, 2001, the beneficiary does not claim the petitioner as a past or present employer. However, counsel has submitted pay stubs for the beneficiary for the period July 2004 through December 2004. Therefore, the petitioner has established that it employed the beneficiary in part of 2004.

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).

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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.² 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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2001 through 2003 were \$2,565, \$8,061, and \$12,764, respectively. The petitioner could not have paid the proffered wage of \$29,120 from its net current assets in 2001 through 2003.

Counsel remarks that the petitioner has an average of \$16,000 per month in its bank account; and, therefore, has revolving cash to pay the beneficiary her wages. However, 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

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

not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Although the petitioner has paid the proffered wage from July 2004 through December 2004, the petitioner did not begin compensating the beneficiary at the proffered wage rate of \$14.00 until more than three years after the priority date. The petitioner is obligated to show that it has sufficient funds to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that 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 beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In the instant case, counsel has provided three tax returns (2001 through 2003) for the petitioner. None of the three tax returns demonstrate that the petitioner has the ability to pay the proffered wage. In addition, the three tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

The petitioner's 2001 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$1,118 and net current assets of \$2,565. The petitioner could not have paid the proffered wage of \$29,120 from either its net income or its net current assets in 2001.

The petitioner's 2002 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$3,550 and net current assets of \$8,061. The petitioner could not have paid the proffered wage of \$29,120 from either its net income or its net current assets in 2002.

The petitioner's 2003 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$3,521 and net current assets of \$12,764. The petitioner could not have paid the proffered wage of \$29,120 from either its net income or its net current assets in 2003.

The petitioner did provide evidence of compensating the beneficiary from July 2004 through December 2004 at the proffered wage rate of \$14.00 per hour. However, the petitioner's 2004 tax return was not provided; and, therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the remainder of the beneficiary's wages in 2004.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.