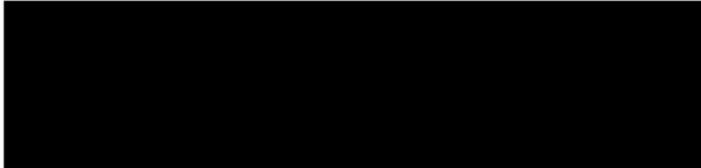




U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: **AUG 21 2007**

EAC-05-238-51460

IN RE:

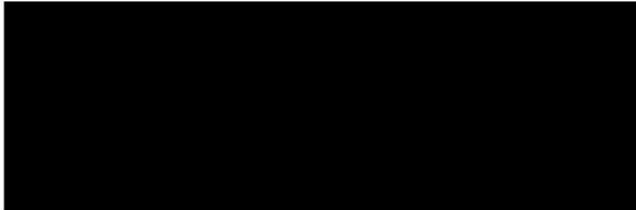
Petitioner:

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, Chief  
Administrative Appeals Office

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

The petitioner is a machine shop. It seeks to employ the beneficiary permanently in the United States as a secretary. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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. 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 April 12, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 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 16, 2001. The proffered wage as stated on the Form ETA 750 is \$16.92 per hour (\$30,974.40 per year<sup>1</sup>). The Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner since January 2001. On the petition, the petitioner claimed to have been established in 1992, to have a gross annual income of \$191,000, and to currently employ 4 workers.

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<sup>1</sup> Based on working 35 hours per week and 52 weeks per year as set forth on the Form ETA 750.

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 appeal<sup>2</sup>. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2001 through 2005 and letters from the petitioner's accountant. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the petitioner's total assets established its ability to pay the proffered wage and that depreciation should be added back to the petitioner's net income in determining the petitioner's ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, counsel did not submit any evidence such as W-2 forms, 1099 forms, payroll records or cancelled paychecks, to show that the petitioner hired and paid the beneficiary compensations in the relevant years from the year of priority date in 2001 to the present despite the beneficiary's claim to have worked for the petitioner since January 2001. Therefore, the petitioner failed to demonstrate that it paid the beneficiary the proffered wage and thus the petitioner is obligated to demonstrate that it could pay the full proffered wage of \$30,794.40 in 2001 through the present.

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 total income and wage expense is misplaced. Showing that the petitioner's total

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<sup>2</sup> 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) and 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).

income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Counsel submits letters from the petitioner's accountant and asserts that the depreciation expense is not an actual expense, and thus should be considered as part of the petitioner's ability to pay the proffered wage in the instant case. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2005. According to the tax returns in the record, the petitioner is structured as an S corporation and its fiscal year is based on a calendar year. The tax returns for 2001 through 2005 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$30,794.40 per year from the priority date to the present:

- In 2001, the Form 1120S stated a net income<sup>3</sup> of \$(9,851).
- In 2002, the Form 1120S stated a net income of \$24,096.
- In 2003, the Form 1120S stated a net income of \$(7,490).
- In 2004, the Form 1120S stated a net income of \$(9,371).
- In 2005, the Form 1120S stated a net income of \$4,082.

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net income to pay the proffered wage.

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<sup>3</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

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. We reject, however, the idea the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. On appeal, counsel asserts that with the petitioner's total assets of \$152,709 in 2005, \$153,883 in 2004 and \$99,768 in 2001, the petitioner has demonstrated the ability to pay. Counsel's reliance on the petitioner's total assets in determining the petitioner's ability to pay the proffered wage is misplaced. 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.<sup>4</sup> 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.

- The petitioner's net current assets during 2001 were \$(59,442).
- The petitioner's net current assets during 2002 were \$(22,146).
- The petitioner's net current assets during 2003 were \$(14,944).
- The petitioner's net current assets during 2004 were \$7,799.
- The petitioner's net current assets during 2005 were \$(3,679).

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

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

On appeal, counsel submits a copy of Interoffice Memorandum from \_\_\_\_\_ Associate Director for Operations, on May 4, 2004 (Yates May 4, 2004 memo). HQOPRD 90/16.45. However, contrary to counsel's assertions that the petitioner's total assets should be considered in determining the petitioner's ability, the \_\_\_\_\_ May 4, 2004 memo expressly indicates net current assets instead of total assets as one of the three measures to determine the petitioner's continuing ability to pay the proffered wage.

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<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Counsel also refers *Matter of Rabbi Leib Tropper*, 2004-INA-74 (May 9, 2005) and asserts that *Rabbi Leib Tropper* held that the certifying officer must consider an employer's overall fiscal circumstances in determining whether such employer has the ability to pay wages for the position offered. However, counsel does not state how cases published by DOL's Board of Alien Labor Certification Appeals (BALCA) are applicable to the instant petition before the Department of Homeland Security's AAO. 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, BALCA 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). 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.

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 the Department of Labor.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has demonstrated that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date and thus 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).

The certified Form ETA 750 in the instant case states that the position of secretary requires two (2) years of experience in the job offered. On the Form ETA 750B, the beneficiary set forth her work experience as a "Secretary" at the petitioning machine shop since January 2001; "Various Odd Jobs" from January 1998 to December 2000; and as a full-time "Secretary" at a metal work shop named Precision Metal Works, Inc. in Farmingdale, NY from January 1995 to December 1997.

The petitioner must 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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 record of proceeding contains an experience letter from alleged former employers of the beneficiary pertinent to the beneficiary's qualification as required by the above regulation. This letter was dated March 2, 2005 on the letterhead of the company with the company's address but without telephone number or fax number. The letter was signed by [REDACTED] as Manager. This letter verifies that the beneficiary "was employed as a secretary for two [sic] years from January 1995 through December 1997" with a description of

the beneficiary's duties and wage. However, this letter does not verify the beneficiary's full-time employment. If the beneficiary worked on a part-time basis, the verified three years of experience can only be counted as 18 months of experience, which does not meet the minimum requirements for the proffered position in the instant case. Therefore, the experience letter does not meet the requirements set forth at 8 C.F.R. § 204.5(g)(1). It is also noted that the author of the letter shares the same last name with the representative of the petitioner. This office accessed New York State Corporations Division official website<sup>5</sup> and found that a company named [REDACTED] Inc. and its chairman or chief executive officer, [REDACTED] are registered at the address of [REDACTED] the same address with the petitioning entity in the instant case; the New York corporation site does not contain any records for Precision Metal Works, Inc. located at [REDACTED]. The record of proceeding does not contain any documents revealing the possible relationship between the author of the experience letter and the petitioner's representative, and between the petitioning entity and the beneficiary's former employer. A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Furthermore, the letterhead the letter is on appears to be created by computer for the purpose of this letter and without the company's contact information; and the record does not contain any objective evidence to support the contents of the letter, such as the corporate documents, tax filing documents or payment records, etc. 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. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Because of these defects, the experience letter from Angelo Marino of Precision Metal Works, Inc. may be given less evidential weight in establishing the beneficiary's qualifications for the proffered position in the instant case. Therefore, the petitioner failed to establish that the beneficiary possessed the requisite two years of experience as a secretary with that experience letter, and thus, the petition cannot be approvable.

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.

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<sup>5</sup> [Http://appsex8.dos.state.ny.us/corp\\_public/corpsearch.entity\\_search\\_entry](http://appsex8.dos.state.ny.us/corp_public/corpsearch.entity_search_entry) (accessed on August 8, 2007)