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U.S. Citizenship  
and Immigration  
Services

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File: [REDACTED]  
EAC-06-024-53824

Office: VERMONT SERVICE CENTER

Date: DEC 31 2007

In re: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Director, Vermont Service Center (“director”), denied the immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner operates a business related to custom design and installation, and seeks to employ the beneficiary permanently in the United States as a tile setter. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s August 29, 2006 decision, the petition was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence. Further, the petitioner failed to adequately document that the beneficiary met the qualifications of the certified labor certification.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).<sup>1</sup>

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.

The petitioner has filed to obtain an immigrant visa and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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<sup>1</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). 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).

*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 the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on November 19, 2001. The proffered wage as stated on Form ETA 750 is \$16.64 per hour,<sup>2</sup> which is equivalent to \$34,611.20 per year based on a 40-hour work week. The labor certification was approved on August 5, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on October 31, 2005. The petitioner listed the following information: established: November 1995; gross annual income: \$290,727; net annual income: not listed; and current number of employees: three.

On February 16, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to provide evidence of the petitioner's ability to pay the proffered wage from the date of November 19, 2001 onward, including its federal tax returns for the years 2001, 2002, and 2003, as the petitioner initially only submitted its 2004 federal tax return. The RFE alternatively requested that the petitioner provide its annual reports or audited financial statements for those years. Additionally, the RFE requested additional documentation to show that the beneficiary met the qualifications of the certified labor certification as the initial letter submitted appeared to have been altered. The RFE further requested that the petitioner explain the familial relationship, if any, between the petitioner and the beneficiary.<sup>3</sup>

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<sup>2</sup> The petitioner initially listed an hourly rate of \$15.50 per hour, but DOL required the wage to be increased to \$16.64 prior to certification.

<sup>3</sup> In a statement in response to the RFE, the petitioner's president advised that the beneficiary was his brother, and that "it is being very difficult for me to find the person that I am able to completely trust and with the experience as Tile Setter."

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). 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 also *Paris Bakery Corporation*, 1998-INA-337 (Jan. 4, 1990) (en banc), which addressed familial relationships: "We did not hold nor did we mean to imply in Young Seal that a close family relationship between the alien and the person having authority, standing alone, establishes, that the job opportunity is not bona fide or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for the employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of the certification." If the petitioner did not reveal the relationship to DOL, then the bona fides of the position may be in question. Prior to certification, the petitioner would have been required to show that there were no qualified and available U.S. workers for the position. The petitioner cannot hire his brother on the basis that he finds him more trustworthy.

The petitioner responded. On August 29, 2006, the director determined that the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage, and denied the petition. Further, the director determined that the evidence was insufficient to show that the beneficiary met the qualifications of the certified labor certification. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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 Form ETA 750B, signed by the beneficiary on November 13, 2001, the beneficiary did not list that he was employed with the petitioner, but listed that he was present in the U.S. "from July 2001 to present [date of signature] – B2 visa." The petitioner did not provide any evidence that it employed the beneficiary. The petitioner, therefore, cannot demonstrate its ability to pay the beneficiary the proffered wage based on prior wage payment.

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. 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). 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.

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 record demonstrates that the petitioner is an S corporation. 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 1120 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 lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at

<http://www.irs.gov/pub/irs-03/i1120s.pdf>, (accessed February 15, 2005). The petitioner does not list any additional income so we will take the petitioner's net income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	-\$5,204
2003	\$16,176
2002	-\$23,837
2001	\$12,650

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	-\$11,497
2003	-\$18,262
2002	-\$15,589
2001	-\$5,799

Based on the petitioner's net current assets, it would not be able to demonstrate its ability to pay the proffered wage in any of the above years. We additionally note that the petitioner filed for a second beneficiary. The petitioner would need to demonstrate its ability to pay the proffered wage for both beneficiaries. Based on the petitioner's federal tax returns, it is unable to pay for either one, or both beneficiaries.

On appeal, the petitioner's president provides that he can pay the beneficiary the proffered wage. He provides that he hired temporary workers who he has employed from the year 2001 until the present. He provides that the petitioner's tax returns show salary payments in the following amounts: 2001: \$63,577; 2002: \$56,994; 2003: \$76,379; and 2004: \$35,427 that were paid to the workers, and would instead be available to pay the beneficiary's wage.

The record does not, however, contain the name(s) of these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the temporary worker positions involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary

could not have replaced him or her. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the foregoing, the petitioner has not overcome the basis for denial related to the petitioner's ability to pay the proffered wage.

The second basis for the petition's denial, was the petitioner's failure to establish that the beneficiary met the qualifications of the certified labor certification.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). 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).

On the Form ETA 750A, the "job offer" for a Tile Setter provides:

Applies to walls, floors, ceiling, following design specifications. Examines blueprints, measures and marks surfaces to be covered and lays out work. Measures and cuts metal lath to size for wall and ceiling surfaces with staple gun or hammer. Cuts and shapes tile with tile cutters and biters.

Further, the job offered listed that the position required:

Education: grade school: 5 years; high school: 5 years;  
Major Field Study: none  
Experience: 2 years in the job offered, Tile Setter  
Other special requirements: verifiable references.

On the Form ETA 750B, the beneficiary listed his relevant experience as: GRST Profesionales Asociados, Bogota, Colombia; from April 1997 to June 2001 (date of signature, November 13, 2001), position: tile setter.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(3), which provides:

(ii) *Other documentation*—

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

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

To document the beneficiary's experience, the petitioner submitted the following letter:

Letter from [REDACTED] o, GRST Profesionales Asociados, undated; "This is to certify that [the beneficiary] worked for my company, as a Tile SETTER from April 1997 to June 2001." The letter further provides that, "[The beneficiary] applied to walls, floors, ceiling, following design specifications. Examined blueprints, measured and marked surfaces to be covered and laid out work. Measured and cut metal lath to size for walls and ceiling. Tacked lath to wall an ceilingy [sic] surfaces with staple gun or hammer. Cut and shaped tile with tile cutters and biters." [Emphasis added].

The director's RFE questioned the italicized portion of the letter, as the document submitted appeared to have been altered. In response, the petitioner submitted the original document of the same letter. The director found that, as the original letter appeared altered, the alteration cast serious doubt on the entire petition. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On appeal, the petitioner submitted a statement from [REDACTED] dated September 25, 2004, and a translation dated September 18, 2006, which provided, "I allow myself to inform that the [REDACTED] [sic]. He was in favor effective of a period between 1995 and year 2003, which can verify in the annexed leaves. Also, I clarify that [the beneficiary] with Certificate of No. [REDACTED] Citizenship of Bogota, it was working like contractor in this company in agreement with the document that you know."

The meaning of the letter provided is not entirely clear, and would not clearly evidence that the beneficiary had the required two years of prior experience as a Tile Setter to meet the requirements of the certified Form ETA 750, or 8 C.F.R. § 204.5(l)(3)(ii)(A).

In addition, the petitioner provided several untranslated documents from a [REDACTED] in Bogota, Colombia.

The documents were not translated in accordance with 8 C.F.R. § 103.2(b)(3), which provides:

*Translations.* Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The petitioner did not submit any further evidence related to the beneficiary's qualifications on appeal. The evidence, as noted above, was deficient in failing to document that the beneficiary had the required two years of prior experience in the position offered.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the petitioner has failed to establish that the beneficiary met the requirements of the certified ETA 750. 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.