

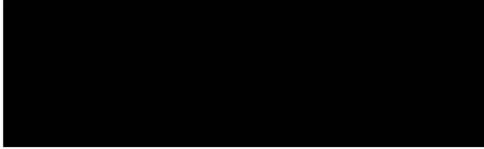
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**U.S. Citizenship
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File: EAC-05-060-53451 Office: VERMONT SERVICE CENTER Date: **JUL 26 2007**

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 Director, Vermont Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed. The director’s decision will be affirmed in part and withdrawn in part.

The petitioner is in the business of stone manufacturing, and seeks to employ the beneficiary permanently in the United States as a stone polisher, machine (“Stone Polisher”). 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 June 14, 2005 decision, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtains permanent residence. Further, the letter provided to document the beneficiary’s experience was insufficient.

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.¹

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 permanent residence 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:

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

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).

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 April 14, 1997. The proffered wage as stated on Form ETA 750 is \$29.41 per hour,² 35 hours per week, which is equivalent to \$53,526.20 per year. The labor certification was approved on December 7, 2000, and the petitioner filed the I-140 on the beneficiary's behalf on December 27, 2004. On the I-140, the petitioner listed the following information: date established: December 1994; gross annual income: \$398,000; net annual income: \$160,000; and current number of employees: three.

On January 19, 2005, the director issued a Request for Additional Evidence ("RFE") to submit additional evidence related to the petitioner's ability to pay from the priority date of April 14, 1997 onward, including either the petitioner's federal tax returns from 1997 onward with all relevant schedules and attachments, the petitioner's annual reports, or audited financial statements. The RFE also sought for the petitioner to provide W-2 Forms for the beneficiary, if the petitioner employed the beneficiary. Further, the RFE requested that the petitioner provide evidence that the beneficiary met the minimum requirements of the position and provide a letter regarding the beneficiary's prior experience. The petitioner responded. Following consideration of the petitioner's response, on June 14, 2005, the director denied the case as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. Further, the director noted that the letter to document the beneficiary's experience was unsigned. The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments 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. In the case at hand, on Form ETA 750B, signed by the beneficiary on April 11, 1997, the beneficiary listed that he was employed with the petitioner since March 1996 to the present (date of signature, April 11, 1997). The petitioner did not submit any evidence that it paid the beneficiary. Therefore, the petitioner cannot establish its ability to pay the proffered wage through 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.

² The petitioner initially listed a wage of \$350 per week, but DOL required that the petitioner increase the wage to \$29.41 per hour prior to certification.

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>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner did not submit its entire tax returns with all relevant schedules. From the documentation submitted, the petitioner lists only income from its business and will take the income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003 ³	\$4,516
2002	\$35,662
2001	\$7,829
2000	-\$29,858
1999	-\$27,502
1998	\$22,474
1997	-\$25,454

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.

We are unable, however, to calculate the petitioner's net current assets, as the petitioner did not provide its Schedule L for any of the federal tax returns submitted.

On appeal, counsel provides, "your decision to deny the application was based on incorrect factual information[,] the applicant has been employed by the employer for the last five years and has been paid."

While Form ETA 750B lists that the petitioner has employed the beneficiary since 1996, the petitioner provided no evidence that it paid the beneficiary in the Form of W-2 statements, Forms 1099, quarterly wage reports, and/or paystubs, etc. The petitioner's federal tax returns do not show that the petitioner has paid any employee wages. Additionally, we note that the director requested evidence that the petitioner paid the beneficiary in his RFE, but the petitioner did not provide such evidence. The purpose of the request for

³ The petitioner did not provide its 2004 federal tax return, which would not have been available at the time of filing the I-140 Petition, but should have been available at the time of appeal.

evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The only documentation on appeal that the petitioner provided related to its ability to pay was a letter from the petitioner, which provided that CIS should consider the petitioner's gross income not its net income.

As noted above, in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that CIS had properly relied on the petitioner's net income, 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. Base on the foregoing, the petitioner has failed to demonstrate its ability to pay the beneficiary the proffered wage from the priority date onward. This portion of the director's decision is affirmed.

Further, the director denied the petition as the petitioner failed to adequately document that the beneficiary had the required two years of prior experience to meet the requirements set forth on the certified ETA 750. 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 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st 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 750, the "job offer" position description provides: "Sets up and operates machine to grind stone to smooth finish or polish stone to lustrous finish. Selects grinding or polishing wheels according to type of stone, finish specified, or step in finishing process." The job offer listed that the position required two years of experience in the job offered, as a Stone Polisher.

On the Form ETA 750B, the beneficiary listed his relevant experience as: (1) the petitioner, Staten Island, New York, from March 1996 to present (date of signature, April 11, 1997), position: Stone Polisher; (2) Foro Marble Co., Inc., Brooklyn, New York, from March 1992 to October 1995, position: Stone Polisher.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(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 initially submitted an unsigned letter from Foro Marble Co. Inc., which provided that the beneficiary was employed from March 1992 to October 1995 as a Stone Polisher.

The director provided in his decision that the letter was unsigned. On appeal, the petitioner submitted a signed version of the same experience letter, which we will accept as sufficient to document the beneficiary has the required experience for the position. The petitioner has overcome the grounds for denial on this issue and this portion of the director's decision will be withdrawn. However, as set forth above, the petitioner has failed to establish its ability to pay the beneficiary the proffered wage from the priority date onward, and the petition was properly denied. 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. The director's decision will be affirmed in part and withdrawn in part.