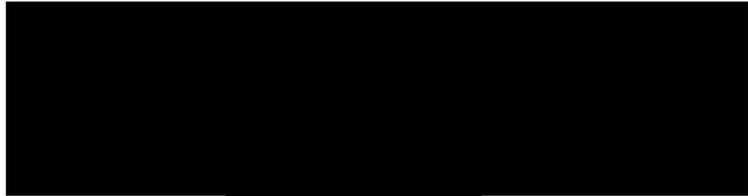




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FILE:

EAC-05-101-50956

Office: VERMONT SERVICE CENTER

Date: **MAY 01 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 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 painting and coating company. It seeks to employ the beneficiary permanently in the United States as a painter (liquid siding applicator). 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 June 29, 2005 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$16.23 per hour (\$33,758.40 per year). The Form ETA 750 states that the position requires two years of experience in the related occupation of painter.

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 in the record includes the petitioner's corporate federal tax returns for 2001 through 2004, the petitioner's financial statements for the year ended April 30, 2002, the payroll records from the petitioner for the beneficiary, and the beneficiary's W-2, 1099 forms and paychecks. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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 in 2001, to have a gross annual income of \$2 million, to have a net annual income of \$30,000, and to currently employ 9 workers. According to the tax returns in the record, the petitioner's fiscal year runs from May 1 to April 30. On the Form ETA 750B, signed by the beneficiary on March 26, 2001, the beneficiary claimed to have worked for the petitioner since November 2000.

On appeal, counsel asserts that evidence submitted proves that the petitioner is able to pay the wage offered to the beneficiary.

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, the petitioner did not submit any W-2 or 1099 forms issued by the petitioner to the beneficiary in 2001 through 2003 although the beneficiary claimed to have worked for the petitioner since November 2000. The record contains copies of federal individual income tax return filed by [REDACTED] for 2001, 1099 form issued by the petitioner to [REDACTED] in 2001, 1099 form issued by [REDACTED] to [REDACTED] in 2001, paycheck issued by the petitioner to [REDACTED], and a letter from the petitioner verifying that [REDACTED] has been employed with them since April 2001². The petitioner did not explain why these documents were submitted and how these documents were able to establish that the petitioner paid the beneficiary the proffered wage from the priority date in 2001 onwards. In general, wages

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).

² In his letter submitted in response to the director's RFE, [REDACTED], the president of the petitioner, stated that the beneficiary joined the company with another co-worker, the co-worker maintained subcontractor status and the beneficiary was paid directly by the coworker. However, the record does not contain evidence of the beneficiary's compensation from the subcontractor.

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 position of these workers involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If these employees performed other kinds of work, then the beneficiary could not have replaced them. Therefore, the petitioner failed to establish its ability to pay the proffered wage through wages paid the beneficiary in 2001 through 2003.

In response to the director's request for evidence (RFE), the petitioner submitted its payroll records for the beneficiary, the beneficiary's paychecks in 2005, and the beneficiary's W-2 and 1099 forms for 2004. These documents show that the petitioner paid the beneficiary \$13,672.54 with the 1099 form as nonemployee compensation and \$653.20 with the W-2 form as employee wages, thus totally \$14,325.74. This figure is \$19,432.66 less than the proffered wage that year. The payroll records and paychecks for the beneficiary show that the petitioner has been paying the beneficiary at the level of \$16.33 per hour (which is more than the proffered wage hourly rate) since January 2005. However, the paychecks also indicate that the beneficiary worked on part-time basis and therefore, has been paid much less than the proffered wage. As of May 7, 2005 the beneficiary was paid \$4,890.85 rather than the proffered wage of \$6,492 for that period. Therefore, the petitioner failed to establish that it is currently paying the beneficiary the proffered wage. The petitioner is obligated to demonstrate that it could pay the full proffered wage in 2001 through 2003, and the difference between wages actually paid to the beneficiary and the proffered wage in 2004 and 2005.

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 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. 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 of proceeding contains copies of the petitioner's tax returns for 2001 through 2004. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$33,758.40 per year from the priority date:

- In the fiscal year of 2001, the Form 1120 stated a net income³ of \$(28,282).
In the fiscal year of 2002, the Form 1120 stated a net income of \$(63,583).
- In the fiscal year of 2003, the Form 1120 stated a net income of \$(68,456).
- In the fiscal year of 2004, the Form 1120 stated a net income of \$0.

Therefore, for the fiscal years 2001 through 2003, the petitioner did not have sufficient net income to pay the proffered wage; for the fiscal year 2004, the petitioner did not have sufficient net income to pay the difference between wages actually paid to the beneficiary and the 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.⁴ 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 its fiscal year of 2001 were \$(92,624).
- The petitioner's net current assets during its fiscal year of 2002 were \$(163,159).
- The petitioner's net current assets during its fiscal year of 2003 were \$(268,928).
- The petitioner's net current assets during its fiscal year of 2002 were \$(255,252).

Therefore, for the fiscal years 2001 through 2003, the petitioner did not have sufficient net current assets to pay the proffered wage; and for the fiscal year 2004, the petitioner did not have sufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage.

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁴ 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 proffered wage as of the priority date through an examination of wages paid to the beneficiary and its net income, or its net current assets.

On appeal counsel asserts that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date submitting letters from the petitioner and City of Baltimore. The petitioner mentions that the company's sales have steadily grown from \$733,465.00 in 2001 to \$2,005,800.00 in fiscal year 2004, however, their year-end summary and accounting method calculates all customer deposits as liabilities until the project is completed, therefore, the company will consistently show a loss for that specific time frame. This office is not, however, persuaded by an analysis in which the petitioner seeks to rely on tax returns prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles. If some income based on accrual accounting method does not appear in a certain year's tax return because the tax return is prepared with the cash accounting, the income must appear in the tax return based on cash method for a later year when the project completes. Reviewing all the petitioner's tax returns for 2001 through 2004, the petitioner did not have any sufficient net income even for the most recent year.

Counsel submits a letter from City of Baltimore to the petitioner that invites the petitioner to join for a brief breakfast meeting. The letter mentions that the petitioner is a significant part of the painting industry and an employer of skilled resident painters. However, counsel does not explain how this letter directly establishes the petitioner's continuing ability to pay the beneficiary the proffered wage as of the priority date in 2001. The petitioner's letter describes its history and growth of gross receipts or sales implicitly advising to consider the totality of circumstance. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the present case, the petitioner is a home improvement company that had been in business for one month at the time the Form ETA 750 was filed. The petitioner had \$733,465 in gross receipts and paid out \$49,479 in wages and salaries during the year in which the priority date was established. During its fiscal years 2001 through 2004, the petitioner never had positive net income or net current assets in any single year. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner did not prove its financial strength and viability and its continuing ability to pay the proffered wage.

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 DOL.

Beyond the director's decision and counsel's assertions on appeal, the AAO will discuss whether or not the petitioner demonstrated that the beneficiary possessed the requisite two years of experience in a related occupation, and thus was qualified for the proffered position prior to the priority date. 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 proffered position requires two (2) years of experience in a related occupation of painter.⁵ On the Form ETA 750B, signed by the beneficiary on March 26, 2001, the beneficiary set forth his work experience as a full time (working 40 hours per week) "Liquid Siding Applicator" for the petitioner since November 2000. Prior to that, he represented that he worked as a full time "Carpenter and Painter" for Wood Working by [REDACTED] in Clarkville, Maryland from May 1999 to November 2000 and as a full time "Painter" for J and J in Columbia, Maryland from April 1997 to April 1999.

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 contains three letters from [REDACTED] the president of the petitioner pertinent to the beneficiary's employment experience. The first letter from [REDACTED] was dated January 27, 2004 [REDACTED] first letter) which states in pertinent part that:

[The beneficiary] has been working with ProCraft Midatlantic, Inc. since November of 2000.

The second letter from [REDACTED] was not dated but submitted in response to the director's RFE on June 1, 2005 [REDACTED] second letter). In his second letter [REDACTED] states in pertinent part that:

[The beneficiary] first joined our company with [REDACTED] in 2001.

The third letter from [REDACTED] was dated August 9, 2005 and submitted on appeal [REDACTED] third letter). In this letter, [REDACTED] states in pertinent part that:

⁵ 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).

In 2000 and 2001 [the beneficiary] worked within a subcontractor crew and quickly proved his outstanding abilities with our products.

All the three letters from [REDACTED] are the letters from the beneficiary's current employer as required by the regulation at 8 C.F.R. § 204.5(g)(1). However, none of them includes a specific description of the duties performed by the beneficiary. Therefore, [REDACTED] letters do not meet the requirements set forth by the regulation and therefore cannot be accepted as primary regulatory-prescribed evidence for the beneficiary's qualifications under the regulation at 8 C.F.R. § 204.5(g)(1). Moreover, the petitioner must demonstrate that the beneficiary possessed the requisite two years of experience stated on its Form ETA 750 prior to the priority date. As noted previously the priority date in the instant case is April 30, 2001. The petitioner provided inconsistent information on the date that the beneficiary started the employment with the petitioner (November 2000, 2000 or 2001). Assuming the beneficiary actually began working for the petitioner from November 2000 (since this date matches with the one provided by the beneficiary on the Form ETA 750B), the beneficiary's experience prior to the priority date of April 30, 2001 was at most six months only. With this six months experience, the beneficiary cannot be qualified for the proffered position. The record does not contain any other evidence to show that the beneficiary had the requisite two years of experience prior to the priority date. Therefore, the petitioner failed to submit any primary regulatory-prescribed evidence to establish that the beneficiary was qualified for the proffered position.

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.