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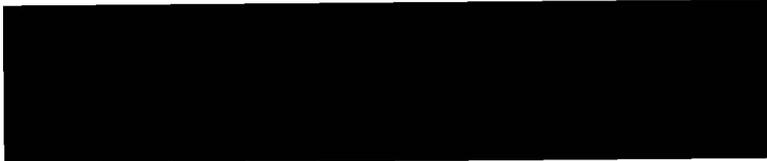
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: LIN 06 131 51152 Office: NEBRASKA SERVICE CENTER Date: SEP 22 2008

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, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because the letter of work experience submitted to the record by the petitioner did not provide sufficient information with regard to the beneficiary's claimed two years of work experience as a cook in Mexico. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case has been discussed in these proceedings previously and 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 November 20, 2006 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The AAO notes that the director requested further evidence as to the petitioner's ability to pay the proffered wage, although the director did not comment further on this issue in his decision. The AAO will comment briefly on this issue following the discussion of the beneficiary's qualifications for illustrative purposes.

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 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 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).

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief and additional evidence. The additional evidence includes the following: a copy of a letter of work experience dated January 1, 2007 and signed by [REDACTED] owner of Cocina Economica, San Luis Potosi, Mexico. In his letter, [REDACTED] explained the beneficiary's

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).

work duties while the beneficiary worked at Cocina Economica. ██████████ stated that the beneficiary worked for him from January 15, 1996 to February 20, 1998 as a cook.

The petitioner also submitted a letter of work verification in response to the director's request for further evidence (RFE) dated July 18, 2006. This earlier letter is signed by ██████████ and dated August 19, 2005. In his letter, ██████████ stated that the beneficiary worked for Cocina Economica from 1994 to 1997, and that the beneficiary was an honest, responsible person, dedicated to his work. ██████████ did not describe the nature of the beneficiary's work with the restaurant. The record does not contain any other evidence with regard to the beneficiary's qualifications.

On appeal, counsel states that the experience letter submitted by the petitioner in response to the director's RFE stated the beneficiary worked for the petitioner from January 15, 1996 to February 20, 1998.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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, Madany 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 the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of specialty cook. The petitioner did not describe in item 14 any educational or training requirements for the position, and indicated the proffered position required two years of experience in the proffered position of specialty cook.

The beneficiary signed the Form ETA 750, Part B on April 5, 2001, and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, the beneficiary provided no information.

The regulation at 8 C.F.R. § 204.5(l)(3) 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.

With regard to the two letters of work experience submitted to the record, contrary to counsel's assertion, the two letters contain contradictory information. The earlier letter, submitted in response to the director's request for further evidence, states that the beneficiary worked for Cocina Economica for a period of three years between 1994 to 1997, while the second letter states that the beneficiary worked for the Mexican restaurant from January 15, 1996 to February 20, 1998, a period of time that commenced two years after the employment claimed in the initial letter of work experience. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." On appeal, counsel states the two letters contain the same information with regard to the beneficiary's work experience as a cook. This statement by counsel is not correct. In addition, the beneficiary listed no previous work experience in Mexico or the United States on the Form ETA 750, Part B. Thus, the AAO would give very limited weight to the petitioner's two letters of work experience. *See Matter of Leung* 16 I&N Dec. 12 (Dist. Dir. 1976).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the record as to the beneficiary's prior work experience. The AAO thus affirms the director's decision that the evidence does not demonstrate that the beneficiary acquired two years of experience prior to the 2001 priority date and thus the petitioner has not demonstrated that he is qualified to perform the duties of the proffered position.

Beyond the decision of the director, the AAO will comment briefly on the petitioner's ability to pay the proffered wage. The director did not comment on this issue in his decision. 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 either 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).

As stated previously, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$23,000 per year.

Relevant evidence submitted to the record includes the petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2002, 2003, and 2004;² the first pages of the petitioner's Forms 1120S for tax

² Submitted with the initial I-140 petition.

years 2000, 2001, and 2005;³ the beneficiary's Forms W-2 Wage and Tax Statements for tax years 2000, 2001, 2002, 2003, 2004, and 2005; the beneficiary's pay statements for his weekly earnings from October 31, 2005 to July 24, 2006; and a document that appears to list the beneficiary's salary payments from January 2001 to December 2005.⁴ The record also contains copies of the beneficiary's Forms 1040 for tax years 2000, 2002, 2003, 2004, and 2005.⁵ The record contains no further evidence of the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner provided no information as to the date it was established, its gross annual income, net annual income, or current number of employees. On the Form ETA 750, signed by the beneficiary on April 4, 2001, the beneficiary did not claim to have worked for the petitioner.

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 submitted the beneficiary's W-2 Forms for tax years 2000 to 2005. The AAO notes that the evidence with regard to tax year 2000 is not dispositive in this matter, as the priority date for the instant petition is April 30, 2001. With regard to tax years 2001 to 2005, the petitioner established it paid the beneficiary the following wages: \$16,990.46 in 2001, \$15,487.50 in tax year 2002; \$15,693.60 in tax year 2003; \$17,127.75 in tax year 2004; and \$25,420.13 in tax year 2005. Based on the copies of paychecks submitted to the record for tax year 2006, the petitioner also paid the beneficiary \$24,150.62 as of July 30, 2006. Thus, the petitioner has established it paid the beneficiary a salary greater than the proffered wage of \$23,000 in tax years 2005 and 2006. Thus the petitioner has established its ability to pay the proffered wage in these two tax years. With regard to the tax years 2001 to 2004, the petitioner did not establish its ability to pay the proffered wage based on the beneficiary's wages. Therefore the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage of \$23,000 during tax years 2001 to 2004.

³ Submitted in response to the director's request for further evidence dated July 18, 2006.

⁴ This latter document is illegible in places.

⁵ Although counsel in his cover letter states the petitioner submitted the beneficiary's Form 1040 for tax year 2001, the AAO does not find this document in the record. The beneficiary's W-2 Form for tax year 2001 is in the record. Although counsel does not note this in his RFE cover letter, the beneficiary's W-2 Forms were submitted with the beneficiary's tax returns.

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 supported by federal case law. See *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 gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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. The court 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 Fang* 719 F. Supp.at 537.

The petitioner submitted its tax returns for tax years 2000 to 2005. Since 2000 is prior to the 2001 priority date, the petitioner's 2000 tax return is not dispositive in these proceedings, and, as previously stated, the AAO will not examine the petitioner's 2000 tax return further in these proceedings. In examining the petitioner's tax returns for tax years 2001 to 2004, the AAO notes that 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

Since the petitioner did not submit a complete Form 1120 S for tax year 2001, the AAO cannot determine whether line 21 or Schedule K would establish the petitioner's net income for the priority year. For purposes of these proceedings, the AAO will use the petitioner's net income identified on line 21 for the 2001 priority year. However, if the petitioner pursues this matter further, it should provide a complete copy of its 2001 tax return, with Schedule K. Because the petitioner had additional deductions, or credits shown on its Schedule K for tax years 2002, 2003, and 2004, the petitioner's net income for tax years 2002 to 2004 is found on Schedule K of its

tax return. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$23,000 per year from the priority date:

- In 2001, the Form 1120S stated a net income of \$40,109.
- In 2002, the Form 1120S stated a net income of \$46,497.
- In 2003, the Form 1120S stated a net income of \$28,166.
- In 2004, the Form 1120S stated a net income of \$17,013.

As stated previously, the petitioner paid the beneficiary \$16,990.46 in 2001, \$15,487.50 in tax year 2002, \$15,693.60 in tax year 2003, and \$17,127.75 in tax year 2004. Based on the petitioner's above-stated net income, the petitioner did have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage of \$23,000 during the period of time in question.

Nevertheless, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position as of the 2001 priority date. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.