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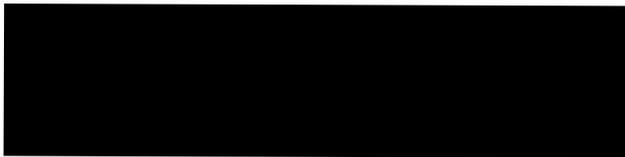
Office: VERMONT SERVICE CENTER

Date: **MAR 24 2009**

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:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting 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 operates a Garage Services company. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification certified by the U.S. 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 or that the beneficiary possessed the requisite qualifying experience for the position. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely, and made 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 denial dated January 24, 2007, the basis for denial of this case was 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 and whether or not the beneficiary had the required experience for the position.

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 at 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 DOL. *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 DOL 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, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$19.11 per hour (\$39,748.80 per year). The Form ETA 750 states that the position requires eight years of grade school and four years of high school, no training, and two years of experience in the proffered position.

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.²

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750 Application for Alien Employment Certification approved by the DOL; the first page of the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2001 through 2005; an unaudited financial statement reflecting the petitioner's profits and losses for 2003³; and copies of documentation concerning the beneficiary's qualifications.

¹ It has been almost eight years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." However, the petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

² The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

³ There is no indication that the financial statement submitted was audited and it was not accompanied by an auditor's report. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1999 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The gross annual income stated on the petition was \$175,000.00. The petitioner did not state the net annual income on the petition. On the Form ETA 750, signed by the beneficiary on March 14, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner had the ability to pay the proffered salary and that the beneficiary had the requisite experience in the proffered position. Accompanying the appeal, counsel submits additional evidence that includes the following documents: an affidavit from the beneficiary stating that he has more than two years of experience as an auto mechanic; two letters from the beneficiary's prior employers regarding his experience as an auto mechanic; a certificate of proficiency for the beneficiary as a Motor Vehicle Mechanic from the Ghanaian Government; and the first page of the petitioner's IRS Form 1120S tax returns for 2001 through 2005.

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, USCIS 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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date. The ETA 750 states that the beneficiary has not worked for the petitioner.

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, USCIS 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 gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120S stated net income of -\$23,456.00.⁴
- In 2002, the Form 1120S stated net income of -\$3,009.00.
- In 2003, the Form 1120S stated net income of \$21,243.00.
- In 2004, the Form 1120S stated net income of -\$184.00.
- In 2005, the Form 1120S stated net income of \$1,537.00.

Since the proffered wage is \$39,748.80 per year, the petitioner did not have sufficient net income to pay the proffered wage for 2001 through 2005.

If the net income the petitioner demonstrates it had available during the 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, USCIS 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, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.⁵

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

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is April 30, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

⁴ The AAO notes that net income is listed on line 21 of the IRS Form 1120S.

⁵ The AAO notes that counsel has only submitted the first page of the petitioner's IRS Form 1120S tax returns for 2001 through 2005. Thus, the AAO is not able to do an analysis of the petitioner's net current assets.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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). The Application for Alien Employment Certification, Form ETA-750, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of auto mechanic. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | |
|---------------|-------------|
| 14. Education | |
| Grade School | Eight Years |
| High School | Four Years |

The applicant does not need to have any training in order to perform the job duties listed in Item 13, but the applicant must have two years of experience in the job offered. Item 15 indicates that there are no special requirements for the position.

The beneficiary set forth his credentials on the labor certification under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he had not worked for the petitioner. He indicated that he was previously employed as an auto mechanic for the Pride of the East International School in Ghana from May 1995 to September 1998; as a self-employed auto mechanic from September 1998 to August 2000; and as a driver/mechanic for DLC Services in Washington, DC from August 2000 to the date the Form 750 was certified. The descriptions of his work for these three positions show skills akin to the duties of the proffered position.

With the appeal, the petitioner submitted two translated experience letters for the beneficiary.⁶ One letter is signed by [REDACTED], who states he was the manager for [REDACTED] while the beneficiary worked there as an auto mechanic apprentice from 1982 to 1985. Another letter is signed by [REDACTED], who states she was the directress for the Pride of the East International School while the beneficiary worked there as an auto mechanic from May 1995 to September 1998.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

⁶ The AAO notes that the director stated in his decision that USCIS had asked the petitioner to submit additional evidence regarding the beneficiary's experience, but that the evidence submitted failed to establish that the beneficiary possessed the required two years of experience as an auto mechanic as of April 30, 2001.

(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.

The AAO finds the letters pertaining to the beneficiary's qualifications submitted on appeal to demonstrate his more than two years of training as an auto mechanic. According to the guiding regulation, the letters must provide the name, address, and title of the employer and a description of the experience of the alien. The letters in the record of proceeding provide the name, address, and title of the employer and a description of the experience of the alien.

However, the purpose of USCIS' previous request for evidence was 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). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

Additionally, the petitioner has failed to submit any evidence regarding the beneficiary's requisite education for the proffered position.

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.