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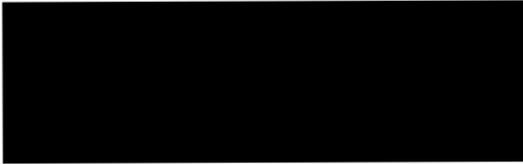
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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File: EAC 06 058 53553 Office: NEBRASKA SERVICE CENTER Date: SEP 03 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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the Nebraska Service Center.

The petitioner operates an industrial business. It seeks to employ the beneficiary permanently in the United States as a laundry machine 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).¹ The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage or that the beneficiary possessed the requisite qualifications for the position beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrates that the appeal was properly filed, was 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 July 5, 2007, the basis for denial of this case was whether or not the petitioner has the ability to pay the proffered wage and whether or not the beneficiary possessed the requisite qualifications for the position as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

¹ The AAO notes that the Form ETA 750 was originally filed by the petitioner for another beneficiary. The AAO notes that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.3(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

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 28, 2001. The proffered wage is \$17.60 per hour (\$36,608.00 per year). Two years of experience are required 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

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).

Relevant evidence in the record includes copies of the following documents: the Form ETA 750B Application for Alien Employment Certification³; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax return for 2001 and the petitioner's IRS Form 1120S tax returns for 2003 and 2004; the petitioner's compiled financial statement for calendar year 2004⁴; and documentation concerning the beneficiary's qualifications.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation in 2001 and as an S corporation in 2003 and 2004. On the petition, the petitioner claimed to have been established in 1952 and to employ 50 workers currently. According to the tax returns in the record, the petitioner's fiscal year for 2001 to 2003 began in July and ended in June and fiscal year for 2004 was based on a calendar year. The net annual income and gross annual income stated on the petition were \$200,000.00 and \$4,500,000.00 respectively. On the Form ETA 750B, signed by the beneficiary on November 29, 2005, 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 a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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). 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, USCIS will first examine whether the petitioner 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 paid the beneficiary the full proffered wage from the priority date. Counsel concedes that the beneficiary has not worked for the petitioner.

³ The AAO notes that the petitioner has submitted the Form ETA 750B for the substituted beneficiary, not the Form ETA 750 approved by the DOL.

⁴ 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. The AAO cannot conclude that this is an audited statement. 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.

If the petitioner does not establish that it 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 record before the director closed on December 26, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's federal income tax return for 2005 was due, but the petitioner did not submit it or its tax return for 2002. Therefore, the petitioner's income tax return for 2004 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001, 2003, and 2004, as shown in the table below.

- In 2001, the IRS Form 1120 stated net income of \$155,843.00.⁵
- In 2003, the IRS Form 1120S stated net income of \$38,201.00.⁶
- In 2004, the IRS Form 1120S stated net income of \$104,795.00.

The petitioner did have sufficient net income to pay the proffered wage for 2001, 2003, and 2004. The petitioner failed to demonstrate its ability to pay in 2002 and 2005.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. The petitioner's total assets include depreciable assets that

⁵ The AAO notes that net income is listed on line 28 of the IRS Form 1120.

⁶ The AAO notes that where an S corporation's income is exclusively from a trade or business, USCIS 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* IRS, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-prior/fl1120s--2003.pdf>, Instructions for Form 1120S, 2004, at <http://www.irs.gov/pub/irs-prior/fl1120s--2004.pdf> (last visited July 29, 2009). The petitioner had income from sources other than from a trade or business in 2003 and 2004, so USCIS takes the net income figure from Schedule K for those years.

the petitioner uses in its business, including real property that counsel asserts should be considered. 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6, of the IRS Form 1120 or IRS Form 1120S and include cash-on-hand. 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. Based on the petitioner's net current assets, it has not demonstrated its ability to pay the proffered wage for 2002 or 2005.

Accordingly, from the priority date of April 28, 2001, the petitioner has not established 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.

Counsel's assertions on appeal do not outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate that the petitioner could not pay the proffered wage from the day the ETA Form 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*,

⁷ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. The petitioner has been in business since 1952 and has employed 50 workers, but it has experienced highly fluctuating gross sales and it has failed to demonstrate its ability to pay for 2002 and 2005. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

In accordance with the director's decision, the AAO finds that 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 28, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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 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.

On the Form ETA 750B, the beneficiary states that he worked as a laundry machine mechanic for Citizen Apron & Towel in South Hackensack, NJ from January 2001 to March 2003. The Form ETA 750B called for the beneficiary to list any other work experience in the past three years. The beneficiary did not list any as of November 29, 2005 when he signed the form.

The petitioner submitted letters from Citizen Apron & Towel and Danny Sport to document the beneficiary's prior work experience. The beneficiary also submitted an affidavit regarding his work at Danny Sport as a "Machine Mechanic" from June 1998 to July 2000.

Letter from illegible signature, Citizen Apron & Towel, South Hackensack, NJ, dated November 30, 2005;
Position title of employer: not listed;
Position title of beneficiary: "Laundry machine Mechanic" [sic];
Dates of employment: "since January 2001 until March 2003" [sic].

First translated letter from [REDACTED] Danny Sport, Cuenca, Ecuador, dated December 6, 2006;
Position title of employer: "OWNER – Manager" [sic];
Position title of beneficiary: "mechanic;"
Dates of employment: "June 1998 until July 2000.

Second translated letter from [REDACTED], Danny Sport, Cuenca, Ecuador, dated July 23, 2007;
Position title of employer: "OWNER" [sic];
Position title of beneficiary: "Mechanic" [sic];
Dates of employment: "June 1998 until July 2000.

The AAO finds the November 30, 2005 letter submitted by Citizen Apron & Towel to lack the title of the employer and the legible name of the employer. The letter also only covers a timeframe of approximately three months in which the beneficiary worked there before the priority date of April 28, 2001. Thus, the letter fails to accurately document that the beneficiary had the full two years of required experience as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). Therefore, the letter is insufficient evidence and not acceptable to document that the beneficiary has the qualifying experience as required by the proffered position.

The AAO finds the December 6, 2006 and July 23, 2007 letters submitted by Danny Sport to document that the beneficiary had the full two years of required experience as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). The AAO notes that the beneficiary did not list this experience on the Form ETA

750B, which called for a listing of work experience during the last three years. The beneficiary completed the Form ETA 750B on November 19, 2005, but finished his employment with Danny Sport in July 2000, more than three years earlier.

On appeal, the petitioner asserts that the beneficiary did have the required two years of experience by means of his work for Danny Sport. The petitioner asserts that the beneficiary was paid in cash, so the petitioner only submitted the two letters from Danny Sport as evidence of his prior experience there.

The director noted in his July 5, 2007 decision that the petitioner should have submitted evidence regarding the beneficiary's prior work experience for Danny Sport in the form of payroll records, pay receipts, etc. The AAO finds this evidence not to be necessary under the terms of 8 C.F.R. § 204.5(I)(3)(ii)(A).

The AAO has determined that the Nebraska Service Center should have another opportunity to obtain the petitioner's 2002 and 2005 tax returns and to review the beneficiary's credentials and experience qualifications. The AAO also finds that the director should have the opportunity to obtain a copy of the approved labor certification for the original beneficiary and to determine whether or not a Form I-140 petition had been filed with it. Therefore, the AAO will remand the case to the director for further action.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The petition is remanded to the director of the Nebraska Service Center for further action in accordance with the foregoing and entry of a new decision.