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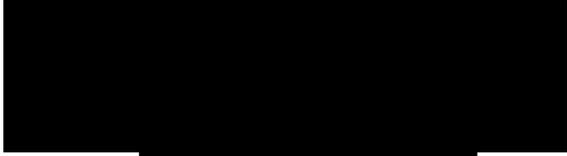
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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FILE: [Redacted]
SRC 07 200 51899

Office: TEXAS SERVICE CENTER

Date: MAR 10 2010

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director shall be withdrawn, and the matter will be remanded to the director for further consideration.

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a construction carpenter (supervisory carpenter). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved 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. Therefore, the director denied the petition.

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.

According to the director's March 5, 2008 denial, at issue in this case is whether 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 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 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 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. The proffered wage as stated on the Form ETA 750 is \$21.85 per hour (\$45,448 per year). The Form ETA 750 indicates that the position requires two years of experience in the proffered position, and an 11th grade education. The

qualified applicant also must be able to work overtime, to work on weekends and to work some nights.

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 on appeal.¹

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 1958, to have a gross annual income of \$4,800,000, and to currently employ 40 workers. According to the tax returns in the record, the petitioner’s fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary claimed to have worked for the petitioner in the proffered position from January 1994 through the date that form was signed. The Forms W-2, Wage and Tax Statement, and the petitioner’s payroll summary in the record establish that the beneficiary worked for the petitioner from 2001 through 2007.

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, U. S. Citizenship and Immigration Services (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 (Reg. Comm. 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. The petitioner’s payroll summary in the record establishes that the petitioner paid the beneficiary \$37,902 in 2001, (\$7,546 less than the proffered wage.) The Forms W-2 in the record establish that the petitioner paid the beneficiary: \$40,433.31 in 2002, (\$5,014.69 less than the proffered wage); \$59,432.78 in 2003, (more than the proffered wage);

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B which are incorporated into the regulations 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).

\$69,760.87 in 2004, (more than the proffered wage); \$71,437.06 in 2005, (more than the proffered wage); \$66,569.62 in 2006, (more than the proffered wage); \$72,407.63 in 2007, (more than the proffered wage). Thus, the petitioner has established its ability to pay the wage of \$45,448 in 2003 through 2007 through an examination of the actual wages paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage from the priority date onwards, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is not sufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] 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.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on March 11, 2008 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 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 is the most recent return available. The petitioner has already demonstrated the ability to pay the wage in the years 2003 through 2007. Thus, the AAO will not examine the tax returns from those years. The petitioner’s tax returns demonstrate its net income for 2001 through 2002, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$16,553.
- In 2002, the Form 1120 stated net income of \$72,805.

The petitioner has established that it had sufficient net income to pay the difference between the proffered wage and the wage actually paid the beneficiary in 2001 or \$7,546. It also had sufficient net income to pay the difference between the proffered wage and the wage actually paid the beneficiary in 2002 or \$5,014.69.

Thus, the petitioner has established an ability to pay the wage through the wages actually paid the beneficiary in 2003-2007, and through its net income added to the amount which it actually paid the beneficiary in 2001-2002.

Therefore, the petitioner has established that it has the continuing ability to pay the beneficiary the proffered wage from the priority date onwards. However, as the record currently stands, the petition is not approvable as set forth below.

Beyond the decision of the director, the petitioner failed to document that as of the priority date the beneficiary had completed an eleventh grade education as required by the Form ETA 750 and as certified by the DOL. *See Spencer Enterprises, Inc. v. United States*, 229 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)(which notes that the AAO reviews appeals on a *de novo* basis).

In evaluating the beneficiary’s qualifications, 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).

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 construction carpenter. Item 14 describes the requirements of the proffered position as follows:

14. Education	
Grade School	--
High School	11
College	--
College Degree Required	--
Major Field of Study	--

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. The applicant must be able: to work overtime, to work weekends and to work nights. Item 15 of Form ETA 750A does not reflect any additional special requirements.

The beneficiary set forth his credentials on Form ETA-750B and on April 19, 2001 signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part 11, eliciting information of the beneficiary's educational background, the beneficiary stated that from September 1968 through July 1975, he attended elementary school. From September 1975 through July 1978, he attended junior high school. From September 1978 through July 1980, he attended high school. From September 1982 through July 1985, he stated that he attended college. After arriving in the United States, the beneficiary attended Los Angeles Adult School from September 1990 through June 1994.

In response to the director's request for evidence to show that the beneficiary had an eleventh grade education, the petitioner submitted an evaluation of the beneficiary's educational background on American Education Research Corporation letterhead stationery that is not signed and is dated February 29, 2008. This evaluation reviewed various transcripts which belong to the beneficiary and concluded that he had completed the equivalent of a 10th grade education at an accredited high school in the United States. The petitioner also submitted a Los Angeles Unified School District Adult School Eighth Grade Diploma issued to Antonio Lara on June 20, 1994.

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

This office has reviewed credentials evaluations information available at the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).² AACRAO, according to its website, www.aacrao.org, is “a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries.” Its mission “is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services.” According to the information found on the online registration page for EDGE, <http://accraoedge.aacrao.org/register/index/php>, EDGE is a “web-based resource for the evaluation of foreign educational credentials.”

The AACRAO EDGE database indicates that in Mexico the equivalent of a U.S. high school diploma is the *certificado de bachillerato*. See the attached printouts from the AACRAO EDGE database that include advice to college and university admissions officers regarding the Mexican equivalent of a U.S. high school diploma.³

The petitioner has failed to establish that, as of the April 30, 2001 priority date, the beneficiary had completed an education deemed to be the equivalent of an 11th grade education at an accredited high school in the United States as required by the Form ETA 750. While the beneficiary indicated on the Form ETA 750 that he attended the Colegio De Bachilleres Cien Metros (Cien Metros) from September 1982 through July 1985, the record contains no evidence that Cien Metros issued him a *certificado de bachillerato* to establish that he completed the equivalent of a U.S. high school degree. Also, the petitioner submitted no evidence that the beneficiary’s Cien Metros transcripts in the record establish that the beneficiary had completed the equivalent of an 11th grade education in the United States as of the priority date. Therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The director did not indicate in the notice of decision that the educational evaluation letter submitted by the petitioner was in any respect deficient. The AAO hereby remands the matter to the director that he might request that the petitioner submit proof that, as of the priority date, the beneficiary had completed the equivalent of an 11th grade education at an accredited high school in the United States.

² In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision.

³ Although we note that the labor certification does not require a high school diploma, we reference this diploma generally.

The burden of proving eligibility for the benefit sought rests entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above. Therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for further consideration and for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.