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20 Massachusetts Ave., N.W., Rm. 3000  
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U.S. Citizenship  
and Immigration  
Services



B6

FILE:

LIN-06-114-52376

Office: NEBRASKA SERVICE CENTER

Date: **APR 06 2009**

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.

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 or reopen, 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a pizza restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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 also determined that the petitioner had not demonstrated that the beneficiary had the qualifications stated on the Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant 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.

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 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$15.19 per hour per hour (\$31,595.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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.<sup>1</sup> On appeal, counsel has submitted a brief. Other relevant evidence in the record includes petitioner's corporate tax returns for 2001 through 2005. The record does not contain any other evidence relevant to the petitioner's 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 2000, to have a gross annual income of \$99,926.00 and a net annual income of \$19,271.43, and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B signed by the beneficiary on April 25, 2001, the beneficiary did not claim to have worked for the petitioner and did not list any work experience.

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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

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<sup>1</sup> 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).

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 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 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 USCIS 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. [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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner's tax returns demonstrate its net income for the years 2001 through 2005 as shown in the table below.<sup>2</sup>

- In 2001, the Form 1120S stated net income<sup>3</sup> of -\$1,023.44.
- In 2002, the Form 1120S stated net income<sup>4</sup> of \$1,000.00.

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<sup>2</sup> 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 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 (on income tax returns for the years 1997 through 2003) line 17e (on returns for the years 2004 and 2005) or line 18 (on returns for the year 2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 30, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

<sup>3</sup> Ordinary income as shown on line 21 of the petitioner's IRS Form 1120S. See footnote 2, above.

<sup>4</sup> Ordinary income as shown on line 21 of the petitioner's IRS Form 1120S. See footnote 2, above.

- In 2003, the Form 1120S stated net income<sup>5</sup> of -\$162.73.
- In 2004, the Form 1120S stated net income<sup>6</sup> of -\$19,271.43.
- In 2005, the Form 1120S stated net income<sup>7</sup> of \$14,700.07.

The petitioner did not have sufficient net income to pay the proffered wage in 2001, 2002, 2003, 2004 or 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. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> 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 tax returns demonstrate its end-of-year net current assets for the years 2001 and 2005 as shown below.

- In 2001, the Form 1120S stated net current assets of \$5,116.45.
- In 2005, the Form 1120S stated net current assets of \$8,506.68

The petitioner did not have sufficient net current assets to pay the proffered wage in 2001 or 2005. The petitioner did not provide a Schedule L for 2002, 2003 or 2004.<sup>9</sup> Therefore, the petitioner has not established that it had sufficient net current assets to pay the proffered wage in 2002, 2003 or 2004.

Therefore, from the date 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 as of the priority date through an examination of wages paid to the beneficiary, net income or net current assets.

On appeal, counsel asserts that depreciation and "other deductions" should be added back into the petitioner's income in determining the ability to pay the proffered wage. This is incorrect. Depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business. As noted above, courts have already rejected the argument that depreciation should be added back to net income in determining a

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<sup>5</sup> Ordinary income as shown on line 21 of the petitioner's IRS Form 1120S. See footnote 2, above.

<sup>6</sup> Ordinary income as shown on line 21 of the petitioner's IRS Form 1120S. See footnote 2, above.

<sup>7</sup> Ordinary income as shown on line 21 of the petitioner's IRS Form 1120S. See footnote 2, above.

<sup>8</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>9</sup> The petitioner was not required to complete Schedule L for tax years 2002, 2003, or 2004 because its total receipts and total assets at the end of the tax year (in 2002, 2003, and 2004) were less than \$250,000.

petitioner's ability to pay the proffered wage. *See, e.g., Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989). Similarly, the "other deductions" listed on the petitioner's tax returns are necessary costs of doing business. As such, the resources used to pay these costs are not available to pay the proffered wage.

Counsel also notes that, in 2001 and 2005, the values of the petitioner's "total assets" were greater than the proffered wage. However, as discussed above, USCIS considers net current assets, not total assets, in determining the petitioner's ability to pay the proffered wage. This is because "total assets" includes assets (such as buildings) which have a life of more than one year and are therefore unlikely to be available to the petitioner to pay the proffered wage in a given year. Therefore, the value of the petitioner's total assets does not establish the petitioner's ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

As noted above, the director also denied the instant petition based on the petitioner's failure to demonstrate that the beneficiary was qualified to perform the proffered position. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

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.

In the instant case, the Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B the beneficiary did not list any work experience. The petitioner did not submit evidence of the beneficiary's experience with the I-140 petition. The petitioner was notified of the deficiency in the evidence in an Intent to Deny issued by the director on May 11, 2006 which stated "[t]he record also lacks evidence that the alien obtained the required two years of experience in the job offered before April 27, 2001."

On appeal, counsel has submitted a letter from [REDACTED] which states that the beneficiary "has been working in the capacity of an assistant manager with us for the last 2 years for [REDACTED]

The letter from [REDACTED] is insufficient to establish the beneficiary's qualifications for the proffered position. First, as noted above, the beneficiary did not list any work experience on the Form ETA 750B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board of Immigration Appeals noted in dicta that the beneficiary's testimony concerning previous employment was not credible where such previous employment was not listed on the beneficiary's labor certification application. Further, it appears that the experience described in the letter may have occurred after the priority date was established. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In addition, the petitioner failed to submit evidence of the beneficiary's experience in response to the Notice of Intent to Deny. 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 Obaigbena*, 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 Notice of Intent to Deny *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position with two years of experience in the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.