



U.S. Citizenship  
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FILE: [Redacted]  
EAC-03-218-50019

Office: VERMONT SERVICE CENTER

Date: OCT 07 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: 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, Director  
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 is a day care program. It seeks to employ the beneficiary permanently in the United States as a bilingual assistant teacher. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary had the education required on the Form ETA 750, and denied the petition accordingly.

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 or seasonal nature, for which qualified workers are not available in the United States.

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 (Comm. 1977). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 19, 2001.

The Form ETA 750, block 14, states that the position of bilingual assistant teacher requires eight years of elementary education, four years of high school education, two years of college education, and an Associate degree in Early Child Education. Other special requirements stated in block 15 of the ETA 750 are a "CDA Certification, Early Child Education," and "Knowledge of Foreign Language (Spanish).

On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary claimed to have worked for the petitioner beginning in March 1996 and continuing until the date of the ETA 750B.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The I-140 petition was submitted on June 26, 2003. On the petition, the petitioner claimed to have been established in 1972, to currently have 151 employees, to have a gross annual income of \$9,655,000.00, and to have a net annual income of \$38,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated August 13, 2003, the director requested additional evidence relevant to the beneficiary's education. In response to the RFE, the petitioner submitted additional evidence, which was received by the director on October 1, 2003.

In a decision dated November 19, 2003 the director determined that the beneficiary possessed the required Associate degree in Early Childhood Education, but that the beneficiary did not acquire that degree until after the priority date. The director therefore denied the petition.

On appeal, counsel submits a letter dated December 18, 2003 and additional evidence.

Counsel states on appeal that when the ETA 750 was initially filed the only educational requirements were for a high school education and training in early childhood education, qualifications which the beneficiary did possess at that time. Counsel states that the beneficiary qualifies as a skilled worker.

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).

The record contains a copy of Associate in Science degree awarded to the beneficiary on June 4, 2003 by Essex County College, Newark, New Jersey. That date is more than two years after the April 19, 2001 priority date. The record contains a course transcript of the beneficiary showing that she successfully completed one course in the Spring of 1997 and four courses in the Fall of 2000, for a total of fifteen credit hours by the end of the Fall 200 semester. That semester was the last complete semester before the April 19, 2001 priority date. The transcript shows that the beneficiary continued taking courses through the Summer of 2003, eventually successfully completing courses totaling 90.5 credit hours. The transcript therefore shows that as of the priority date, the beneficiary had completed only a small proportion of her coursework toward her Associate in Science degree.

The Form ETA in the record shows that some amendments were made to the ETA 750 before its approval by the Department of Labor. The requirement for an Associate Degree in "Early Child Education" was added by an amendment on October 2, 2002, according to a notation on the ETA 750. Nonetheless, the beneficiary must possess all the requirements on the approved labor certification as of the date of its filing. *Matter of Wing's Tea House*, 16 I&N Dec. at 160. A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary has an Associate degree in Early Child Education on April 19, 2001.

In his decision, the director correctly found that the petitioner had failed to establish that the beneficiary had the required degree as of the April 19, 2001 priority date. The decision of the director to deny the petition was therefore correct, based on the evidence in the record before the director. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are insufficient to overcome the decision of the director.

Beyond the decision of the director, as second issue raised by the evidence concerns the petitioner's ability to pay the proffered wage to the beneficiary during the each of the years relevant to the instant petition.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date. As noted above, the priority date in the instant petition is April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$15.99 per hour, which amounts to \$33,259.20 annually.

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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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).

The I-140 petition states in Part 5 that the petitioner was formed in 1972 and employs 151 employees. The regulation at 8 C.F.R. § 204.5(g)(2), quoted above, states that where a petitioner employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. Although the petitioner was permitted by this regulation to submit a statement from one of its financial officers in order to establish the petitioner's ability to pay the proffered wage, the petitioner did not do so.

In the absence of a statement from a financial officer of the petitioner, in determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary claimed to have worked for the petitioner beginning in March 1996 and continuing until the date of the ETA 750B

The record contains copies of Form W-2 Wage and Tax statements of the beneficiary for 2000, 2001 and 2002. The record before the director closed on October 1, 2003, with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the beneficiary's Form W-2 for 2003 was not yet available.

The beneficiary's W-2 forms in the record state compensation from the petitioner as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2000	\$15,655.33	not applicable	not applicable
2001	\$16,170.45	\$33,259.20	\$17,088.75
2002	\$17,620.34	\$33,259.20	\$15,638.86

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002, which are the two years at issue in the instant petition.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a non profit organization. The record contains copies of the Form 990 Return of Organization Exempt from Income Tax of the petitioner for 1999 and 2000. The petitioner's reporting year runs from July 1 to June 30 of the following year. The petitioner's reporting return for 1999 was for the period from July 1, 1999 until June 30, 2000, and its return for 2000 was for the period from July 1, 2000 to June 30, 2001. The record before the director closed on October 1, 2003 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date, the petitioner's federal return for its reporting years of 2001 and 2002 should have been available. Those reporting years would have ended on June 30, 2002 and June 30, 2003 respectively, assuming that the petitioner made no changes to its reporting year after submitting its 2000 return.

The record contains no explanation for the absence of the petitioner's returns for its reporting years of 2001 and 2002. It is noted that in the RFE the director had specifically requested evidence relevant to the years 2000 and 2001. Even assuming that the information on the petitioner's return for 2000 is sufficient to establish the petitioner's ability to pay the proffered wage as of the April 19, 2001 priority date, since no returns were submitted for the following two years, the evidence fails to establish the petitioner's continuing ability to pay the proffered wage until the beneficiary obtains lawful permanent residence.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. But even again assuming that the petitioner's return for 2000 would establish the petitioner's ability to pay the proffered wage as of the priority date, the absence of any returns for the following two years prevents any analysis of the petitioner's net current assets for those reporting years.

The record also contains copies of bank statements for an account of the petitioner for February and March 2001. Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. The bank statements in the record show ending balances of \$62,444.81 as of February 1, 2001 and \$208,831.04 as of March 1, 2001. Each of those amounts is greater than the annual proffered wage of \$33,259.20. But the record contains no bank statements for any periods after March 1, 2001. Therefore the bank statements fail to establish the petitioner's continuing ability to pay the proffered wage until the beneficiary obtains lawful permanent residence.

For the above reasons, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In summary, the evidence in the record fails to establish that the beneficiary had the degree required on the ETA 750 as of the priority date. Beyond the decision of the director, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *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)(noting that the AAO reviews appeals on a de novo basis).

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.