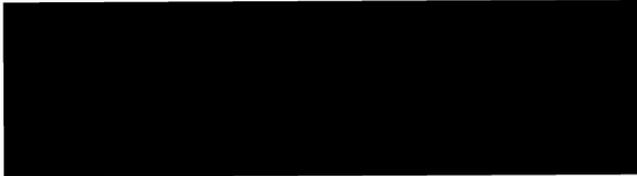


**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**



B6

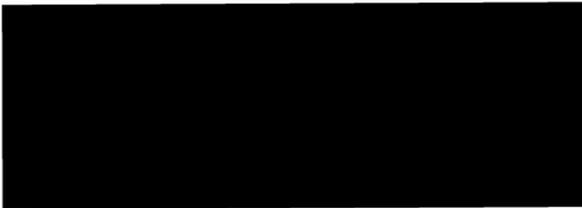
FILE: WAC 04 151 52200 Office: CALIFORNIA SERVICE CENTER Date: JUN 21 2006

IN RE: Petitioner:  
Beneficiary:



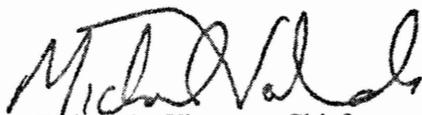
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a wholesale packer and distributor of goods. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. 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 the beneficiary would be employed as a permanent, full-time employee. The director further determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director questioned the authenticity of two letters of experience submitted by the petitioner on behalf of the beneficiary in this case. The director denied the petition accordingly.

On appeal, counsel indicated that she would submit a brief and/or evidence to the AAO within 30 days and stated the following:

1. The denial is in error. The alien beneficiary meets the two-year requirement. Petitioner employer will submit additional documents as evidence of this requirement.
2. The documents submitted are not fraudulent in that they were signed by the prior employers. The alien beneficiary will submit new documents to evidence past experience.

Counsel dated the appeal December 28, 2004. As of this date, more than 17 months later, the AAO has received nothing further. The AAO sent a fax to counsel on May 11, 2006 informing counsel that no separate brief and/or evidence was received, to confirm whether or not she would send anything else in this matter and as a courtesy, providing her with five days to respond. On May 11, 2006, counsel's colleague, [REDACTED] sent a letter to this office indicating that counsel was out of the country and was not due to arrive back in the United States until May 17, 2006. [REDACTED] indicated that counsel would send this office the requested information upon her return. To date, more than three weeks following counsel's scheduled return, no reply has been received.

As set forth in the director's December 1, 2004 denial, the director determined that the petitioner had not established that the beneficiary would be employed as a permanent, full-time employee. Counsel has not specifically addressed this portion of the director's decision. Counsel submitted no new evidence relating to this determination on appeal.<sup>1</sup> Therefore, the petitioner has not overcome this portion of the director's decision.

Further, the director determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the proffered position. The director noted discrepancies in information pertaining the beneficiary's employment experience. 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 petitioner must 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 November 3, 2000.

---

<sup>1</sup> As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup> On appeal, counsel asserts that the beneficiary meets the two-year requirement, but provides no new evidence to support her claim. Counsel also asserts that the documents are not fraudulent in that they were signed by the beneficiary's former employers. Counsel submits no new evidence to support her claim.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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 maintenance mechanic. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	6
	High School	0
	College	0
	College Degree Required	none
	Major Field of Study	none

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, or two years of experience as a machine operator. Since this is a public record, the duties set forth at Item 13 will not be recited in this decision. Item 15 of Form ETA 750A reflects the following special requirements: at least two years experience in operation of machines used for packing goods and at least two years experience as a mechanic in maintenance of machines used for packing goods.

The beneficiary set forth his credentials on Form ETA 750B and signed his name on October 17, 2000 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked 45 hours per week as an electrician for Brewser Electronics from January 1991 to January 1995, and that he worked 30-40 hours per week as a maintenance electrician for American Nutrition Bars from January 1995 to June 1997. He also represented that he worked 40 hours per week as a maintenance mechanic for the petitioner from November 1994 to the date he signed the Form ETA 750B. He does not provide any additional information concerning his employment background on that form.

<sup>2</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).

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 a letter dated October 1, 2004, the petitioner claims that the beneficiary worked as a maintenance mechanic for the petitioner from November 29, 1994 through July 3, 1996. In addition to the experience letter from the petitioner, the petitioner provided two experience letters from the beneficiary's former employers in support of its petition. As noted by the director in his decision, the experience letters submitted by the petitioner contain apparent discrepancies. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The letter from Brewster Electronics dated October 22, 2000 signed by James Brewster indicates the beneficiary was employed as an electrician from January 1991 to 1995, which overlaps with his employment with the petitioner. The letter from American Nutrition Bars dated October 2000 signed by the same James Brewster indicates that the beneficiary worked as a maintenance electrician from 1995 to 1997, which overlaps with his employment with the petitioner. While it may be possible that the beneficiary worked simultaneous full-time jobs, the record does not contain competent objective evidence that would resolve the director's concerns. The petitioner has failed to resolve the inconsistencies in the record.

Moreover, the proffered position requires two years of experience as a maintenance mechanic, two years of experience in the operation of machines used for packing goods and two years of experience as a mechanic in the maintenance of machines used for packing goods. The experience letters from Brewster Electronics and American Nutrition Bars indicate that the beneficiary has experience as an electrician, not as a maintenance mechanic, and the letters fail to indicate whether the beneficiary has two years of experience in operation of machines used for packing goods and two years of experience as a mechanic in maintenance of machines used for packing goods. The experience letters do not meet the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), as they do not describe the experience of the beneficiary. Counsel's assertion on appeal that the beneficiary's prior employers signed the experience letters does not address the regulatory requirements of experience letters. Further, the certificate of proficiency submitted with the petition is not relevant to this case. Proficiency as an electrician is not a requirement set forth on the Form ETA 750A. The petitioner has failed to demonstrate that the beneficiary acquired two years of experience from the evidence submitted into this record of proceeding and therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date.<sup>3</sup> 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. 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.

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 CFR § 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).

On the petition, the petitioner claimed to have been established in June 1984, to have a gross annual income of \$78,054,000.00, and to currently employ 320 workers. On the Form ETA 750B, signed by the beneficiary on October 17, 2000, the beneficiary claimed to have worked for the petitioner from November 1994 to the date he signed the application. Here, the Form ETA 750 was accepted on November 3, 2000. The proffered wage as stated on the Form ETA 750, as amended, is \$18.57 per hour (\$38,625.60 per year based on a 40 hour work week). Relevant evidence in the record includes the petitioner's financial statements for 2000, 2001, 2002 and 2003, the beneficiary's W-2 Form for 1996 and the beneficiary's IRS Form 1040, U.S. Individual Income Tax Return, for 1996. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage. Although the petitioner claims to employ 320 workers on Form I-140, it has not submitted a statement from a financial officer which establishes its ability to pay the proffered wage.

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, Citizenship and Immigration Services (CIS) 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).

<sup>3</sup> 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).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 evidence submitted by the petitioner shows that the petitioner paid the beneficiary \$10,104.72 in 1996. However, despite the petitioner's assertion that it employed the beneficiary for a brief period in 2000, no evidence was submitted to establish that the petitioner paid the beneficiary the full proffered wage from the priority date, November 3, 2000, and continuing until the beneficiary obtains permanent residence.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses contrary to counsel's assertions. 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). The petitioner failed to submit its federal income tax returns or any of the other forms of required evidence as set forth in 8 C.F.R. § 204.5(g)(2) for any relevant period.

The record also contains copies of unaudited financial statements. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. 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.

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.