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U.S. Citizenship  
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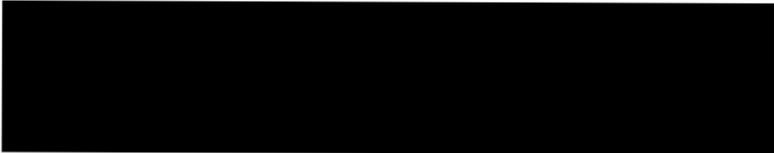


File:  Office: VERMONT SERVICE CENTER Date: **SEP 28 2006**  
EAC-03-212-51921

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 Acting Director (Director), Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a management and development corporation and seeks to employ the beneficiary permanently in the United States as a supervisor for janitorial services ("Supervisor, Janitorial/Maintenance Services"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's November 19, 2004, denial, the case was denied based on the petitioner's failure to demonstrate the petitioner's ability to pay the proffered labor certification wage from the priority date until the beneficiary obtained permanent residence.

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>1</sup>

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 establish that its job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, here, April 12, 2001, 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).

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

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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).

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 16, 2001. The proffered wage as stated on Form ETA 750 for the position of a janitorial supervisor is \$550.00 per week, 40 hours per week, which is equivalent to \$28,600 per year. The labor certification was approved on April 2, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on June 25, 2003.

"Pennsylvania Residential Real Estate Management" ("PRREM") is the petitioner listed on the ETA 750, and on the I-140 Petition. Counsel listed PRREM's tax identification number on the I-140 Form as 23-2265864. Counsel listed the following information related the petitioning entity: established 1995 gross annual income: \$1,075,966; net annual income: \$258.167<sup>2</sup>; and current number of employees: 5 + subcontractor; wages per week: \$550.00.

On May 4, 2004, the Service Center issued a Request for Additional Evidence ("RFE") for the petitioner to send corroborating evidence of the beneficiary's experience outside the U.S., specifically payroll records, and that the petitioner should submit its profit/loss statement, bank records, or personnel records for 2001.

The Service Center denied the petition on November 19, 2004, based on the petitioner's failure to demonstrate its ability to pay the beneficiary from the time of the priority date until the beneficiary obtains permanent residence.

The petitioner appealed and the matter is now before the AAO. We will first examine the petitioner's ability to pay, and then consider the petitioner's additional arguments on appeal. The evidence in the record of proceeding regarding the petitioner's ability to pay includes a 2001 Form 1065 for Juniper East Associates, the beneficiary's Form W-2 for 2003 issued by Pennsylvania Residential Real Estate, and a payroll record for the time period June 16, 2004 to June 30, 2004, and July 1, 2004 to July 14, 2004, and a check ledger showing three additional payments to the beneficiary.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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.

On Form ETA 750B, signed by the beneficiary on March 8, 2001, the beneficiary does not list that she was employed with the petitioner. However, on Form G-325A filed with the beneficiary's I-485 Adjustment of Status application, dated February 26, 2003, the beneficiary listed that she has been employed as a supervisor with the petitioner, PRREM, since August 1998. The record contains the following W-2 information for the beneficiary:

<u>Tax Year</u>	<u>Employer Name</u>	<u>Tax ID</u>	<u>Amount Paid</u>
2003	Pennsylvania Residential Real Estate	23-2750257	\$2,000

The petitioner, PRREM, has also provided a payroll record for the beneficiary for the pay period ending July 14, 2004, exhibiting partial year earnings for 2004 of \$12,173.92.

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<sup>2</sup> We believe that counsel meant to list "\$258,167" instead of "\$258.167."

Based on the above, the petitioner cannot demonstrate that it has not paid the beneficiary the full proffered wage in any of the years. 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. 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).

Examining the petitioner's ability to pay, the evidence in the record of proceeding regarding the petitioner's ability to pay is conflicting. Counsel has submitted a 2001 Form 1065 U.S. Return of Partnership Income for a "Juniper East Associates," Federal Employer Identification Number: [REDACTED]. And while this tax ID number matches the number listed on the I-140 Petition, the petitioner has also submitted the beneficiary's 2003 W-2 from PRREM, noted above, listing a Federal Employer Identification Number of [REDACTED]. The petitioner notes in a letter submitted that the beneficiary's salary "will be paid from an account entitled PA Residential Real Estate. The PRRE account is the master account used to make disbursements on behalf of a number of real estate companies. Any expenses from the PRRE account are allocated to the individual real estate companies. [REDACTED] salary is borne by Jupiter East Associates." If we accept that PRREM is the petitioner, then the evidence following FEIN [REDACTED] only will be accepted, and the 2001 U.S. Return of Partnership Income 1065 Form would not be relevant.

We note that a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel contends on the I-290B Appeal Form that the petitioner can pay the proffered wage and that the Request for Additional Evidence did not request further information related to the petitioner's ability to pay and, therefore, the director's decision was erroneous. We note that the RFE did the request the petitioner's 2001 profit and loss statements, bank account records, Forms 941, and other evidence regarding whether the beneficiary was paid. The only documentation submitted was the beneficiary's W-2 statement for 2003, and limited pay information for 2004. The petitioner did not submit any further information related to the petitioner's ability to pay the proffered wage in 2001.

As the record does not contain any further evidence of the petitioner's ability to pay the beneficiary the proffered wage, the documentation submitted is insufficient to establish that PRREM, tax ID, [REDACTED], is able to pay the beneficiary the proffered wage.

Although, not raised in the director's denial, we find that the petitioner also failed to establish the beneficiary's qualifications based on the certified ETA 750. 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 evaluating the beneficiary's qualifications, the U.S. Citizenship & Immigration Service (CIS) must look to the job offer portion of the alien 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 (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).

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

(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.

Here, on the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a supervisor, janitorial services, with job duties including: "Supervises, trains and coordinates workers in cleaning and maintaining business establishments to resident satisfaction. Assigns custodial tasks to workers, and inspects work for conformance to standards. Trains new workers, records hours worked, recommends discharge of incompetent workers, and performs other personnel duties as required." The petitioner did not list that the position required any education in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed by the beneficiary on March 8, 2001, the beneficiary listed her prior experience as: (1) Supervisor of Maintenance, 1990 to 1992 for "LIC Faustina Alt Santos, Dominican Republic," a real estate management office. The beneficiary did not list the month that her work began and the month that her work ended. She listed that she worked 40 hours per week; and (2) "Maintenance/Cleaning," 1993 to 1998 for Mars Community Residence in Maryland, a real estate rental business. Similarly, the beneficiary did not list the month that her work began and the month that her work ended. She did not list that she had any supervisory duties.

As evidence to document the beneficiary's qualifications, the petitioner initially provided a letter from Lic. Faustina Altagracia-Santos, Attorney, General Real Estate. The letter confirmed that the beneficiary was employed "from the year 1990 until 1992, as the person in charge of Maintenance Department of inside and

outside of my offices.” The letter does not confirm the exact month that the beneficiary began her employment, or the exact month that she left her employment. Further, the letter does not confirm whether the beneficiary was employed on a full-time, or a part-time basis.

The certified ETA Forms require that the beneficiary demonstrate two prior years of experience as a supervisor of janitorial services. The [REDACTED]’s letter fails to demonstrate that the beneficiary has the two years of prior work experience. For example, the beneficiary could have begun work in December 1990 and left work in January 1992, which would provide only a little over a year of experience in the position. Based on the deficiencies in the letter initially submitted, the Service Center requested further information from the petitioner to document the beneficiary’s work with [REDACTED].

In response to the RFE, the petitioner submitted a second letter to document the beneficiary’s work experience from Mars Community Residence, which provided that she “worked for my business from 1993 to 1998. Albania performed multiple tasks in various aspects of my business. Albania was responsible for maintaining the overall appearance for all of my properties, both the outside and the inside. Albania’s responsibilities included but were not limited to cleaning and minor maintenance as well as maintaining a livable environment for all of my clients, in other words complete client satisfaction.” The Mars letter similarly fails to contain the exact month that the beneficiary started and ended work, or whether her work experience was full-time, or part-time. Further, the letter fails to confirm that she worked as a supervisor, the experience required for the position offered.

The two letters taken together, fail to definitively document that the beneficiary met the two years of Supervisory, Janitorial Services, required in the job offered. In the absence of documentation or payroll records from abroad as requested by the RFE, the beneficiary submitted a three page statement regarding her prior work experience. She provides that she was employed with [REDACTED]’s “as a Supervisor of Maintenance from the beginning of February 1990 until the end of November 1992, on a full-time basis; during this time I missed work for about one month after my daughter Luz was born on July 24, 1992.” After she stopped working full-time to care for her children, the beneficiary provides that she worked an additional six months for [REDACTED] on a part-time basis. She provides that she instructed three or four workers as their supervisor in oversight of 25 units that [REDACTED] owned. The beneficiary previously obtained a letter to document her experience from [REDACTED] in 2001 through her family. However, the beneficiary contends that her family attempted to find [REDACTED] to obtain a more specific letter, but that [REDACTED] had passed away and, therefore, was unable to obtain a letter.

We find that the beneficiary’s statement alone without corroborating evidence is insufficient to document her prior work experience. The beneficiary does not provide whether she sought to obtain letters from any co-workers or individuals that she supervised, or perhaps individuals in the units owned by [REDACTED]. Further, the ETA 750B Form failed to list the month of the beneficiary’s start and end date. Should this information have been provided on the form, the statement might be given more weight. Additionally, the beneficiary did not list her foreign experience on Form G-325A in the box “show below last occupation abroad if not shown above.” While this also would have been a self-statement, the information, if listed, would have potentially corroborated the beneficiary’s statement.

In the absence of independent corroborating evidence, we cannot find that the petitioner has demonstrated that the beneficiary met the experience requirements of the certified ETA 750.

Accordingly, the petition was properly denied for failure to establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains permanent

residence; and should also have been denied for failure to document that the beneficiary met the position requirements as set forth in the certified Forms ETA 750.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the record. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.