



U.S. Citizenship  
and Immigration  
Services

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**B6**



File: [REDACTED]  
LIN-06-007-53624

Office: NEBRASKA SERVICE CENTER

Date: AUG 23 2007

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:

SELF-REPRESENTED

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 Director, Nebraska Service Center (“director”), denied the immigrant visa petition. The petitioner then appealed the denial and the matter is now before the Administrative Appeals Office (“AAO”). The AAO will remand the decision back to the director for further consideration in accordance with the instructions below.

The petitioner operates a Mexican restaurant, and seeks to employ the beneficiary permanently in the United States as a cook, specialty, foreign food (“Mexican Specialty Cook”). The petitioner did not submit an original Form ETA 750 Application for Alien Employment Certification, approved by the Department of Labor (“DOL”) as required by statute with the petition, but instead submitted only a copy of Form ETA 750. As set forth in the director’s February 21, 2006 decision, the petition was denied based on the petitioner’s failure to submit an original Form ETA 750.

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 ETA 750 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, 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 August 17, 2001. The proffered wage as stated on Form ETA 750 is \$11.82 per hour,<sup>2</sup> 40 hours per week, which is equivalent to \$24,585.60 per year. The labor certification was approved on August 6, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on October 11, 2005. On the I-140, the petitioner listed the following information: date established: 1972; gross annual income: \$1,554,004.00; net annual income: \$421,769.00; and current number of employees: 150.

On October 24, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit additional evidence related to the petitioner's ability to pay from August 17, 2001 onward, including the petitioner's 2001, 2002, 2003 federal tax returns, as well as copies of all W-2 Forms issued to the beneficiary, if the petitioner employed the beneficiary; to submit evidence that the beneficiary had the required two years of experience as listed in the certified Form ETA 750; and for the petitioner to submit the original approved Form ETA 750. The petitioner responded and provided its tax returns, documentation regarding the beneficiary's prior work experience, and a copy of the Form ETA 750.<sup>3</sup> On February 21, 2006, the director denied the petition as the petitioner failed to submit an original Form ETA 750 as required. The director noted that there may be other deficiencies in the petition, which were not raised in the denial and, therefore, submission of an original Form ETA 750 alone may not sufficient to obtain approval. The petitioner appealed, and the matter is now before the AAO.

The regulation at 8 C.F.R. § 103.2(b)(4) provides:

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<sup>2</sup> We note that the petitioner initially listed a wage of \$11.00 per hour, but DOL required that the petitioner increase the wage to \$11.82 per hour prior to certification.

<sup>3</sup> In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("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).

On the Form ETA 750A, the "job offer" listed that it required two years of prior experience in the position offered, as a Mexican Specialty Cook. The petitioner further listed under special requirements that the position required two years of experience specifically as a Mexican Specialty Cook.

The petitioner submitted numerous letters on behalf of the beneficiary to show his work as a cook, as well as documentation related to cooking studies completed. However, none of the letters submitted documented that the beneficiary had experience specifically related to Mexican cooking. On appeal, the petitioner submitted letters specifically documenting that the beneficiary had over four years as a Mexican Specialty Cook.

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with the Service.

See also 8 C.F.R. 204.5(g)(1): "In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval." Accordingly, the original labor certification was required. As the petitioner only submitted a copy of Form ETA 750, the petition was properly denied.

The regulation at 20 C.F.R. § 656.30(e) provides that DOL may issue duplicate labor certifications "upon the written request of a Consular or Immigration Officer."

On appeal,<sup>4</sup> the petitioner provided that it was unaware that the document submitted was a copy. The petitioner provided that the beneficiary contacted the individual that initially filed the Form ETA 750,<sup>5</sup> and was not able to obtain the original Form ETA 750 as the original was "either misplaced or lost." The petitioner then sought assistance from another source and was informed that Citizenship & Immigration Services ("CIS") could request the original from DOL. Accordingly, the petitioner requested on appeal that an original be obtained.

Subsequent to the petitioner's initial appeal submission, the petitioner was able to obtain the original Form ETA 750 from the individual that filed on the petitioner's behalf, and submitted the original. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). 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). We will, however, exercise discretion and accept this document.

As noted in the director's denial, submission of the original Form ETA 750 alone may not result in the petition's approval. The director indicated that there may be additional issues, which would require the petitioner to provide further evidence.

Although not raised in the decision, the AAO has identified an additional ground of ineligibility namely its ability to pay all sponsored beneficiaries of multiple immigrant visa petition filings the proffered wage. 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

<sup>4</sup> The director's decision provides that the petitioner may not appeal the denial of the present I-140 based on 8 C.F.R. § 103.1(f)(3)(E)(iii). However, in the final paragraph of the decision, the director provides instructions related to the petitioner's right to appeal, and that "if you wish to appeal this decision, you may do so." We additionally note that 8 C.F.R. § 103.1(f)(3)(E)(iii) would pertain to a petition filed without any labor certification. In the case at hand, the petitioner filed with a copy of the labor certification so that 8 C.F.R. § 103.1(f)(3)(E)(iii) would not apply in the instant matter.

<sup>5</sup> The petitioner filed the I-140 petition and the appeal on its own, self-represented.

appeals on a *de novo* basis). 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>6</sup> As this issue was not raised in the director's decision and the petitioner was not given an opportunity to address this issue, the petitioner should be provided an opportunity to do so on remand in accordance with the instructions and discussion below.

First, in determining the petitioner's ability to pay the proffered wage during a given period, 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. In the case at hand, on Form ETA 750B, signed by the beneficiary on July 27, 2001, the beneficiary did not list that he has been employed with the petitioner. The petitioner did not claim to have employed the beneficiary. Therefore, the petitioner cannot establish its ability to pay the proffered wage through prior wage payment.

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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner's tax returns reflect a small amount of income from other sources for 2002, 2003, and 2004, so that we will take the net income figure for those years from Schedule K. In 2001, the petitioner lists only income from its business so CIS will evaluate its net income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	\$49,234

<sup>6</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). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

2003	-\$15,038
2002	\$6,311
2001	\$80,019

The petitioner's net income would allow for payment of the beneficiary's proffered wage in 2001 and 2004, but not in the other two years. Additionally, we note that the petitioner has sponsored multiple beneficiaries, and the petitioner would need to demonstrate its ability to pay for all sponsored workers.<sup>7</sup>

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	-\$41,167
2003	-\$70,814
2002	-\$82,689
2001	-\$88,677

Following this analysis, the petitioner's federal tax returns shows that the petitioner lacks the ability to pay the beneficiaries the proffered wages in any of the above years based on net current assets.

The petitioner additionally submitted a letter from its bank dated January 5, 2006, which provided that the petitioner had a current bank balance of \$44,911.49, and an average balance for the prior twelve months of \$84,051.00. First, we note that bank statements, and funds in bank accounts are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Further, cash assets in the petitioner's bank account should already have been accounted for as cash on the petitioner's Form 1120S Schedule L and included in net current assets analysis above. The petitioner did not provide evidence to show that the funds in the petitioner's account represent funds beyond those listed on the petitioner's Forms 1120S federal tax returns. The letter would reflect the amount that the petitioner had for the year 2005, and not from the time of the priority date. The letter would, therefore, not establish the petitioner's ability to pay from 2001 to the present.

As the petitioner's ability to pay the proffered wage for multiple beneficiaries was not raised in the director's denial, the petitioner should have the opportunity to address this issue on remand.

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<sup>7</sup> CIS records indicate that the petitioner has filed for at least ten beneficiaries for permanent residence between 1999 and the present, with eight applications filed in 2002. It is possible that an entity related to the petitioner has filed for another two beneficiaries.

In accordance with the foregoing, we will remand the petition to the director. The director may request any relevant information related to the petitioner's ability to pay multiple beneficiaries their respective proffered wages. The petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Following issuance of the RFE and upon receipt of all the evidence, the director will review the entire record and enter a new decision, which if adverse to the petitioner shall be certified to the AAO.

**ORDER:** The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.