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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
and Immigration
Services

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AUG 29 2007

File: [REDACTED]
SRC-03-097-50292

Office: TEXAS SERVICE CENTER Date:

In re: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Texas Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner operates a business related to the integration of computer systems and seeks to employ the beneficiary permanently in the United States as an instructor for technical training (“Director of Training”). 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 May 13, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains 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.¹

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

¹ 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 February 19, 2002. The proffered wage as stated on Form ETA 750 for the position of an instructor for technical training is \$36,000 per year. The labor certification was approved on September 22, 2002, and the petitioner filed the I-140 Petition on the beneficiary's behalf on February 18, 2003.² The petitioner listed the following information on the I-140 Petition: established: March 19, 1997; gross annual income: see attached; net annual income: see attached; and current number of employees: 4.

On April 1, 2005, the director issued a Request for Evidence ("RFE"). The director requested that the petitioner submit: documentation that the beneficiary met the certified position requirements in terms of prior experience; to submit other evidence related to the petitioner's ability to pay the proffered wage in the form of the petitioner's 2003 federal tax returns with corresponding W-2 Forms, as well as 2001 W-2 Forms.

On May 2, 2005, the petitioner responded and provided one letter regarding the beneficiary's prior experience; a copy of the beneficiary's 2003 tax return with W-2; and a copy of the beneficiary's 2001 tax return and W-2. Following review, the director determined that the evidence submitted in response to the RFE was insufficient to demonstrate the petitioner's ability to pay the proffered wage, and denied the petition on May 13, 2005. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. 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 February 12, 2002, the beneficiary listed that she has been employed with the petitioner since October 2000. The petitioner submitted W-2 forms, which exhibit the following wages:

<u>Year</u>	<u>Amount paid</u>
2005	\$10,500 ³
2004	\$21,000 ⁴
2003	\$21,000
2002	\$21,000
2001	\$21,000

The wages paid to the beneficiary were less than the proffered wage. Therefore, the petitioner cannot establish its ability to pay the beneficiary based solely on prior wage payment to the beneficiary. The petitioner must establish that it can pay the difference between the wages paid and the proffered wage.

- We note that the record of proceeding reflects that the beneficiary's full surname is [REDACTED]. The beneficiary is referred to as both [REDACTED], and [REDACTED] in the record.

On February 20, 2007, the AAO director issued an RFE related to the minimum qualifications of the position. In response to the RFE, the petitioner additionally submitted the beneficiary's most recent W-2 Form, and the petitioner's 2004 and 2005 federal tax returns.

⁴ The petitioner submitted the beneficiary's 2002 and 2004 W-2 Forms on appeal.

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.

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The petitioner's tax returns reflect that it was initially structured as a C corporation and then reincorporated as an S corporation in 2003. 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 return does not reflect income from other sources. Therefore, we will take the petitioner's net income from line 21, which indicates ordinary income as follows:

<u>Tax year</u>	<u>Net income or (loss)</u>
2005	\$66,818 ⁵
2004	\$28,769
2003	\$26,059

The petitioner previously was structured as a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The tax returns submitted state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2002	\$14,616

⁵ The petitioner supplied its 2004 and 2005 federal tax returns in response to the RFE issued by the AAO director.

2001 \$12,784⁶

From the above net income, the petitioner had sufficient net income in only 2005 to demonstrate its ability to pay the proffered wage. However, if we add the amounts that the petitioner has already paid to the beneficiary in wages, this would demonstrate the following combined wages and income for 2002: \$35,616; 2003: \$47,059; 2004: \$49,769. This would demonstrate that the petitioner could meet the wage for 2004, and 2003, but not in 2002, where the wages paid in combination with the petitioner's net income would be \$384 below the proffered wage.

Next, we will examine the petitioner's continuing ability to pay the required wage under a second test based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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 net current were as follows:

<u>Year</u>	<u>Net Current Assets</u>
2005	\$9,027
2004	\$27,361
2003	\$22,084
2002	\$40,974
2001	\$13,248

As demonstrated above, the petitioner had sufficient net current assets to pay the proffered wage in 2002.

The petitioner additionally submitted Forms 941 Employer's Quarterly Federal Tax Return for the first quarter of 2005, as well as for the quarters ending January 30, 2004, June 30, 2004, September 30, 2004, and December 31, 2004.⁸ The Forms 941 show wages paid to all employees, but not specifically the beneficiary. We note that the Forms 941 reflect that the petitioner employed two employees for the first three quarters of 2004, but the final quarter of 2004, and first quarter of 2005 reflects that the petitioner employed only one individual.

On appeal, the petitioner contends that CIS "erroneously calculated the proffered wage"⁹ and that if the petitioner's 2001 net income of \$4,103¹⁰ and net current assets of \$13,248 were combined, this would equal

⁶ We note that the priority date is February 19, 2002, so that the petitioner's 2001 tax return would not be required as the petitioner appears to file taxes on a calendar year basis.

⁷According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

⁸ Based on the date of filing the appeal, the petitioner's 2004 federal tax returns were not available.

⁹ Additionally, on appeal, counsel raises the issue that CIS sent the RFE to counsel as opposed to the petitioner, and that in this manner counsel was confused whether the RFE sought the beneficiary's W-2 and tax returns, or the petitioner's tax returns. We note that the petitioner's address is not listed on Form I-140, or on the Form G-28 initially submitted. Rather, counsel has listed the law firm's address on the I-140, and "c/o" the law firm on the G-28.

\$17,351,¹¹ and the petitioner would be able to pay the remaining \$15,000 in wages. We note that since the priority date is February 2002, the year 2001 is not in issue. The net income above demonstrates the petitioner's ability to pay in 2005; the net current assets demonstrate the petitioner's ability to pay in 2002; and the petitioner's net income combined with prior wages paid to the beneficiary demonstrates the petitioner's ability to pay for the year 2003, and 2004. Therefore, on appeal, the petitioner has overcome the basis for denial as set forth in the director's decision and established its continuing ability to pay beginning on the priority date.

Further, although not raised in the director's denial, we find that there is an issue related to the position's minimum qualifications. 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*, 299 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 petitioner has listed different educational requirements on Form ETA 750, and on Form I-129, in a filing related to the beneficiary's nonimmigrant status for what appears to be the same position.

On July 24, 2000, the petitioner filed a Petition for a Nonimmigrant Worker, Form I-129, for a Director of Training pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director approved the petition.

The I-129 letter of support provided the following job description for the position of Director of Training:

[The beneficiary] will formulate, structure, plan and implement creative training courses relative to the company's technology and software products for clients' personnel in order to train personnel in the programs that company has developed for their needs. Will develop course curriculum and schedules for company's training programs, which are offered to its clients in conjunction with custom programs developed for each client. Will emphasize and provide instruction on automation through the use of custom design computer programs, specifying parameters and start up information systems. Will develop and supervise, through subordinate trainers, with regard to communication programs for automated data transfer. Will teach clients' personnel employees how to appropriately and efficiently utilize the programs to best suit their needs. Will assist students in developing skills, enhancing productivity and quality of work through the use of the particular program developed for their company.

¹⁰ The petitioner refers to net income as line 30 of the petitioner's tax return, which we note instead is the petitioner's total income.

¹¹ We note that CIS will consider net income and net current assets separately, but not in combination. Combining both would duplicate revenues the petitioner received during the year.

Further, the I-129 letter of support specifically noted the following education requirements: "A Bachelor's Degree in Education or the equivalent, is the minimum requirement, meeting the industry standard, for the position of Director of Training, with the duties and responsibilities as delineated above."

The pay rate offered for the Director of Training position was listed as \$21,000 per year, and the I-129 H-1B petition was approved on September 19, 2000.

Subsequent to the H-1B's approval, the petitioner then filed a labor certification on behalf of the same beneficiary for the position of Director of Training. The ETA 750 was filed on February 19, 2002, and listed a pay rate of \$36,000 per year.

Further, the job description on the ETA 750 read as follows:

Will formulate, structure, plan and implement training courses relative to the company's software products for clients in order to train personnel in the programs that have [sic] developed for their needs. Will develop course curriculum and schedules for the client training programs. Will emphasize and provide instruction in the use of custom computer programs, specifying parameters and information systems. Will develop and supervise, communication programs for automated data transfer. Will teach clients how to appropriately and efficiently utilize the programs to best suit their needs. Will assist students in developing skills, enhancing productivity and quality of work through the use of the program developed for their company.

The ETA 750 position description listed was essentially very similar in job duties to the position description for the H-1B position of Director of Training. Since the ETA 750 position appears to be the same position as the I-129 H-1B position, this would be expected. However, we note that the ETA 750 listed the following education requirement: Education: "no specific academic requirements." The position certified did not require any degree, and specifically did not require a Bachelor's degree in Education, or the equivalent as listed in the H-1B petition.

The AAO director issued an RFE and requested that the petitioner provide information related to both the petitioner's organization and the position, and to explain discrepancies within the record:

The Form I-140 filed indicates that you employed four individuals, and Form I-129 listed five individuals. Please provide an organizational chart identifying your employees by name, position title, and required education for the position, as well as the quarterly wage reports filed for these employees from July 2000 to the present. Additionally, provide W-2 statements from the year 2002 for each worker, and provide I-9 documentation for each worker presently employed.

Additionally, the RFE requested that the petitioner explain the differing educational requirements between the I-129 H-1B position, and the certified Form ETA 750, and to provide any evidence that would distinguish

these positions from one another. Further, the RFE requested an explanation of the discrepancy in the prevailing wage for the same position in light of the different educational requirements; that the petitioner provide samples of the training programs and curriculum that the beneficiary developed for the petitioner's clients from the years 2000 to the present; and that the petitioner provide contract samples executed by the petitioner and the petitioner's clients, which describe the services that the petitioner will provide, and the training that the beneficiary would provide to the petitioner's clients.

In response to the RFE, the petitioner supplied: the petitioner's organization chart for July 2000, at the time the petitioner filed its I-129 H-1B petition on behalf of the beneficiary; an organization chart for February 2003, the date of filing the I-140 petition; copies of quarterly wage reports and/or W-2 and W-3 Forms for the time period July 2000 through June 30, 2005. The petitioner further indicated that it did not have any I-9 documentation as it did not have any employees currently on payroll, but rather used the labor of subcontractors. Additionally, the petitioner submitted selected sample training programs and curriculum that the beneficiary developed for the petitioner's clients,¹² and provided sample invoices for services provided as the petitioner indicated that it did not have contracts with its clients.

Related to the questions regarding the position's requirements and wage, the petitioner provides:

The prevailing wage at the time of filing the H-1B was \$18,574.40 per year . . . The salary for the position was \$21,000. When it was determined that requiring professional experience instead of academic qualifications was more appropriate for the position and made the position available to a larger pool of US workers, the Petitioner also raised the salary offer to accommodate the professional requirements . . . The petitioner conducted a good faith recruitment effort to find qualified workers for the position. The petitioner also believed the elimination of academic requirements would make the position available to a larger pool of US workers.

The regulations related to the H-1B nonimmigrant category at 8 C.F.R. §§ 214.2(C)(ii)(4) provide that a specialty occupation:

Means an occupation which requires theoretical and practical application of a body of highly specialized and practical knowledge of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which required the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

¹² In the training programs provided, one training program provided was focused on an accounts receivable module, and provided a four hour training schedule outline; a second program was focused on the accounts payable module and consisted of a four to six hour training outline; a third program focused on the "banks" module and was a three hour training.

For the position to qualify as an H-1B position, under 8 C.F.R. §§ 214.2 (C)(iii)(A) the position must meet one of the following criteria:

- (1) a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) the employer normally requires a degree or its equivalent for the position; or
- (4) the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The beneficiary must establish that he or she holds a U.S. baccalaureate degree or higher required by the specialty from an accredited college or university; holds a foreign degree equivalent to a U.S. baccalaureate or higher degree required by the specialty; holds an unrestricted state license, registration, or certification required by the specialty; or has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. 8 C.F.R. §§ 214.2(C)(iii)(B).

The instructions on Form ETA 750 provide that the employer should list in item 14, the “minimum education, training, and experience required to perform the job duties.” The petitioner in the instant case has not listed that any education is required for the position. The petitioner has advertised that the position does not require a degree. The petitioner contends that it sought to make “the position available to a larger pool of US workers.” The ETA 750 itself states that the petitioner should list the minimum requirements. DOL lists that the petitioner should not “include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.” See Instructions for completing Form ETA 750, Part A. Offer of Employment, section 14.

If the position required a bachelor’s degree, the petitioner should have listed the degree on the ETA 750. If the petitioner were willing to advertise and hire a qualified candidate without a bachelor’s degree, then the position truly does not require one. The petitioner has failed to set forth any criteria to show that the I-129 H-1B position is different than, or distinguishable from the Form ETA 750 position. We, therefore, conclude that the positions are the same. By the petitioner’s own admission, the petitioner determined that work experience was more important for the position than a degree.¹³ We are willing to accept that the position does not require a bachelor’s degree, and will approve the I-140 Petition.¹⁴

¹³ The ETA 750 position was classified with a Dictionary of Occupational Title (“DOT”) code of 166-221-010, as an instructor, technical training. DOT descriptions do not provide whether education is standard for the position, but listed a SVP code of 8, which would allow four to ten years of experience for the position.

¹⁴ Based on the conflict in the educational requirements, and the petitioner’s failure to distinguish between the two positions, if the ETA 750 position does not require a bachelor’s degree to perform the duties of the position, then the H-1B position also does not require the minimum of a four year degree in a specialty. Thus, the I-129 H-1B approval would be subject to revocation.

Based on the foregoing, the petitioner has overcome the 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 been met.

ORDER: The appeal is sustained. The petition will be approved.