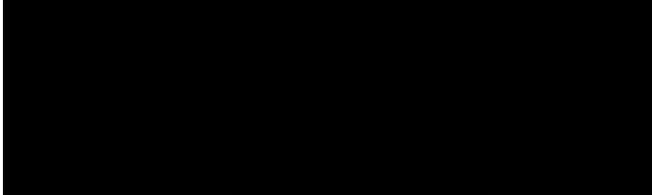




U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
WAC-05-030-53557

Office: CALIFORNIA SERVICE CENTER

Date: DEC 31 2007

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:



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, California Service Center (“director”) denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner operates a freight forwarding and international shipping business, and seeks to employ the beneficiary permanently in the United States as an accountant and auditor (“Accountant”). 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 22, 2005 decision, the petition was denied as the director concluded that the petitioner would not employ the beneficiary in accordance with the terms of the certified Form ETA 750.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).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 professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(ii), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

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.

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 U.S. Department of Labor (“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

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).

U.S. Department of Labor 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 for processing by the relevant office within the DOL employment system on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$26.96 per hour, 40 hours per week, which is equivalent to \$56,076.80 per year. The labor certification was approved on July 26, 2004. The petitioner filed an I-140 Petition for the beneficiary on November 15, 2004. The petitioner listed the following information on the I-140 Petition: established: January 26, 1995; gross annual income: \$7,665,707; net annual income: \$98,092; and current number of employees: 19.

On October 3, 2005, the petitioner and the beneficiary were interviewed at the Citizenship & Immigration Services ("CIS") Santa Ana, California District Office. Based on the interview and on information obtained at that interview, the director concluded that the petitioner did not intend to employ the beneficiary full-time as an accountant in accordance with the terms of the certified ETA 750. Specifically, the decision provided:

The President of the petitioning entity and beneficiary were interviewed, under oath, on October 3, 2005. The petitioner was asked what tasks the beneficiary had done, and what tasks the beneficiary would continue to do for the organization. The petitioner initially stated that the beneficiary had worked continuously as an accountant. The petitioner was advised that the Form ETA 750, Part B, indicated that the beneficiary had worked for the petitioner as an Import Manager. The petitioner then stated that the beneficiary may have done other tasks in the past, but was currently an accountant, and was intended to be an accountant for the company.

During the interview, the beneficiary stated that she has continuously performed the tasks listed on Form ETA 750, Part B, Section 15, under "WORK EXPERIENCE." The beneficiary stated that she spent roughly half of her time performing these operations tasks and roughly half of her time performing accounting tasks. The beneficiary stated that, to the best of her knowledge, she would continue to perform the same tasks into the future and after being granted permanent residence.

As the Form ETA 750 listed the activities of an accountant, and was certified for the position of an accountant, the director found that the petitioner did not intend to employ the beneficiary in accordance with the terms of the certified Form ETA 750. The director did note that the petitioner was not required to employ the beneficiary in the certified position "at this stage of the immigration process." Further, the director also noted that the petitioner "may have the capacity to support a full-time accountant. However, the record indicates that the petitioner has structured the beneficiary's job to include import management duties, and that the petitioner intends to have the beneficiary continue to perform those duties regardless of whether the beneficiary is a permanent resident." The petitioner appealed and the matter is now before the AAO.

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 Form 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).

CIS must look to the job offer portion of the labor certification to determine the required terms of, and 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). 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). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. *See* 20 C.F.R. § 656.30(c)(2).

On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as an accountant with duties including:

Apply principles of accounting to analyze financial information and prepare financial reports; compile and analyze financial information to prepare entries to accounts, such as general ledger accounts, documenting business transactions. Analyze financial information detailing assets, liabilities and capital, and prepare balance sheets, profit and loss statements, and other reports to summarize current and projected company financial position using the calculator and accounting software programs. Audit contracts, orders and vouchers, and prepare reports to substantiate individual transactions prior to settlement. Will establish, modify, document and coordinate implementation of accounting and accounting control procedures.

Further, the job offered listed that the position required:

Education:	Bachelor's degree
Major Field Study:	Accounting
Experience:	2 year in the job offered
Other special requirements:	Test will be given to verify ability to perform duties.

In contrast to the job offered, the beneficiary listed that she performed the following job duties on Form ETA 750B as an Import Manager for the petitioner from November 1999 to "the present" (date of signature: April 17, 2001): "Supervised personnel handling import operations. Coordinate with shipping lines regarding arrival schedules of vessels. Coordinate with the inland movement of shipments. Deals with agents abroad regarding shipments. Handles problems that may arise regarding customer complaints." The beneficiary did not list that she handled any accounting functions.

On Form G-325, filed with the beneficiary's I-485 Adjustment of Status application, the beneficiary listed

that she was employed by the petitioner as an Accountant from November 1999 to the present (signed on November 16, 2004).

The beneficiary also listed that she had prior experience as an Accountant with Express Line Corporation in Inglewood, California, from April 1998 to November 1999, and with World Wide Consolidated Freight Co., Sucat Paranaque, Philippines, from March 1989 to July 1995, for which she provided a letter to document her experience.

Based on the information obtained during the interview from the petitioner and the beneficiary, the director concluded that the petitioner would not employ the beneficiary in accordance with the certified ETA 750 job description above, and that the beneficiary would be performing work other than as an accountant. The beneficiary testified that she performed duties as an import manager, as well as an accountant, and expected that her mix of job duties would continue.

On appeal, counsel asserts the petition should have been granted, that the petitioner met its burden of proof to demonstrate its intent to employ the beneficiary; that the director's determination was speculative; that the Department of Homeland Security does not have jurisdiction to determine whether the petitioner complied with DOL regulations; and that the decision was based on unfavorable information, which was not contained in the record; and that the director failed to disclose evidence from the interview, and that the information, which formed the basis for the denial was first raised in the director's decision.

Counsel provides that the petitioner's burden of proof is based on the civil standard of preponderance of the evidence. *Matter of Soo Hoo*, 11 I&N 151 (BIA 1965). Further, he provides that the petitioner must show that it is financially able to pay the proffered wage, and that it intends to employ the beneficiary to perform the job duties as set forth in the job. *Matter of Romano*, 12 I&N Dec. 731 (Comm. 1968). Counsel provides that it is undisputed that the petitioner can pay the proffered wage, that it is undisputed that the beneficiary is working full-time, and that the beneficiary meets the qualifications of the labor certification.²

Counsel provides that the director erroneously concluded that the petitioner lacked the intent to employ the beneficiary in the certified position on the basis that the beneficiary was previously employed as an import manager in the past. On appeal, the petitioner submitted an offer of employment as well as a sworn statement that the petitioner's "nature and volume of work have changed to require the services of a full time accountant." Further, the petitioner provides that it will hire another import manager, so that the beneficiary can solely provide the services of an accountant.

The petitioner's president provided a statement, which was signed but not dated, and contained a declaration at the end that, "I declare under penalty of perjury that the foregoing is true and correct:"

I intend to comply with all the terms and conditions of the approved labor certification. [The

² The petitioner provided a letter in accordance with 8 C.F.R. § 204.5(l)(3) to show that the beneficiary had the required two years of prior experience, as well as a copy of the beneficiary's degree and educational evaluation to show that she had the required Bachelor's degree in Accounting for the position. The petitioner additionally submitted Forms W-2 to evidence its prior employment of the beneficiary. The beneficiary's W-2 Forms reflected the following payments: 2001: \$36,300; 2002: \$42,230.00; 2003: \$49,120.20; and 2004: \$58,565.00, as well as paystubs with a September 30, 2005 copy, which reflected year-to-date earnings of \$43,451.54. The petitioner additionally submitted its federal tax returns, which evidenced sufficient net income, or net current assets to pay the proffered wage.

beneficiary] will be employed on a full time basis and earn \$26.96 per hour after obtaining legal permanent residency . . . She will assume the position of Accountant.

...

[The beneficiary] has [been] employed by [the petitioner] from November 1999 to the present time. She was performing the duties of an accountant and an import manager. The company wishes to employ a full time accountant now for the following reasons:

The company's branch offices in New York, Chicago, and Atlanta were previously responsible for their own accounting. In 2004 all the accounting functions were shifted to the head office in California. Our California office now does all the accounting for our corporate office in California and the three branch offices.

[The petitioner's] gross sales increased from \$819,597 in 2002 to \$1,680,396 in 2004. We expect another 20 – 30% increase in sales revenue to be reflected in our corporate income tax return for 2005. This reflects the increased volume of our global transactions.³

...

The number of employees has increased from 12 in September 2004 to 15 in July 2005. We will hire another import manager so that [the beneficiary] will have the time to perform accounting duties on a full time basis.

The petitioner and the beneficiary were interviewed in 2005, but the petitioner did not raise the issue of the 2004 accounting consolidation transfer at that time, only on appeal after denial. The information obtained from the interview demonstrated that the beneficiary was still employed, after the 2004 transfer and consolidation of functions in a mixed position with job duties as both an Import Manager, and as an Accountant. Therefore, the petitioner's explanation is still in question.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel next argues that it is DOL and not DHS who may determine the issue of full-time employment. He asserts that DOL certifies the labor certification based on 20 C.F.R. § 656.24 and whether the employer has met the requirements of 20 C.F.R. § 656 and has shown that there are no qualified U.S. workers who are able, willing, qualified, and available at the place of the job opportunity. Further, counsel asserts that in the absence of fraud or willful misrepresentation that DOL's determination is not subject to review. Counsel asserts that CIS' role is to determine whether the beneficiary qualifies for the position described in the ETA 750, and that the petitioner has the ability to pay the proffered wage. Counsel contends that CIS now seeks to deny the I-140 petition on the basis of criteria for which CIS was never authorized to evaluate the petition in

³ We note that the petitioner's tax returns reflect a substantial increase in gross receipts: 2002: \$7,665,707; 2003: \$2,165,936; and 2004: \$19,615,030.

the first place.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

See also 20 C.F.R. § 656.3.

Following approval of the labor certification, that labor certification forms the basis for the job offer to the beneficiary. 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. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). It is within CIS' role to determine whether the job offer is realistic and that the petitioner intends to employ the beneficiary in accordance with the terms of the labor certification. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (R.C. 1979); *see also* 20 C.F.R. § 656.30(c)(2). The director determined that the record as a whole did not support that the petitioner would employ the beneficiary in the position offered. The petitioner essentially indicated at the interview that he would continue to employ the beneficiary in a dual capacity as an import manager, and as an accountant, and on that basis the director concluded that it was unlikely the petitioner intended to employ her as an accountant on a full-time basis. Therefore, it is reasonable to question whether the petitioner has a realistic and bona fide job offer for the beneficiary.

Counsel further contends that under 8 C.F.R. § 103.2(b)(16) an applicant shall be allowed to inspect the record of proceeding, and that the determination shall be based on information disclosed to the applicant or petitioner unless classified. Counsel contends that the derogatory information was only disclosed in the denial, but that CIS failed to disclose "its Memorandum of the Interview" to the petitioner.

8 C.F.R. § 103.2(b)(16) provides that "an applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as provided in the following paragraphs."

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [CIS] and of which the applicant is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

(ii) Determination of statutory eligibility. A determination of statutory eligibility shall be based only on information contained in the record of proceeding which is disclosed to the applicant or petitioner, except as provided in paragraph (b)(16)(iv) of this section.

The petitioner was informed of the need for an interview, and allowed to supplement the record at the time of the interview. During the interview, the petitioner and beneficiary were allowed to address questions relevant to the basis for denial. The director based the denial on information obtained from an interview with the beneficiary and the petitioner's owner, so that the conclusion was drawn from facts ascertained at the interview with the petitioner and beneficiary present. Therefore, the petitioner was aware of the derogatory information being considered by CIS.

While the evidence provided by the petitioner addresses the petitioner's additional growth and transfer of accounting functions, based on the petitioner's statement, this transfer occurred in 2004. The petitioner and the beneficiary were interviewed toward the end of 2005, and did not raise this issue or its need for an accountant based on the transfer of functions to California. Therefore, the petitioner's statement on appeal is in question. CIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, the Form ETA 750B and Forms G-325A conflict regarding the beneficiary's position title. The petitioner and beneficiary both provided information at the interview that the beneficiary would continue to complete duties related to both positions, as an Import Manager, and as an Accountant. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Based on the foregoing, the petitioner has failed to overcome the basis for denial, that the petitioner would not employ the beneficiary as a permanent full-time employee in accordance with the certified ETA 750. 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.