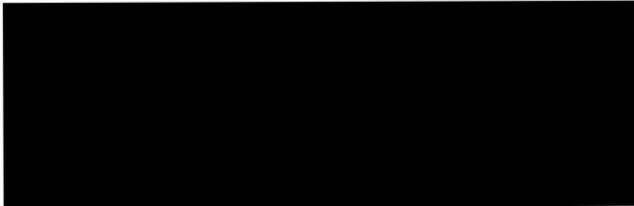




U.S. Citizenship  
and Immigration  
Services

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prevent clearly unwarranted  
invasion of personal privacy

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File: [Redacted]  
SRC-05-225-51463

Office: TEXAS SERVICE CENTER Date: JUL 26 2005

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:



PHOTOCOPY

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, Texas 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 is in the business of real estate, and seeks to employ the beneficiary permanently in the United States as a manager, real estate firm (“Operations Officer”), pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition was filed with a copy of Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor on behalf of another alien.<sup>1</sup>

The petitioner has filed to obtain an immigrant visa and classify the beneficiary as a professional. The regulation at 8 C.F.R. § 204.5(l)(2) 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 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).

The chronology of the case may be summarized as follows:

- On April 18, 2001, the petitioner filed the Form ETA 750 on behalf of the original beneficiary;<sup>2</sup>
- On March 30, 2002, the Form ETA 750 was approved on behalf of the original beneficiary;
- On April 22, 2002, the petitioner filed the Form I-140 petition for the original beneficiary;
- On September 17, 2002, the Form I-140 petition was approved on behalf of the original beneficiary;
- On October 10, 2002, the original beneficiary filed Form I-485 Adjustment of Status application to adjust to permanent residence based on the approved I-140;

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<sup>1</sup> We note that the record of proceeding is missing the original labor certification as required by 8 C.F.R. § 204.5(g)(1).

<sup>2</sup> We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services (“CIS”) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL’s final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

- On May 11, 2005, the original beneficiary's Form I-485 Adjustment of Status application to adjust to permanent resident status was approved based on the position offered in the April 18, 2001 labor certification;
- On August 12, 2005, the petitioner filed a petition on behalf of the present substituted beneficiary. On the I-140, the petitioner listed the following information: date established: 1998; gross annual income: \$382,908.00; net annual income: not listed; current number of employees: five;
- On October 21, 2005, the director issued a decision and denied the petition as the petitioner sought to substitute the present beneficiary based on a labor certification on which basis the original beneficiary had already adjusted status to lawful permanent resident. The labor certification was therefore no longer available for the present beneficiary to use.

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>3</sup>

The record shows that the appeal is properly filed, timely and makes an 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.

On appeal, counsel asserts that the petitioner submitted a request to withdraw the approved I-140 petition on behalf of the original beneficiary prior to filing the petition on behalf of the instant beneficiary, and prior to the adjustment of the original beneficiary. In support, counsel provides a copy of a letter request dated February 24, 2005 requesting that Citizenship and Immigration Services ("CIS") withdraw the I-140 petition approved on behalf of the initial beneficiary. Counsel additionally attached the Federal Express tracking information to exhibit CIS receipt of the petitioner's request. Counsel quotes the director's decision related to Legacy INS HQ Memo 27 (MM6E03),<sup>4</sup> which instructs CIS on implementation of the new labor certification substitution procedure:

The petitioner must also submit a written notice of withdrawal of the initial I-140 petition for which was based on the labor certification. The service center should ensure that the petitioner is not using the same labor certification more than once. The adjudicator must determine whether the original labor certification beneficiary has immigrated or applied for adjustment of status based on the labor certification and I-140 petition filed by the employer. If the service center determines that the substituted alien otherwise fails to meet the requirements for substitution, the I-140 petition should be denied.

Counsel asserts that it followed the enumerated procedures and that CIS was in error in approving the original beneficiary's I-485 Adjustment of Status application, and accordingly, that the instant beneficiary be substituted into the certified Form ETA 750 position.

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<sup>3</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).

<sup>4</sup> *See also* Memorandum, "Substitution of Labor Certification Beneficiaries," Louis Crocetti, Associate Commissioner, HQ 204.25-P (March 7, 1996). The authority to substitute labor certification beneficiaries was delegated to CIS solely at the discretion of DOL pursuant to a memorandum of understanding.

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.

The regulation at 20 C.F.R. § 656.30(c)(2) provides:

A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

The Act does not provide for the substitution of aliens in the permanent labor certification process. Similarly, both the CIS and the Department of Labor's regulations are silent regarding substitution of aliens. The substitution of alien workers is a procedural accommodation that permits U.S. employers to replace an alien named on a pending or approved labor certification with another prospective alien employee. Historically, this substitution practice was permitted because of the length of time it took to obtain a labor certification or receive approval of the Form I-140 petition. *See generally*, Department of Labor Proposed Rule, "Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity," 71 Fed. Reg. 7656 (February 13, 2006). The final rule related to labor certification substitution prohibits substitution, as well as the sale, barter, or purchase of permanent labor certifications and applications. The rule continues the Department's efforts to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656).

CIS may not approve a visa petition when the approved labor certification has already been used by another alien. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412 (Comm. 1986). Moreover, CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). Thus, while based on the date of filing the instant petition, CIS would permit the substitution of beneficiaries because of the delegation of authority from DOL, once the labor certification has been used for the original beneficiary, even in error, that labor certification is no longer available. The labor certification on which this petition is based already served as the basis of admissibility for the original beneficiary. Section 212(a)(5)(A) of the Act. Accordingly, the labor certification is no longer available to support the petitioner's application for the present beneficiary in the instant matter.

Further, although not raised in the director's denial, we find that the petitioner has failed to establish its ability to pay the beneficiary the proffered wage of \$46,700 from the time of the priority date until the beneficiary obtains permanent residence and should have been denied on this basis as well. 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). 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>5</sup>.

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

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, the petitioner has not indicated that it previously employed the beneficiary, or provided any documentation that it paid the beneficiary.<sup>6,7</sup>

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<sup>5</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).

<sup>6</sup> We note that CIS records reflect that the petitioner filed Form I-129 on behalf of the beneficiary on July 28, 2003, and a second extension I-129 on March 24, 2006, so that it appears the petitioner has employed the beneficiary.

<sup>7</sup> We note that the petitioner did not provide Form ETA 750B on behalf of the substituted beneficiary, which would list the beneficiary's prior work experience.

As the petitioner has provided no evidence of prior wage payment, the petitioner cannot establish its ability to pay the proffered wage based on prior wage payments to the beneficiary.

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 lists some income from other sources, so that we will take the income from Schedule K:

<u>Tax year</u> <sup>8</sup>	<u>Net income or (loss)</u>
2003	\$30,941
2002	\$34,234

The petitioner's net income would not allow for payment of the beneficiary's proffered wage of \$46,700 in any of the above years.

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

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<sup>8</sup> We note that the petitioner did not provide its 2001 federal income tax return, or any other regulatory prescribed evidence for the year 2001, the priority date year, to exhibit the petitioner's ability to pay the proffered wage in that year. Further, the petitioner did not provide its 2004 federal tax return, which may or may not have been available at the time of filing the I-140 petition. Thus, the petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date as required by 8 C.F.R. § 204.5(g)(2).

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>
2003	-\$34,852
2002	-\$25,182

Following this analysis, the petitioner's federal tax returns show that the petitioner similarly lacks the ability to pay the proffered wage in any of the above years based on net current assets as well.

Additionally, we note that CIS records reflect that the petitioner has filed for multiple beneficiaries and the petitioner would need to demonstrate that it could pay for all sponsored beneficiaries from the time of the respective priority dates until each beneficiary obtains permanent residence. As the petitioner has not established that it can pay the proffered wage for the instant beneficiary, the petitioner also cannot establish that it can pay the proffered wage for all respective beneficiaries that the petitioner has filed for.

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.