

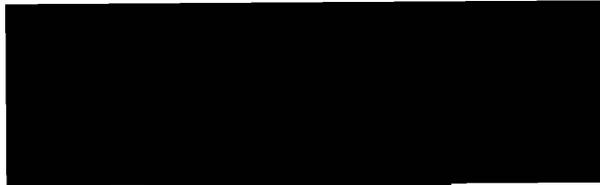


U.S. Citizenship
and Immigration
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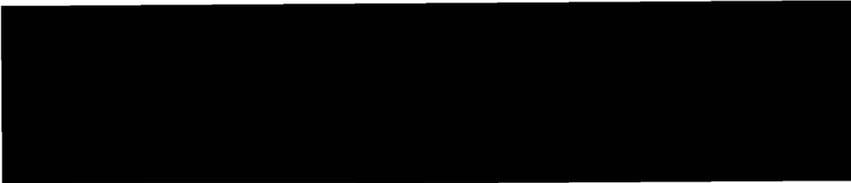
File: [Redacted]
SRC-05-132-50167

Office: TEXAS SERVICE CENTER Date: JUN 14 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, Texas Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The petition will be remanded in accordance with the instructions below.

The petitioner operates a convenience store and seeks to employ the beneficiary permanently in the United States as a manager, retail store (“Store Manager”). 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 June 14, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date 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. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

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 November 27, 2002. The proffered wage as stated on Form ETA 750 for the position is \$37,000 per year based on a 40 hour work week. The labor certification was approved on June 15, 2004, and the petitioner filed the I-140 petition on the beneficiary's behalf on April 8, 2005. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: October 1, 1999; gross annual income: \$2,833,198; net annual income: \$69,616; and current number of employees: four.

On May 10, 2005, the director issued a Request for Evidence ("RFE"), requesting that the petitioner submit evidence related to the petitioner's ability to pay, including the petitioner's federal tax returns for 2002, and 2004, or annual reports, or audited financial statements for those years; and W-2 Forms if the petitioner employed the beneficiary. The petitioner responded. Following consideration of the response, on June 14, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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 instant case, there is no evidence that the petitioner employed the beneficiary. On Form ETA 750B, signed by the beneficiary on September 20, 2002, the beneficiary did not list that he was employed with the petitioner. The petitioner did not claim that it had employed the beneficiary, and did not provide any W-2 statements for the beneficiary. Therefore, the petitioner cannot demonstrate its ability to pay the proffered wage through 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, Citizenship & Immigration Services ("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 petitioner is structured as 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). Line 21 shows the following income:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	-\$96,900
2003	\$69,616
2002	-\$137,770

The petitioner's net income would allow for payment of the beneficiary's proffered wage in 2003, but not 2002 or 2004.

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.² 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	\$284,298
2003	\$112,748
2002	\$52,447

Following this analysis, the petitioner's federal tax returns show that the petitioner can pay the proffered wage in all of the above years.

On appeal, counsel provides that CIS erred in its calculation of the petitioner's net current assets. We agree. The petitioner can demonstrate its ability to pay the proffered wage from the priority date onward based on the petitioner's net current assets.

Further, although not raised in the director's denial, we find that the documentation submitted to show the beneficiary's prior work experience is insufficient. 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).

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

²According 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.

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). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d).

The beneficiary must demonstrate that he had the required skills by the priority date. On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a store manager, or two years in a related occupation as a general manager with job duties including: "Manage store operations, order food supplies. Supervise and train employees, assign job duties, work schedules and evaluate performance. Perform daily accounting of funds and prepare banking transactions; reconcile cash with sales receipts. Maintain payroll and tax accounting." The petitioner listed no educational requirements in Section 14, and listed special requirements for the position in Section 15 as "experiential references required."

On the Form ETA 750B, signed by the beneficiary on September 20, 2002, the beneficiary listed his prior experience as: (1) AAM Food Mart, Chamblee, GA, April 2001 to present (date of signature, September 20, 2002), Store Manager; and (2) Standard Polymers, Mumbai, India, from January 1999 to April 2001, Manager (general).

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

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

As evidence to document the beneficiary's qualifications, the petitioner submitted the following letter:

1. Letter from "Proprietor" [no name listed], Standard Polymers, Mumbai, India, undated;
Dates of employment: January 1999 to April 2001;
Title: Manager

Job Duties: “He managed store operations, maintained inventories & supplies, supervised, hired, and trained employees and used to do the stock accounting for the firm.”

The beneficiary listed Standard Polymers business as “plastics manufacturing” on Form ETA 750. Accordingly, the letter’s reference to store operations would seem out of place for a manufacturer as the business is not retail based. Additionally, we note that no name is listed for the individual that signed the letter, which fails to conform to the regulatory requirements of 8 C.F.R. § 204.5(I)(3)(ii)(A). We find that the letter is vague, and question that Standard Polymers has “store operations,” or that the letter is sufficient to document that the beneficiary has the required experience to meet the requirements of the certified ETA 750. As this issue was not previously raised, the petitioner should have an opportunity to address this issue on remand.

In accordance with the foregoing, we will remand the petition to the director to issue an RFE related to the beneficiary’s prior work experience to show that he meets the requirements of the certified ETA 750. 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.

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