

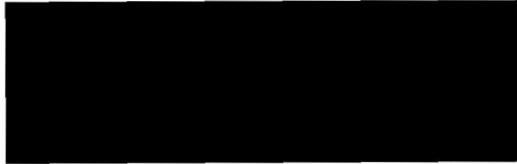


U.S. Citizenship
and Immigration
Services

PUBLIC COPY

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

B6



FILE: [Redacted] SRC 04 028 51041

Office: TEXAS SERVICE CENTER

Date: MAR 19 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:

SELF REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner¹ is an export-import corporation. It seeks to employ the beneficiary permanently in the United States as a foreign trade economist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary meets the requirements listed on the labor certification, and, therefore, the beneficiary does not qualify for the position of foreign trade economist. The director denied the petition accordingly.

According to the petition when filed,² the company was established in 1999, and, it employed two individuals.

The record shows that the appeal is properly filed and 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.

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 demonstrate that, on the priority date, (*See* 8 CFR § 204.5(d)) the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the 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 on February 14, 2001.

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 appeal³.

¹The petitioner is also known as [REDACTED], and, it trades and does business as LAER.

² The petitioner appears to have retained representation. The petitioner's ostensible representative filed a Form G-28, Notice of Entry of Appearance in this matter. That notice does not state that the representative is an attorney. Further, that putative representative's name does not appear on the roster of accredited representatives. The record contains no indication that the petitioner's ostensible representative is authorized to represent the petitioner. All representations will be considered, but the decision will be furnished to the petitioner. The regulation at 8 C.F.R. § 103.2(a)(3) specifies that a petitioner may be represented "by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter." *See* <http://www.usdoj.gov/eoir/profcond/chart.htm>. The ostensible representative, who is a notary public in Florida according to the record, is not an attorney accepted into the Florida bar, according to the information at < <http://www.floridabar.org/names.nsf> > accessed January 21, 2007, or an authorized representative in the records of the U.S. Department of Justice.

³ 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).

The Evidence Submitted to Demonstrate the Beneficiary’s Qualifications.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 13, 14 and 15, set forth the job description, minimum education, training, and experience that an applicant must have for the position of foreign trade economist as follows:

13. Describe Fully the Job to be Performed (*Duties*)

Export – Import of cosmetics to existing western European markets with [sic] which the company is already in business, as well as new eastern European market research.

14. State in detail the MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties described in item 13:

| | |
|---|---|
| Education (enter number of years) | |
| Grade School | <u>8</u> |
| High School | <u>4</u> |
| College | <u>Blank (as Certified)⁴</u> |
| College Degree Required | <u>Blank (as Certified)</u> |
| Major Field of Study | <u>Blank (as Certified)</u> |
| Training | <u>N/A</u> |
| Experience | |
| Job Offered | |
| Number –Years / Mos. | <u>2/4</u> |
| Related Occupation | |
| Number –Years / Mos. | <u>N/A</u> |
| Related Occupation | |
| Specify | <u>N/A</u> |

15. Other Special Requirements

Special purpose language in the field [sic] English, Hungarian, Russian [languages].

⁴ “Blank (as Certified)” that in the Alien Employment Certification process means this item was eventually left blank although originally it contained information.

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she represented that she has been as a foreign trade specialist from 1994 through October 1996 with the Budacolor Paint-Factory Ltd., of Budapest, Hungary.

According to a letter in the record of proceeding dated June 3, 2005, from [REDACTED], and, a letter from the petitioner dated May 30, 2005, the beneficiary arrived in the United States in 1997, and after receiving employment authorization on November 6, 2002, began employment with the petitioner.

With the petition filed November 6, 2003, the petitioner submitted copies (unless indicated otherwise) of the following documents: a copy of the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; Articles of Incorporation of the petitioner filed September 1999; Form SS-4; biographic pages from the beneficiary's passport; the beneficiary's U.S. entry visa, and, I-94 departure record; two CIS notice of Action forms; the beneficiary's marriage record and birth certificate; the beneficiary's "Curriculum Vitae" statement; a "Sponsor Statement;" a diploma that stated that the beneficiary graduated from the College of Foreign Trade, in Szeged, Hungary where she attended "1992/93" – "1995/96" and "she was declared qualified Foreign Trade Economist;" and, a "Certificate of Employment" from the Budacolor Paint-Factory Ltd., of Budapest, Hungary as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on January 25, and April 22, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, and, consistent with 8 C.F.R. § 204.5(l)(3), that the beneficiary possesses 2 years and 4 months of experience and the high school education as specified in the labor certification. The director requested copies of the beneficiary's degrees, transcripts and certificates as well as job verification(s) with name, address and title of the writer, from prior employer(s) or trainers with the beneficiary's job title, duties, dates of employment and number of hours worked.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(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.

In response to the above, the petitioner submitted copies of the following documentation: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a high school diploma stating that the beneficiary graduated in 1992; a diploma that stated that the beneficiary graduated from the College of Foreign Trade, in Szeged, Hungary where she attended "1992/93" – "1995/96" and "she was declared qualified Foreign Trade Economist;" a "Certificate of Employment" from the Budacolor Paint-Factory Ltd., of Budapest, Hungary, that the beneficiary was employed part-time besides her

studies at the university from 1994 to 1996, and thereafter from July 1, 1996 to October 25, 1996 full-time as an export-import foreign trade specialist; and three U.S. federal tax returns Form 1120 for the years 2001, 2003 and 2004.

The director denied the petition on May 24, 2005, finding that the petitioner had not established that the beneficiary meets the requirements listed on the labor certification, and, therefore, the beneficiary does not qualify for the position foreign trade economist. Specifically, the director found that according to a "Certificate of Employment" dated December 29, 1996, from the Budacolor Paint-Factory Ltd., of Budapest, Hungary, that the beneficiary was employed part-time from 1994 to 1996 and from July 1, 1996 to October 25, 1996 full-time as an export-import foreign trade specialist which job experience is less than the two years and four months required by the labor certification.

On appeal filed June 10, 2005, the petitioner made no statement on the I-290B Form. The petitioner failed to identify specifically an erroneous conclusion of law or a statement of fact as a basis for the appeal.⁵

On appeal the petitioner submitted copies of the following documentation: a letter from the petitioner dated June 3, 2005 stating in pertinent part that the U.S. Department of Labor received the job experience "Certificate of Employment" dated December 29, 1996, from Budacolor Paint-Factory Ltd., of Budapest, Hungary and it did not distinguish between full and part-time employment (and by implication neither should the Citizenship and Immigration Services); the beneficiary's joint personal tax return for 2004 stating wages received of \$40,869.00 with a W-2 Wage and Tax statement from the petitioner stating wages of \$30,307.00 were paid to the beneficiary in 2004.

The petitioner also re-submitted previously submitted documentation: the petitioner's U.S. federal tax return Form 1120 for the year 2004; a copy of the original Form ETA 750, Application for Alien Employment Certification; a diploma that stated that the beneficiary graduated from the College of Foreign Trade, in Szeged, Hungary where she attended "1992/93" – "1995/96" and "she was declared qualified Foreign Trade Economist;" and, a "Certificate of Employment" from the Budacolor Paint-Factory Ltd., of Budapest, Hungary, that the beneficiary was employed part-time besides her studies at the university from 1994 to 1996 and full-time thereafter from July 1, 1996 to October 25, 1996.

As already stated, the petitioner by letter dated June 3, 2005 stated in pertinent part that the U.S. Department of Labor received the job experience "Certificate of Employment" dated December 29, 1996, from Budacolor Paint-Factory Ltd., of Budapest, Hungary. The petitioner stated that the U.S. Department of Labor did not distinguish between full and part-time employment and, therefore, by implication neither should the Citizenship and Immigration Services (CIS) on that question. We disagree.

In determining the respective jurisdictions of the U.S. Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. *See Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d

⁵ The petitioner's statement on appeal contains no specific assignment of error. Alleging that the director erred in some unspecified way is an insufficient basis for an appeal. 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."

1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect which the grant of a visa would have on the employment situation. The CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true. A plain reading of the minimum requirements of the labor certifications are in years and months of job experience. A work-week is indicated on the labor certification as 40 hours weekly. Therefore, the CIS and AAO do distinguish between full-time and part-time prior job experience.

Although the advisory opinions of other Government agencies are given considerable weight, CIS has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved. In this instance, by all the evidence presented in this matter prior to the priority date, the beneficiary had four months full-time and an indeterminate two years part-time job experience in the position of foreign trade specialist. There was no evidence presented that the positions of foreign trade specialist and the proffered position of foreign trade economist are comparable.

The AAO thus affirms the director's decision. The preponderance of the evidence does not demonstrate that the beneficiary acquired two years and four months of job experience in the position foreign trade economist from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that she is qualified to perform the duties of the proffered position from the priority date.

Ability to Pay the Proffered Wage.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Director 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).

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. *See* 8 C.F.R. § 204.5(d). The Form ETA 750 was accepted on February 14, 2001. The proffered wage is \$891.40 weekly (\$46,352.80 yearly).

The regulation at 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.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first 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. Evidence was submitted to show that the petitioner employed the beneficiary. A W-2 Wage and Tax statement was submitted stating wages paid by the petitioner to the beneficiary of \$30,307.00 in 2004.⁶ Since the proffered wage is \$891.40 weekly (\$46,352.80 yearly) the petitioner did not pay the beneficiary the proffered wage in 2004. The petitioner must demonstrate that it is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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*, the court held that the 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.⁷ *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng* at 537.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$46,352.80 per year from the priority date of February 14, 2001:

- In 2001, the Form 1120 stated a loss⁸ of <\$16,130.00>.⁹

⁶ Since the total gross income for the petitioner for 2004 was only \$44,000.00, the beneficiary's wages of \$30,307.00 paid in 2004, seems disproportionate to the revenues of this company. According to the petition dated October 29, 2003, when the petition was prepared the petitioner had a gross annual income of \$247,620.00 with net annual income of \$218,410.00. These figures are not supported by the financial evidence submitted. We note that the petitioner failed to submit its 2002 tax return. If this petition is pursued, these matters should be reviewed.

⁷ Gross receipts (Line 1a) on the return for 2001, 2003 and 2004 were "NONE," \$32,000.00 and \$44,000.00 respectively. The 2002 tax return was not submitted.

⁸ Internal Revenue Service Form 1120, line 28, "Taxable income before net operating loss deduction and

- A tax return for 2002 was not submitted.
- In 2003, the Form 1120 stated net income of \$1,065.00.
- In 2004, the Form 1120 stated net income of \$2,693.00.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has net income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have net income sufficient to pay the proffered wage or the difference between wages actually paid and the proffered wage, at any time for which the petitioner's tax returns are offered for evidence. Also, in the subject case the petitioner has not paid the beneficiary the proffered wage from an examination of the evidence submitted found in the record of proceeding.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁰ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

Examining the Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, 2003 and 2004, petitioner's Form 1120 returns stated current assets of \$500.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$500.00 in net current assets. Since the proffered wage is \$46,352.80 per year, this sum is less than the proffered wage.

In the subject case, as set forth above, the petitioner did not have net income sufficient to pay the proffered wage or the difference between wages actually paid and the proffered wage, at any time for which the petitioner's tax returns are offered for evidence. Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

special deductions...."

⁹ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

¹⁰ According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary had the requisite two years and four months of experience as a foreign trade economist. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.