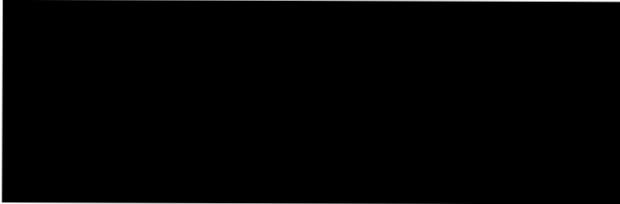




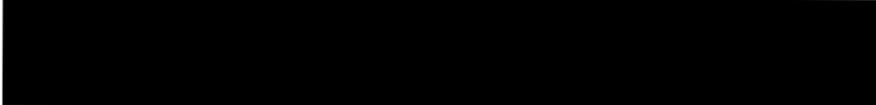
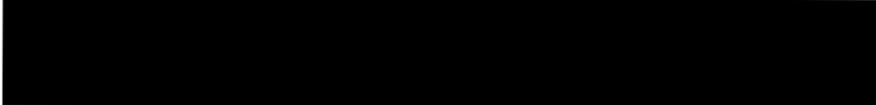
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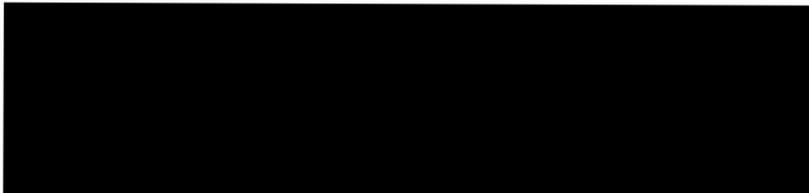
FILE: 
WAC-02-198-53819

Office: CALIFORNIA SERVICE CENTER Date: **MAY 24 2007**

IN RE: Petitioner: 
Beneficiary: 

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

The petitioner operates a retail food market, and seeks to employ the beneficiary permanently in the United States as a market research analyst (“Marketing Analyst”). 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 September 28, 2005 denial, the case was denied as the director concluded that the beneficiary would not be employed as a permanent full-time employee in accordance with the certified ETA 750.

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 professional or a skilled worker. 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 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 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 October 6, 1998. The proffered wage as stated on the Form ETA 750 is \$30.86 per hour,² 40 hours per week, which is equivalent to \$63,814.40 per year. The labor certification was approved on May 1, 2002. The petitioner filed an I-140 Petition for the beneficiary on June 3, 2002. The petitioner listed the following information on the I-140 Petition: established: July 3, 1993; gross annual income: \$2,571,337; net annual income: not listed; and current number of employees: 25.

The director issued a Request for Evidence ("RFE") on August 29, 2002 requesting that the petitioner provide documentation regarding the beneficiary's experience to show that she met the education and experience requirements of the certified ETA 750; and evidence of the petitioner's ability to pay for the years 1998 to 2001. **The petitioner submitted a response to the RFE. On September 19, 2005, the beneficiary was interviewed at the Citizenship and Immigration Services ("CIS") Santa Ana, California District Office.** Based on the interview, the director concluded that the petitioner did not intend to employ the beneficiary full-time in accordance with the terms of the certified ETA 750. The director denied the petition on September 28, 2005. 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 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).

² The petitioner initially listed a wage of \$12 per hour, which would be equivalent to an annual salary of \$24,960 per year. DOL required that the petitioner increase the wage to \$30.86 per hour based on the education and experience required prior to certification.

On the Form ETA 750A, the “job offer” states that the position requires two years of experience³ in the job offered, as a marketing analyst with duties including:

Devise methods to increase profitability, manage expenses and reduce department overhead. He/She will: Analyze statistics and other types of data, such as annual revenues and expenditures so as to develop solutions to decrease the overhead expenses; analyze the marketing conditions in local and regional areas to increase potential uses for the services that the company offers; analyze data gathered through questionnaires and opinion poles [sic] and organize findings of the studies and prepare recommendations for implementation of the changes that client request; examine and analyze demographical data to forecast future marketing trends; review the data gathered on the competitors and analyze prices and methods of marketing and distribution and make recommendations and assist in the implementation of the proposal.

The petitioner listed educational requirements in Section 14 as: 4 years of college and a Bachelor’s degree in Business Administration or Marketing. The offer is based on a 40 hour work week with a schedule of 9:00 a.m. to 6:00 p.m.

On September 19, 2005, CIS interviewed the beneficiary at the local Santa Ana District Office. At the interview, the petitioner confirmed that it currently employed the beneficiary as a market analyst, and that she began working for the petitioner in May 1997 on a part-time basis. She initially worked approximately 20 hours per week, but now was working 30 hours per week, and was paid a salary of \$2,200 per month. The beneficiary said that she worked five days a week, approximately six hours per day.⁴ Her job duties included: reviewing sales projections, product analysis, addressing product complaints, and customer service issues. She assisted with market analysis at two of the petitioner’s other locations.⁵ No one else conducted market research for the petitioner.

The director concluded that since the beneficiary is able to perform all the market research for three locations on a part-time basis, that the petitioner did not require a full-time market research analyst. Further “the

³ The petitioner provided documentation in accordance with 8 C.F.R. § 204.5(l)(3) that the beneficiary had the required two years of prior experience. The petitioner submitted a copy of the beneficiary’s bachelor’s degree in Business Administration obtained in the Philippines.

⁴ The record contains the following W-2 statements for the beneficiary, which confirms that the petitioner has employed the beneficiary:

<u>Year</u>	<u>W-2 Wages</u>
2004	\$26,400
2003	\$26,400
2002	\$22,626
2001	\$21,719.97
2000	\$18,455.41
1999	\$16,284.60
1998	\$16,807.80
1997	\$9,940.80

⁵ The petitioner has three locations, two in Diamond Bar, California, and a third in Ontario, California. The petitioner employs 51 people at the three locations.

petitioner did not satisfy [CIS] on [its] need for a permanent full time market analyst from the priority date of October 6, 1998 to the present. The petitioner has established he has been able to open 2 additional stores since October of 1998 and show a profit without a permanent full time market analyst.”

On appeal, counsel⁶ provides that the I-140 Petition represents a future job offer, that INA § 203(b)(3) provides that a permanent job offer is required, and that there is no requirement that the petitioner prove its need for a permanent full-time market analyst at the time of filing of the labor certification, the priority date. Further, counsel contends the issue that the beneficiary has worked part-time previously is not relevant.

We agree that the I-140 position is a “future job offer,” in that the petitioner is not required to employ the beneficiary in the certified position until the beneficiary adjusts status. However, while the issue of the beneficiary’s prior part-time employment is not relevant to the question of the beneficiary’s future employment, the issue of the beneficiary’s part-time employment is relevant to the question of whether the job offer is realistic.

As noted previously, 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 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).

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.

Inherent in the labor certification process is the need to document that there are not any qualified available U.S. workers. The petitioner would have advertised the position, and had there been a qualified U.S. worker, the petitioner would have had to offer the U.S. worker the position. *See* 20 C.F.R. § 656. Included in the job offer is the wage and hour information. The petitioner would have offered a qualified U.S. worker a full-time position in accordance with the ETA 750 job offer. As a result, for the job offer to be realistic, the petitioner would have needed to be able to offer a qualified U.S. worker a full-time position at the time that the position

⁶ A different attorney filed the appeal on the petitioner’s behalf.

was advertised. The petitioner did not demonstrate that, despite employing the beneficiary part-time, allegedly on the advice of prior counsel, that it would have been able to employ the beneficiary on a full-time basis at any time throughout the labor certification process. The employer bears the burden of proving that a position is permanent and full-time; if the petitioner's evidence does not demonstrate that the position is permanent and full-time, a certification may be denied.⁷ A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel further contends that the denial is speculative that the beneficiary would not be full-time when the petitioner attested that he would employ the beneficiary full-time, and that the director's decision is arbitrary and capricious. Counsel cites to *Omni Packaging Inc. v. INS*, 733 F. Supp. 500 (D.P.R. 1990) citing *Bowman Transportation Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974) in support. 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 rather than arbitrary speculation.

Counsel provides that federal case law dictates that the "threshold issues" in determining whether a job is permanent are: "1. whether the job requirements have substantially changed or increased, and 2. whether the nature and volume of the work justifies full-time employment." See *Matter of Izdebska*, 12 I&N 54 (Dec. 1966). Counsel summarizes and seeks to distinguish *Matter of Izdebska* and provides that the Board of Immigration Appeals ("BIA") determined that an employer did not require a full-time, live-in maid when the employer managed his household using the services of a housekeeper once a month. Further, the employer's circumstances had not changed to show that he would require more help. The BIA denied the I-140 since the petitioner could not ensure full-time employment in the future. Counsel contends in contrast that the petitioner here can demonstrate its need for a full-time market research analyst through the company's "rapid expansion" demonstrated in the petitioner's tax returns and in the owner's declaration." The owner's declaration attests that the company opened a second branch in 2002, a bakery in 2004, and that it intended to open another branch in November 2005.

Aside from the owner's statement, counsel has not provided any evidence regarding the "rapid expansion" of the petitioner's business. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel does not provide what aspect of the petitioner's tax return reflects the rapid expansion. If we were to examine the petitioner's tax returns, they would reflect the following:

⁷ See *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988).

<u>Year</u>	<u>Net Income</u> ^{8,9}	<u>Net Current Assets</u> ¹⁰	<u>Gross Receipts</u>
2004	-\$57,878	\$54,730	\$2,682,088
2003	-\$1,660	\$94,507	\$2,381,329
2002	\$69,291	\$69,934	\$2,545,904
2001	\$121,052	\$208,052	\$2,567,889
2000	\$29,839	\$114,658	\$2,254,083
1999	\$47,621	\$95,950	\$2,076,890
1998	\$91,761	\$134,360	\$1,738,586

The petitioner's net income, net current assets, or gross receipts reflected on the tax returns do not exhibit the expansion of income or sales with the petitioner's expanded business. Counsel has not provided which aspect of the petitioner's tax return reflects the "rapid expansion." In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

⁸ 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).

⁹ Counsel contends that the petitioner can demonstrate its ability to pay. We note that the W-2 wages paid to the beneficiary in combination with either the petitioner's net income, or net current assets would demonstrate the petitioner's ability to pay for the instant beneficiary. However, the petitioner has filed for a second beneficiary as well, and would need to demonstrate that the petitioner can pay for both beneficiaries. Forms 941 Quarterly wages submitted show that the petitioner has paid some wages to the second beneficiary, but we are unable to conclude definitively from the record before us that the petitioner can demonstrate its ability to pay for both beneficiaries.

¹⁰ Net current assets are the difference between the petitioner's current assets and current liabilities. 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. 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 petitioner did not provide any documentation related to an increase in the beneficiary's hours as the business expanded, any documentation of the beneficiary's previous hours worked, any documentation related to competitive marketing plans required for the business presently or as it expands, or any information related to the industry, and that a business of the petitioner's nature would require a full-time market research analyst.

Additionally, we note that the petitioner has employed the beneficiary since 1997 and has not paid the beneficiary more than \$26,400 during this time period. The petitioner would be required to pay the beneficiary \$63,814.40, or \$37,414.40 more in wages based on the higher wage that DOL assessed for the position prior to certification. The petitioner has provided a statement that they intend to pay the beneficiary the proffered wage. However, in reviewing the petitioner's quarterly Forms 941, for the quarter ending June 30, 2005, submitted with the application, we note that the highest quarterly wages reflected on the forms for any employee wage was \$10,461, for an annual wage of \$41,844. The Form 941 reflects that one of the petitioner's owner's earned \$8,475.45 quarterly for an annual wage of \$33,900. Given the quarterly wages reflected, it is questionable, despite the owner's statement that the beneficiary will be paid the proffered wage. The owner's statement asserts that the petitioner was in the process of converting the beneficiary's employment to full-time at the proffered wage. The petitioner did not submit on appeal, or supplement its filing, with evidence to show that the beneficiary was paid the proffered wage.¹¹ The petitioner must establish that the job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Based on the foregoing, the petitioner has failed to overcome the basis for denial, and has failed to demonstrate that the petitioner can offer a full-time position, and that the job offer is realistic. 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.

¹¹ We note that while the petitioner is not required to pay the proffered wage until the beneficiary obtains permanent residence, a demonstration that the petitioner was now paying the proffered wage, would provide evidence that the job offer was realistic.