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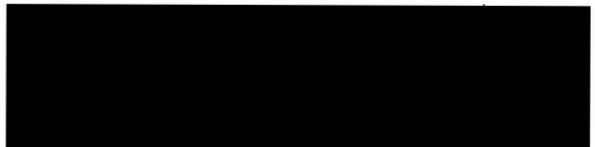
U.S. Department of Homeland Security
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Washington, DC 20529



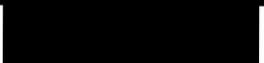
U.S. Citizenship
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File:



EAC-05-187-52226

Office: VERMONT SERVICE CENTER

Date: FEB 07 2008

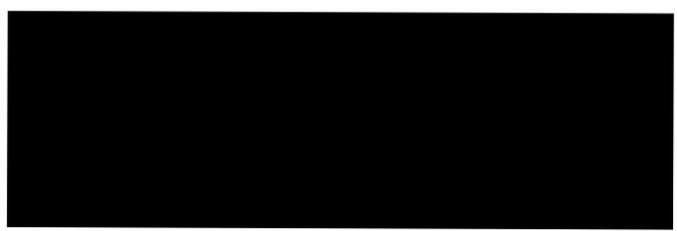
In re:

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 Director, Vermont Service Center (“director”), denied the immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a restaurant, and seeks to employ the beneficiary permanently in the United States as a baker (“Baker, Line Cook, Prep”). 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 January 31, 2006 decision, the petition was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

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 an immigrant visa and classify the beneficiary as a skilled worker. 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 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

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).

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 the case at hand, the petitioner filed Form ETA 750 with the relevant DOL state workforce agency on November 8, 2002. The proffered wage as stated on Form ETA 750 is \$11.72 per hour, equivalent to \$24,377.60 per year based on a 40-hour work week. The labor certification was approved on April 11, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on June 20, 2005. The petitioner listed the following information: established: 2002; gross annual income: \$350,000; net annual income: not listed; and current number of employees: 15.

On September 21, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide additional evidence of the petitioner's ability to pay the proffered wage from the date of November 8, 2002 onward, as the tax returns that the petitioner had submitted failed to demonstrate its ability to pay. The RFE additionally requested that the petitioner provide W-2 statements for the years 2002, 2003, and 2004 if the petitioner employed the beneficiary. The petitioner responded. On January 31, 2006, the director determined that the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage, and denied the petition. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("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. On Form ETA 750B, signed by the beneficiary on October 31, 2002, the beneficiary did not list that he was employed with the petitioner. The petitioner provided in response to the RFE that the beneficiary "has been included in the payroll account since his beginning date of employment and continues to be to date." The petitioner, however, did not provide any W-2 statements, Forms 1099, or copies of any of the beneficiary's pay statements to evidence that the petitioner paid the beneficiary.

On appeal, the petitioner provided the beneficiary's 2005 Form W-2, which exhibited wages paid to the beneficiary in the amount of \$21,474.50.

The W-2 Form lists that the "Restaurant Group L Uva LLC" paid the beneficiary his wages. The Restaurant Group L Uva LLC lists an address of: [REDACTED] with a Federal Employment Identification Number ("FEIN") of [REDACTED]. The petitioner listed on Form ETA 750, and Form I-140 is: "The Federal Restaurant & Bar," [REDACTED] with an [REDACTED]. The two entities appear to be the same, however, the petitioner did not provide any information that "The Federal Restaurant & Bar" is part of the Restaurant Group L Uva LLC, or that Restaurant Group L Uva does business as the Federal Restaurant & Bar.²

² Massachusetts corporate information has a listing for the Restaurant Group L'Uva, LLC, but the registration does not provide any information regarding a "dba" or that it trades under any other names.

The petitioner additionally provided copies of the first page of the beneficiary's Form 1040 individual tax return along with printed out copies of W-2 earnings showing earnings from the Restaurant Group L Uva LLC. For 2003, the petitioner paid the beneficiary \$14,796.88, and in 2004, the petitioner paid the beneficiary \$17,107. The petitioner did not provide a Form W-2 or wage print out for 2002, but the beneficiary lists that he earned \$7,994 in wages in that year.

We note that the director specifically requested in her RFE that the petitioner submit the beneficiary's Forms W-2. The petitioner failed to do so. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.³

Additionally, we note that the amounts paid to the beneficiary in each year are less than the proffered wage. As the petitioner failed to timely provide evidence of prior payment to the beneficiary in response to the RFE, the information submitted on appeal will not be considered.

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.

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

See

<http://corp.sec.state.ma.us/corp/corptest/CorpSearchSummary.asp?ReadFromDB=True&UpdateAllow> (accessed January 14, 2008).

The petitioner initially filed its appeal on February 21, 2006. The petitioner subsequently provided additional evidence on March 16, 2006. In counsel's letter, he requests additional time to submit the Forms W-2. As this evidence was previously requested, and counsel provided no reason for the delay in submitting the evidence in response to the RFE or why it could not be submitted at the time of the appeal, the petitioner will not be allowed additional time to submit the Forms W-2.

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 submitted tax returns for the Restaurant Group L'uva, LLC, which was initially structured as a C corporation, but changed to an S corporation as of April 1, 2004.

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>, (accessed February 15, 2005). The petitioner does not list any additional income so we will take the petitioner's net income from line 21:

Net income or (loss)
-\$45,028

For the years 2002, and 2003, the Restaurant Group L'uva, LLC was structured as a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The tax returns submitted state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	-\$34,451
2002	-\$17,427

The net income would not allow for payment of the beneficiary's proffered wage in any of the above years. Similarly, we note that the petitioner did not provide evidence that the Restaurant Group L'uva does business as the Federal Restaurant & Bar.

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 1120. 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

⁴ The 2004 tax return for the Restaurant Group L'uva, LLC reflects filing for the tax year beginning April 1, 2004, the effective date of S election, through December 31, 2004. The Restaurant Group L'uva, LLC's tax returns for 2002, and 2003 do not reflect that filing based on a tax year, but instead appear to be based on a calendar year filing.

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	\$18,865
2003	\$8,521
2002	\$26,660

Based on the petitioner's net current assets, it would be able to demonstrate its ability to pay the proffered wage in 2002, but not in any other year.

The petitioner additionally submitted a letter on letterhead for the "Center for Extended Care at Amherst," which provided confirmation of the job offer to the beneficiary. It is unclear why the petitioner was unable to provide the offer on the petitioner's own letterhead.

On appeal, counsel provides that the petitioner can pay the proffered wage, and submitted the beneficiary's W-2 Form for 2005, W-2 print-outs for 2003, and 2004 exhibiting payments to the beneficiary by the Restaurant Group L'Uva, as well as a copy of the beneficiary's Form 1040 for the years 2002, 2003, and 2004.

As noted above, the director requested this information in an RFE. The petitioner failed to provide it at that time. Accordingly, as the petitioner failed to provide this information in response to the RFE, it will not be accepted on appeal. See *Matter of Soriano*, 19 I&N Dec. at 764.

Accordingly, the petitioner has failed to establish its ability to pay the proffered wage.

Further, although not raised in the director's denial, the petitioner has failed to show that the beneficiary meets the requirements of the certified ETA 750. 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 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).

On the Form ETA 750A, the "job offer" description for a baker, line cook, prep provides:

Makes bread, pasta and desserts. Help preparing throughout the day. Works the line.

Further, the job offered listed that the position required:

Education: none

Major Field Study: none

Experience: 2 years in the job offered;

Other special requirements: none listed.

On the Form ETA 750B, the beneficiary listed his relevant experience as: (1) Alchemy, Edgartown, MA, from March 2001 to April 2002, position: cook (seasonal); (2) Savoir Fare, Edgartown, MA, from March 1998 to March 2001, position: (seasonal) cook; and (3) the News, Edgartown, MA, dates not listed, position: cook. The description of his experience for each position reads, "prepared and cook [sic] all types of food." The beneficiary did not list the number of hours worked for any of the foregoing positions.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(3), which 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.

To document the beneficiary's experience, the petitioner submitted the following letter:

Letter from [redacted] and, Human Resources Manager, [redacted] Vineyard Harbor View Hotel and [redacted] Edgartown, MA, dated September 24, 2002, which provided; "Please be advised that [the beneficiary] worked for the Harbor View Hotel and [redacted] House on [redacted] Vineyard in Massachusetts from March 1997 through April 1999. [The beneficiary] was a Stewart [sic] in the kitchen and making \$10.00 per hour when he resigned."

We note that the letter fails to confirm that the beneficiary worked as a baker, fails to address whether the beneficiary worked on a full-time or part-time basis, and fails to identify the beneficiary's job duties to determine whether he has the experience required as listed on the certified Form ETA 750. Further,

the beneficiary did not list his employment with the Harbor View Hotel and Kelley House on Form ETA 750B. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.

Additionally, we note that the letter provided is a light copy of the document. The letter was typed on a computer. However, we note that the typeface for the year end date of the beneficiary's experience, "1999," is darker, a different typeface, and not aligned with the remainder of the line and sentence. It appears that the letter, specifically, the year 1999, may have been altered, and then recopied. 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).

The petitioner did not submit any further evidence of the beneficiary's prior experience to demonstrate that he met the requirements of the certified labor certification. The letter above is deficient to demonstrate the beneficiary meets the requirements of the labor certification. Accordingly, the petition should have been denied on this basis as well.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the petitioner has failed to establish that the beneficiary met the requirements of the certified ETA 750. 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.