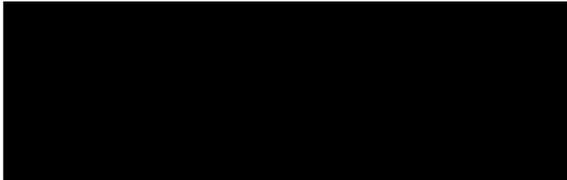


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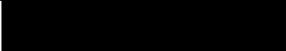


U.S. Citizenship  
and Immigration  
Services

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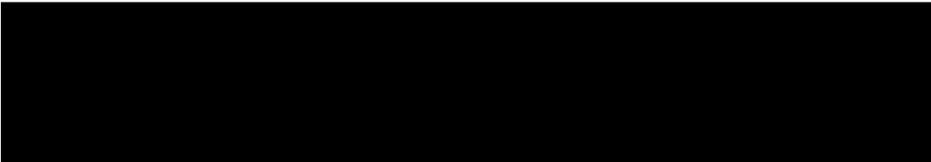
Office: TEXAS SERVICE CENTER Date: **JAN 10 2008**

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, Texas Service Center (director), denied the immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO rejected the appeal as untimely filed. The petitioner then filed a Motion to Reopen or Reconsider the AAO's determination. The Motion will be granted. The director's decision will be affirmed.

The petitioner is a manufacturer, and seeks to employ the beneficiary permanently in the United States as a machinery maintenance worker. 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 March 23, 2005 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, as well as the petitioner's failure to establish that the beneficiary had the required prior two years of experience.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

Counsel asserts that the appeal initially filed was timely, and that the use of prior version of Form I-290 should have been accepted, and, therefore, CIS policy was incorrectly applied. We find that the filing meets the requirements of a Motion to Reconsider. We will reopen the petition and reconsider the matter.

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).<sup>1</sup>

The petitioner has filed to obtain permanent residence 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

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). 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).

element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant, which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on Form ETA 750 is \$10.52 per hour<sup>2</sup> for an annual salary of \$21,881.60 per year based on a 40 hour work week. The labor certification was approved on February 15, 2003, and the petitioner filed the I-140 Petition on the beneficiary's behalf on June 16, 2004. The petitioner listed the following information: established: 1984; gross annual income: \$30,000,000; net annual income: \$2,500,000; and current number of employees: 156.

On February 4, 2005, the director issued a Notice of Intent to Deny (NOID) on the basis that the letter the petitioner submitted to document the beneficiary's prior experience did not sufficiently demonstrate that he met the qualifications of the certified labor certification. Further, the NOID provided that the petitioner had not demonstrated its ability to pay the proffered wage, and that the petitioner should submit copies of its federal tax returns, annual reports, or audited financial statements, as well as the beneficiary's W-2 Forms for the years 2001, 2002, 2003, and 2004.

The petitioner failed to respond to the NOID. On March 23, 2005, the director denied the petition based on a determination that the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage, and further that the petitioner failed to adequately demonstrate that the beneficiary met the qualifications of the certified labor certification. The petitioner appealed to the AAO.

On September 21, 2006, the AAO rejected the appeal as untimely filed. Further, the AAO noted that the director could have chosen to treat the untimely filed appeal as a motion to reopen, but declined to do so. The petitioner has now filed a Motion to Reopen or Reconsider the appeal that the AAO dismissed.

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, 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 April 24, 2001, the beneficiary listed that he has been employed with the petitioner since May 2000. Counsel submitted the following W-2 statements for the beneficiary only on appeal:

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<sup>2</sup> The petitioner initially listed an hourly wage of \$7.00 per hour, however, DOL required that the wage be increased to \$10.52 prior to certification.

<u>Year</u>	<u>W-2 Wages</u>
2004	\$25,854.26
2003	\$19,456.10
2002 <sup>3</sup>	not provided
2001	\$18,419.92
2000	\$11,670.79

The beneficiary's 2000 W-2 statement lists [REDACTED] as the employer, with an address of [REDACTED]. The 2003 and 2004 W-2 statements list [REDACTED] with an address of [REDACTED]. The petitioner listed on Form ETA 750 and on Form I-140 is: "USA Labs, Inc." with an address of [REDACTED].

The job offer is from USA Labs, Inc. The I-140 petition was signed by the petitioner's representative for USA Labs, Inc. As USA Labs, Inc. is the petitioner, USA Labs, Inc. would need to provide evidence of its ability to pay the beneficiary. The record contains no evidence of a job offer from Cosmyl Inc., or a job description or wage for any such position. Any such offer would not negate the petitioner's obligation to show its ability to pay the proffered wage under 8 C.F.R. § 204.5(g)(2), which it has failed to show.

The petitioner did not provide any documentation that the Cosmyl, Inc. and USA Labs, Inc. share the same tax identification number, or that they were the same employer. The petitioner did not provide any incorporation documentation, certificate of name change, doing business as, or fictitious name documentation, or documentation related to either corporation's federal tax identification number. Wages paid by, and financial information related to a company other than the petitioner, cannot be used to satisfy the petitioner's need to demonstrate that it can pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Further, the petitioner did not submit evidence to establish Cosmyl, Inc. would constitute a successor-in-interest to the initial petitioner, which would require documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Based on the record before us, the petitioner has not provided sufficient documentation to allow us to conclude that Cosmyl, Inc. and USA Labs, Inc. are the same entity. Further, even if we were to accept that they were the same entity, or related entities, the documentation related to wages paid alone would be insufficient to demonstrate the petitioner's ability to pay the proffered wage. The wages paid would be less than the proffered wage in 2001, 2002, and 2003.

Further, the director's NOID specifically requested that the petitioner provide the beneficiary's W-2 statements. The petitioner failed to do so.

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<sup>3</sup> The petitioner did not provide the beneficiary's 2002 W-2 statement. It is unclear why this statement was not submitted.

The purpose of a NOID, similar to a 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 Obaighena*, 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.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner did not provide any federal tax returns, but instead provided unaudited financial statements.

Counsel submitted the petitioner, [REDACTED]'s financial statements dated October 31, 2003, which list that the statements were "prepared by management." The statements include a balance sheet dated October 2003, a statement of operations dated October 31, 2003, and a statement of changes in shareholder's equity for the period ending October 31, 2003. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The initial page identifies that management prepared the statements, and as such are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel additionally submitted financial statements for Cosmyl, Inc. dated March 31, 2003, which also list that the statements were "prepared by management." The statements include a balance sheet dated March 31, 2003, a statement of operations dated March 31, 2003, and a statement of changes in shareholder's equity for the period ending March 31, 2003. As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The unaudited statements related to Cosmyl, Inc. are similarly deficient.

The two financial statements provide no information to connect the companies. Further, if the companies were one and the same, it is unclear why there would be separate financial statements, which list different

amounts in assets and liabilities. As both statements were unaudited, they would be insufficient to show the petitioner's ability to pay the proffered wage. The petitioner did not provide any other regulatory prescribed evidence such as its federal tax returns to demonstrate the petitioner's ability to pay the proffered wage.

Additionally, we note that CIS records reflect that the petitioner has filed at least six immigrant petitions since 2001, and that the petitioner would need to demonstrate that it could pay for all sponsored workers.<sup>4</sup>

On appeal, counsel provides that the petitioner had over 100 employees at the time that the petition was filed and that management's statements would be authorized by the regulation to show the petitioner's ability to pay.

The regulation at 8 C.F.R. § 204.5(g)(2) provides that, "In a case where the prospective employer employs more than 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." The regulation further provides that "in appropriate cases, additional evidence . . . may be submitted by the petitioner or requested by [CIS]."

The petitioner did not provide any statement from its financial officer, which established its ability to pay the proffered wage. Further, the regulation provides that the "director may accept" such evidence. The director may also request further evidence. As the petitioner did not submit a statement from its financial officer, the director requested additional documentation. Regarding the sufficiency of the financial statements, as noted above, the statements submitted were unaudited, and not in compliance with 8 C.F.R. § 204.5(g)(2).

Additionally, the petitioner failed to respond to the NOID's request to provide the beneficiary's Forms W-2 to document wages paid to the beneficiary.<sup>5</sup> The petitioner only submitted evidence in response to the NOID on appeal. Consequently, such evidence need not be accepted, but even if it were, it does not establish eligibility. See *Matter of Soriano*, 19 I&N Dec. 764.

Based on the foregoing, the petitioner has failed to establish its ability to pay the proffered wage.

Next, we will address the second issue raised, whether the beneficiary met the qualifications of the certified labor certification. In evaluating the beneficiary's qualifications, 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> 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

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<sup>4</sup> The petitioner filed an appeal related to another I-140 petition for a different beneficiary. The record related to that appeal contained information regarding the petitioner's bankruptcy filing, including an order, which directed the appointment of a Chapter 11 Trustee as of January 19, 2005. Counsel provided that a Chapter 11 bankruptcy allows a company, which is capable of continued operations to remain in business and reorganize its debt.

<sup>5</sup> On appeal, counsel provides that CIS did not allow sufficient time to respond to the NOID without citation to legal authority for this premise.

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 750, the “job offer” description provides:

Set up filling machines, set up codes, set up and repair cap machine, wash and label machine and change parts as needed. Provide standard maintenance for operating machinery. Tirelli (filling) Oden (filling) Simplex (filling).

The job offered listed that the position required prior experience of: two years in the job offered, machinery maintenance worker, or two years in the related occupation of an industrial worker. The petitioner did not list any other special requirements.

On the Form ETA 750, the beneficiary listed his relevant experience as: (1) USA Labs, Inc., from May 2000 to present, machinery maintenance worker, 40 hours per week; (2) York International, Bogota, Colombia, from February 1996 to August 1998, Planning Engineer, 40 hours per week; and (3) Industrias Full SA, Bogota, Colombia, from January 1995 to February 1996, Industrial Safety Inspector, 40 hours per week.

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] Production Manager, York International Company, April 2001;  
Position title: Maintenance Supervisor from February 1, 1996 to July 30, 1996; and Planning Engineer from August 1, 1996 to August 30, 1998;  
Description of duties: “His responsibilities was to determine the required materials for the equipment needed in the production at the air conditioning plant, maintain the production machineries, coordinate and supervised [sic] the plant.”

The letter fails to identify whether the beneficiary was employed on a full-time, or a part-time basis. Therefore, it is unclear whether the beneficiary would have two full years of experience as an “industrial worker.” Further, the submitted translation of the beneficiary’s work experience did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

*Translations.* Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation, which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

In the present case, the translator failed to certify that the translation is complete and accurate, and that she is competent to translate from the foreign language in question into English.

While the beneficiary had other prior experience listed on Form ETA 750B, the petitioner did not submit any documentation to verify those prior positions. Accordingly, the petitioner has failed to establish that the beneficiary met the qualifications of the certified Form ETA 750.

Additionally, on appeal, counsel provides that "portability provisions of AC 21 [American Competitiveness in the Twenty-First Century Act of 2000 ("AC 21")] make a denial based on the grounds stated – more than 180 days after the petition was filed, inappropriate."

The pertinent section of AC 21, Section 106(c)(1), amended section 204 of the Act, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence. - A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

The petitioner failed to respond to the director's NOID. Only on appeal, after denial, did counsel submit a statement from "Swift Spinning," Columbus, Georgia, which provided that the beneficiary has been employed with Swift Spinning, Inc. since January 14, 2005 as a Winding Team Leader at a pay rate of \$11.50 per hour. Further, we note that the correspondence from Swift Spinning was dated May 24, 2005, and referred to the fax from counsel received "today," or May 24, 2005, several weeks after the petitioner's response to the NOID was due. Counsel provided no evidence prior to denial that the beneficiary had changed jobs to a position in the same or similar occupational classification as the instant petition's proffered position.

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 Motion to Reconsider is granted. The director's decision is affirmed.