



U.S. Citizenship
and Immigration
Services

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File: [Redacted]
SRC-06-225-51801

Office: TEXAS SERVICE CENTER Date: **MAR 06 2008**

In re: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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DISCUSSION: On June 11, 2007, the petitioner requested that the I-140 petition filed on behalf of the beneficiary be withdrawn. On August 3, 2007, the Director, Texas Service Center ("director"), acknowledged the withdrawal request. The beneficiary had concurrently filed an Adjustment of Status, Form I-485, application to adjust to permanent residence on July 13, 2006. On August 6, 2007, the director certified the petition to the Administrative Appeals Office ("AAO") to determine whether the beneficiary's I-485 Adjustment of Status application may properly be denied where the petitioner withdrew the initial I-140 petition, or whether the beneficiary would have the ability to adjust under the American Competitiveness in the Twenty-First Century Act of 2000 ("AC 21"). The AAO concurs with the director's decision that the beneficiary would have no basis upon which to adjust as the petitioner withdrew the I-140 petition, the petition was never approved, the petition was not approvable on the merits, and the beneficiary had no other job offer.

The petitioner is a retail food, sandwich and beverage shop, and seeks to employ the beneficiary permanently in the United States as a manager, fast food services ("Business Store Manager"). 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). On August 6, 2007, the director certified the petition to the AAO.

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." See 8 C.F.R. § 103.4(a)(5).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation No. 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).¹

Additionally, 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).

The petitioner has filed to obtain an immigrant visa and classify the beneficiary as an "other," or unskilled worker. Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.²

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).

² The petitioner initially filed Form ETA 750, which listed the position requirements as two years of training or experience. As initially filed, Form ETA 750 would have classified the position for a skilled worker. The

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant, which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability 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 25, 2001. The proffered wage as stated on Form ETA 750 is \$12 per hour for an annual salary of \$23,712 per year based on a 38-hour work week. The labor certification was approved on March 8, 2006, and the petitioner filed the I-140 Petition on the beneficiary's behalf on July 13, 2006. The petitioner listed the following information: established: 1996; gross annual income: \$385,820; net annual income: \$18,096; and current number of employees: four.

On October 23, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to provide evidence of the petitioner's ability to pay the proffered wage for the years 2001, 2002, and 2004 to 2006. The RFE provided that while the petitioner submitted tax returns for the years 2002 to 2004, the returns failed to demonstrate that the petitioner could pay the proffered wage, and that the petitioner failed to submit its tax returns or other evidence for the years 2001, 2005, or 2006. Accordingly, the RFE requested that the petitioner submit evidence for these years. Further, the RFE requested that the petitioner submit evidence that the beneficiary had complied with the National Security Entry-Exit Registration System (NSEERS).³

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). However, the petitioner reduced the experience required for the position to one year prior to certification. DOL approved the correction prior to certification. Accordingly, the petition will be considered under the "other worker" category.

³ NSEERS was established September 11, 2002 to monitor individuals entering and leaving the U.S. NSEERS required nonimmigrants from Iran, Iraq, Libya, Sudan, and Syria as designated by the Federal Register to comply with NSEERS registration at ports of entry, as well as nonimmigrants designated by the U.S. Department of State, and any other nonimmigrant regardless of nationality, identified by an immigration officer in accordance with 8 CFR § 264.1(f)(2). The NSEERS requirement was expanded to include other

On April 17, 2007, the director issued a second RFE, which acknowledged the petitioner's response to the initial RFE, but that the petitioner's response had been misplaced. Accordingly, the RFE requested that the petitioner provide evidence of the petitioner's ability to pay the beneficiary the proffered wage, as well as to provide the beneficiary's Forms W-2 for 2001 through 2006, along with the beneficiary's latest pay receipts to show the petitioner's wages paid to the beneficiary.

By letter dated June 11, 2007, counsel provided a letter, which stated: "We have discussed this matter with the petitioning corporation. We have been advised that the employer wishes to withdraw the subject I-140 Petition for Alien Worker without prejudice. In this manner, the employer may, as appropriate, refile this case in the future with the DHS/USCIS."

On August 3, 2007, the director provided an Acknowledgment of Withdrawal Request. The Acknowledgement provided that under 8 C.F.R. § 103.2(b)(6) that "an applicant or petitioner may withdraw an application or petition at any time until a decision is issued by the Service. However, a withdrawal may not be retracted." Further, the Acknowledgment cited Part (15), which states in pertinent part:

The Service's acknowledgement of a withdrawal may not be appealed . . . Withdrawal or denial due to abandonment does not preclude the filing of a new application or petition with a new fee. However, the priority or processing date of a withdrawn or abandoned application or petition may not be applied to a later application petition. Withdrawal or denial due to abandonment shall not itself affect the new proceeding; but the facts and circumstances surrounding the prior application or petition shall otherwise be material to the new application or petition.

On August 6, 2007, the director certified the petition to the AAO for consideration of the issue whether in a case where the I-140 petition has been withdrawn, if the beneficiary would have any basis to adjust under Section 106(c) of AC 21. Specifically, the director noted a conflict between guidance contained in policy

groups of nationals, and nationals from the designated groups were to report for Special Registration in four separate "call-in groups." Lebanon, the beneficiary's country of origin, was listed for call-in registration between January 27 and February, 7, 2003. *See* 68 Fed. Reg. 2366 (January 16, 2003). Group 2 additionally included: citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. *Id.* at 2366. Group 3 included citizens or nationals of Pakistan or Saudi Arabia. *See* 68 Fed. Reg. 33 (February 19, 2003). Group 4 expanded NSEERS and Special Registration to include citizens or nationals of Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. *Id.* at 33. On December 2, 2003, the Department of Homeland Security ("DHS") suspended the automatic 30-day and annual re-registration requirements for NSEERS. *See* <http://www.ice.gov/pi/specialregisration/index.htm>, accessed April 5, 2007.

The beneficiary listed that he was a citizen of Pakistan, and, as such, would have been required to register in accordance with Group 3.

The beneficiary provided by way of response to the RFE that he "entered the United States without inspection on or about February 27, 1999 through the American border with Canada. More specifically, I was secreted into the United States by an agent whom I retained." As he provides that he was never inspected, he asserts that having entered illegally, he did not believe that he was subject to the NSEERS requirement.

memo QHPRD 70/6.2.9-P dated December 27, 2005, and an adopted AAO decision, *Matter of Al Wazzan*, A95 253 422 (AAO Jan. 12, 2005).

The director notes that *Al Wazzan* provides:

Contrary to the ordinary meaning of the word, counsel's assertion would have the AAO construe the term "valid" to include denied or unadjudicated petitions. *See Webster's New College Dictionary* 1218 (2001) (defining "valid" as "well-grounded", "producing the desired results", or "legally sound and effective".) Since an approved visa petition was required to file an application for adjustment of status, it is extremely doubtful that Congress intended the term "valid" to include petitions that are denied or remain pending after the close of the 180-day period.

....

Therefore, to be considered "valid" in harmony with the thrust of the related provisions and with the statute as a whole, the petition must have been filed and for an alien that is "entitled" to the requested classification and that petition must have been "approved" by a CIS officer pursuant to his or her authority under the Act. *See generally* § 204 of the Act, 8 U.S.C. § 1154.

Matter of Al Wazzan.

The director notes that in contrast, the December 27, 2005 memo provides under question 11:

Question 11: When is an I-140 no longer valid for porting purposes?

Answer: An I-140 is no longer valid for porting purposes when:

- A. an I-140 is withdrawn before the alien's I-485 has been pending for 180 days; or
- B. [...]

As the memo and *Al Wazzan* were in conflict, the director sought to resolve what constitutes "valid" for withdrawn visa petitions. The director looked to question 1 of the December 27 memo which stated that if a beneficiary has ported off an unapproved I-140 and the I-485 has been pending for over 180 days, then CIS is to determine the eligibility of the underlying Form I-140. In the present case, the beneficiary had not ported, and a review of the I-140 demonstrated that the petition did not warrant approval. Further, the petitioner requested that the petition be withdrawn. The director determined that by viewing AC 21 in harmony with all its sections, the petition would not be considered valid under 204(j) of the Act, and that the beneficiary would therefore not be eligible to adjust.

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.

Governing adjustment of status, section 245(a) of the Act, 8 U.S.C. § 1255(a), states:

Status as Person Admitted for Permanent Residence on Application and Eligibility for Immigrant Status

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an *approved* petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General [now the CIS], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is *eligible* to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) *an immigrant visa is immediately available* to him at the time his application is filed.

(Emphasis added.)

An immigrant visa is immediately available to an alien seeking employment-based preference classification under section 203(b) of the Act (such as the beneficiary in this case) when the alien's visa petition has been approved and his or her priority date is current. 8 C.F.R. § 245.1(g)(1), (2). Hence, adjustment of status may only be granted "by virtue of a valid visa petition approved in [the alien's] behalf." 8 C.F.R. § 245.1(g)(2).

After enactment of the portability provisions of AC21, on July 31, 2002, Citizenship & Immigration Services ("CIS") published an interim rule allowing for the concurrent filing of Form I-140 and Form I-485, whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time without the need to wait for an approved I-140. *See* 8 C.F.R. § 245.2(a)(2)(B)(2004); *see also* 67 Fed. Reg. 49561 (July 31, 2002). The beneficiary in the instant matter had filed his Form I-485 on July 13, 2006, concurrently with the petitioner's filing of Form I-140.

CIS implemented concurrent filing as a convenience for aliens and their U.S. employers. Because section 204(j) of the Act applies only in adjustment proceedings, CIS never suggested that concurrent filing would make the portability provision relevant to the adjudication of the underlying visa petition. Rather, the statute and regulations prescribe that aliens seeking employment-based preference classification must have an immigrant visa petition approved on their behalf before they are even eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

Section 204(j) of the Act prescribes that "A petition . . . shall remain valid with respect to a new job if the individual changes jobs or employers." The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260, 2000 WL 622763 (Apr. 11, 2000); *see also* H.R. Rep. 106-1048, 2001 WL 67919 (Jan. 2, 2001). However, the statutory language and framework for granting immigrant status, along with recent decisions of three federal circuit courts of appeals, clearly show that the term "valid," as used in section 204(j) of the Act, refers to an approved visa petition.

Statutory interpretation begins with the language of the statute itself. *Hughey v. U.S.*, 495 U.S. 411, 415 (1990). We are expected to give the words used in the statute their ordinary meaning. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (citing *I.N.S. v. Phinpathya*, 464 U.S. 183, 189 (1984)). We must also construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988). *See also* *COIT Independence Joint Venture*

v. Federal Sav. and Loan Ins. Corp., 489 U.S. 561, 573 (1989); *Matter of W-F-*, 21 I&N Dec. 503, 506 (BIA 1996).

With regard to the overall design of the nation's immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.” (Emphasis added.)

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs CIS's authority to approve an immigrant visa petition before immigrant status is granted:

After an investigation of the facts in each case . . . the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).⁴

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien “entitled” to immigrant classification under the Act “may file” a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). However, section 204(b) of the Act mandates that CIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, Congress specifically granted CIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until CIS approves the petition.

Therefore, to be considered “valid” in harmony with the portability provision of section 204(j) of the Act and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by CIS pursuant to the agency's authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. A petition is not validated merely through the act of filing the petition with CIS or through the passage of 180 days.

Section 204(j) of the Act cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

⁴ We note that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word “pending.” *See* Section 101(a)(15)(V) of the Act, 8 U.S.C. § 1101(a)(15)(V) (establishing a nonimmigrant visa for aliens with family-based petitions that have been pending three years or more).

Accordingly, it would subvert the statutory scheme of the U.S. immigration laws to find that a petition is valid when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never entitled to the requested immigrant classification. We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.⁵

In the case at hand, the I-140 petition was not approved and was withdrawn. Further, the petitioner would not have been approved, as we will discuss below, and the beneficiary did not provide evidence of any other job offer, or assert that he would “port” to another valid job offer. *See* section 204(j).

The enactment of the portability provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require CIS to approve an immigrant visa petition prior to granting adjustment of status. Accordingly, as this petition was withdrawn, never approved, and not approvable, it cannot be deemed valid by improper invocation of section 204(j) of the Act.

More specifically, in reviewing the merits of the underlying petition, and although not raised in the director’s acknowledgment of withdrawal, the petitioner is unable to show its 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 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).

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 April 20, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner did not provide any evidence in response to the RFE that the beneficiary had begun working for the petitioner.⁶

⁵ Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge’s jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien’s application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when “an *approved* immigration petition will remain valid for the purpose of an application of adjustment of status.” *Sung*, 2007 WL 3052778 at *1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a “previously approved I-140 Petition for Alien Worker”); *Perez-Vargas*, 478 F.3d at 193 (stating that “[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved”). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.

⁶ Form G-325 filed with the beneficiary’s I-485 Adjustment of Status application lists that the beneficiary began working for the petitioner in “2001,” but the form does not list the month that the beneficiary began his employment.

Accordingly, the petitioner cannot establish its ability to pay the proffered wage based on any prior wage payment to the beneficiary.

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 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 record demonstrates that the petitioner is 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). The petitioner does not list any additional income so we will take the petitioner's net income from line 21:

<u>Tax year</u> ^{7,8}	<u>Net income or (loss)</u>
2005	\$28,363
2004	\$18,096
2003	\$33,947
2002	-\$2,271
2001	\$18,054

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in the years 2001, 2002, or 2004.

⁷ The petitioner provided its 2001 and its 2005 federal tax returns in response to the RFE.

⁸ The petitioner also submitted its 1999 federal tax return, however, since the priority date is in April 2001, the petitioner's 1999 federal tax return is not relevant to the petitioner's ability to pay from April 2001 onward.

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 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2005	\$1,063
2004	-\$3,886
2003	-\$2,319
2002	-\$1,591
2001	\$311

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

The petitioner's accountant additionally provided a statement that the petitioner's depreciation and section 179 amortization⁹ should be added back to the petitioner's net income in which case the petitioner would be able to demonstrate its ability to pay the proffered wage.

Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business. Amortization is "similar to the straight line method of depreciation in that an annual deduction is allowed to recover certain costs over a fixed time period." *Id.* at 3.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

⁹ Section 179 allows the filer to claim expenses on Form 4562 related to "property that you acquire by purchase for use in the active conduct of your trade or business," and that meets certain other criteria as listed in the Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2007), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>.

Therefore, the AAO is not persuaded that the petitioner's depreciation or amortization can show its ability to pay the proffered wage.

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 Business Store Manager provides:

Manages the retail franchise business, estimates stock requirements based on sales, conducts inventory, hire and fire employees, supervise the employees, train them, prepare work schedule, prepare payroll and report it to accountant, pay out bills, check invoices with order, order supplies, recommend expansion of business, advertising, plan strategy to stimulate sale, maintain books of account, balance account, check and enforce quality standards, recommend remodeling of store, serving and attending customers, maintaining franchise standards for food preparation, serving, packing and wrapping.

Further, the job offered listed that the position required:

Education: four years of high school;¹⁰
Major Field Study: none

Experience: 1 year in the job offered, Business Store Manager;

Other special

¹⁰ The petitioner provided documentation that the beneficiary had completed a "Higher Secondary Certificate" in Pakistan along with an evaluation to show that his education was the equivalent of a U.S. high school diploma. Further, the petitioner provided documentation that the beneficiary had completed a Bachelor of Commerce degree in Pakistan, which the evaluation provided would be the equivalent of two years of U.S. undergraduate education.

requirements: none listed.

On the Form ETA 750B, the beneficiary listed his relevant experience as: (1) Aahil Corporation, Chicago, IL, from March 1999 to March 2001, position: Business Store Manager; (2) Anila Donuts, Chicago, IL, from April 1999 to December 1999, position: Night Store Manager; (3) Karachi Sheraton Hotel, Karachi, Pakistan, from December 1990 to February 1999, position: Front Desk Manager.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(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 letters:

1. Letter from [REDACTED], Anila Donuts, Chicago, IL, dated April 11, 2006;¹¹
Position title: Store Manager;
Dates of employment: April 12, 1999 to May 31, 2000;
Description of duties: "cash handling, hiring/firing employees, operations, marketing, and all HR aspects of the business."

The letter does not provide whether his employment was on a full-time or a part-time basis to allow us to conclude whether the prior experience would constitute one full year of experience as required by the certified Form ETA 750.

2. Letter from [REDACTED] Personnel Manager, [illegible] Industries Private Limited, Karachi, Pakistan, dated 11th April [year not listed];
Position title: "Despatch Clerk;"
Dates of employment: February 3, 1990 to February 8, 1991;
Description of duties: not listed.

The letter would be insufficient as it does not list the beneficiary's job duties, lists a different position title, and does not indicate whether the experience was full-time or part-time.

¹¹ The petitioner additionally provided a copy of the Form W-2 that Anila Donuts issued to the beneficiary for 1999, which showed earnings in the amount of \$15,204.19. The petitioner did not provide the beneficiary's 2000 Form W-2.

3. Letter from [REDACTED], Director of Human Resources, Karachi Sheraton, Karachi, Pakistan, dated April 14, 2006;
Position title: "his last position was Guest Services Executive in the Front Office Department;"
Dates of employment: December 1, 1990 to February 6, 1999;
Description of duties: "He started his career with Karachi Sheraton as Cashier. However, due to his work performance and potential of assuming more responsibilities he was given the above mentioned supervisory level position to handle front office related affairs."

Karachi Sheraton also provided a "Certificate of Service," which provided that the beneficiary had worked as a "Guest Services Executive" from December 1, 1990 to February 6, 1999.

The certificate does not distinguish between positions and dates that the beneficiary may have worked in another position.

The letters provided are all insufficient to show that the beneficiary has the required one year of prior experience as a Business Store Manager. The first letter does not provide whether the beneficiary was employed on a full-time or a part-time basis in order to calculate the full length of time that he was employed in the requisite position. The second letter was insufficient as it did not list the beneficiary's job duties, lists a different position title, and does not indicate whether the experience was full-time or part-time. The third letter was insufficient as it did not provide the beneficiary's job duties. The letter further did not distinguish the time spent in each position, and whether the beneficiary's work was on a full-time or a part-time basis. Further, it is unclear that experience as a Guest Services Executive would be the same as a Business Store Manager. The petitioner did not list that the experience could be gained through a related occupation.

The foregoing letters are insufficient to demonstrate that the beneficiary meets the requirements of the certified Form ETA 750.

Based on the foregoing, we concur with the director that section 204(j) of the Act would not provide any basis upon which the beneficiary could adjust status to lawful permanent resident based on a Form I-485 Adjustment of Status application as the petition was withdrawn, not approved, not approvable, and the beneficiary did not have a valid job offer in a same or similar position. Accordingly, the petition was not valid. Further, 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. The petitioner also failed to establish that the beneficiary met the requirements of the certified ETA 750. Accordingly, the petition is 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 director's decision is affirmed.