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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 17 2008

EAC 05 185 50042

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a hair salon and beauty spa. It seeks to employ the beneficiary permanently in the United States as a maintenance superintendent. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established its continuing financial ability to pay the proffered wage and denied the petition accordingly.

For the reasons discussed below, the AAO withdraws the director's determination of the petitioner's ability to pay the proffered salary but concludes that the petitioner failed to establish that the beneficiary possessed a two-year college technical degree as required by the ETA 750.

On appeal and in response to the request for evidence issued by this office, the petitioner, through counsel, submits additional evidence and asserts that the beneficiary obtained the qualifying educational credentials and that the petitioner had the continuing financial ability to pay the proffered wage.

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).

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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

> (ii) *Other documentation—*
>
> > (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.

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

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

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on March 22, 2001.[1] The proffered wage is stated as $33.49 per hour, which amounts to $69,659.20 per year.

The visa preference petition was filed on June 13, 2005. Part 5 of the petition indicates that the petitioner was established on September 24, 1993, claims a gross annual income of $1,557,608, a net annual income of $1,353,936, and currently employs more than thirty workers.

Form ETA 750B originally signed by the beneficiary on March 1, 2001 and later amended on April 11, 2005, does not indicate that he worked for the petitioner. Other documents, such as Wage and Tax Statements (W-2), submitted by the petitioner, indicate that the petitioner has employed him part-time since 2000. It is noted that a statement containing an unidentifiable signature on the petitioner's letterhead and dated May 18, 2005, indicates that the beneficiary will commence his employment with the petitioner as a Superintendent, Maintenance at $33.49 per hour upon receipt of employment authorization and a valid Social Security card. Counsel's transmittal letter, dated April 11, 2006, indicates that the beneficiary is currently a part-time employee and that the petitioner plans to increase his salary upon full-time employment and approval of the visa petition. Counsel also states that one of the owners will be retiring and that his compensation could be allocated toward paying the offered wage.

The educational and experience requirements for the proffered position are found on Form ETA-750 Part A. Regarding the minimum level of education and experience required for the certified position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

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[1] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

Education (number of years)

Grade school	(none stated)
High school	(none stated)
College	2
College Degree Required	Technical
Major Field of Study	Any technical Major

Experience:

Job Offered	2(yrs.)
Related Occupation	none stated

Block 15:

Other Special Requirements	(none stated)

As set forth above, the proffered position requires two years of college culminating in a technical degree in any technical major and two years of experience in the job offered. DOL assigned the occupational code of 189.167-046 superintendent maintenance, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at http://online.onetcenter.org/crosswalk/ (accessed July 17, 2008) and its description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See http://online.onetcenter.org/link/summary/49-1011.00* (accessed July 17, 2008). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

> A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

Considering the position's requirements of two years of college culminating in a technical degree in any technical major and two years of experience, as well as DOL's classification and assignment of educational and experiential requirements for the occupation, the position will be analyzed as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act based on its educational and experience requirements.

In support of the petitioner's financial ability to pay the proposed wage offer of $69,659.20 per year, the petitioner provided copies of the petitioner's Form 1120, U.S. Corporation Income Tax Returns for 2000,

2001, 2002 and 2003 and 2004. They indicate that the petitioner files its taxes using a fiscal year running from June 1st to May 31st of the following year. The corporate tax returns contain the following information:

	2000	2001	2002	2003	2004
Net Income (line 28, Form 1120)	$10,821	-$21,905	-$ 2,747	-$ 2,718	-$ 9,238
Current Assets (Sched. L)	$81,579	$97,792	$94,362	$99,705	$83,164
Current Liabilities (Sched. L)	$11,024	$28,063	$14,514	$16,464	$ 9,222
Net current assets	$78,555	$69,729	$79,848	$83,241	$73,942

As noted in the above table, net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.[2] Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of the Form 1120 federal tax return. Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 16(d) through 18(d). If the petitioner's year-end 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.

Additional evidence provided by the petitioner includes copies of the beneficiary's individual federal tax returns and copies of his Wage and Tax Statements (W-2) for the years 2000 through 2005. The W-2s indicate that the following wages were paid by the petitioner to the beneficiary through the

Year	Wages	Difference from Proffered Wage of $69,659.20
2000	$29,735	-$39,924.20
2001	$24,890	-$44,769.20
2002	$17,900	-$51,759.20
2003	$14,400	-$55,259.20
2004	$14,400	-$55,259.20
2005	$14,400	-$55,259.20

The director denied the petition on August 9, 2006. The director determined that the petitioner's taxable income was insufficient to demonstrate its continuing ability to pay the proffered wage of $69,659 in 2001 or

[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

in any other period. The director also declined to adopt counsel's theory that a retiring owner's salary could be allocated to the proffered wage as the position had been described as a new position on Part 6 of the Immigrant Petition for Alien Worker (I-140) and that while such a proposition might be considered for future payment of salary, it does not establish that the ability to pay the proffered wage existed as of the priority date.

On appeal, counsel reiterates the contention that one of the owners who has desired to retire and has been performing some of the duties that the beneficiary is due to perform. Therefore, upon approval of the preference petition, the owner will retire and his salary and duties can be turned over to the beneficiary. Counsel claims that the petitioner could not allow the beneficiary to commence his full time employment with the company due to lack of official documents and that the position was classified as a new position on the visa petition because no one individual was performing all of the certified duties of the job. Counsel also emphasizes that the petitioner's gross receipts of over one million dollars in the past four years and employment of an average of 30 workers supported the petitioner's ability to pay the proffered wage.

With regard to counsel's assertion relating to the retirement of an owner and allocation of salary and duties to the beneficiary, it is noted that nothing in the record identifies the owner, specifies the duties or salary or even supports the theory of allocation of such funds retroactively to the petitioner's ability to pay the proffered wage. The undocumented assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If either the petitioner's net income or net current assets could cover the difference between the proffered wage and the actual wages paid to the beneficiary, then the ability to pay the proffered wage during a specified period would be demonstrated. In this case, as noted above, although the evidence contains certain discrepancies related to the petitioner's admissions of the beneficiary's past employment, it is noted that the beneficiary's personal tax returns correspond to the amounts claimed on the W-2s. Therefore, these amounts will be considered in calculating the petitioner's ability to pay the proffered wage.

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 examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra,* and *Ubeda v. Palmer, supra; see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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 as suggested by counsel in this case. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, although noting that the petitioner's federal tax returns figures reflected a fiscal year running from June 1st to May 31st of the following year and the beneficiary's W-2s reflected calendar year earnings, it may be concluded that while the petitioner's net income as shown in the table above was insufficient to cover the difference between the proffered wage and the actual wages paid to the beneficiary in each of the 2000 through 2004 fiscal years, its net current assets consistently exceeded the amounts necessary to demonstrate the petitioner's ability to pay in each of the years from 2001 through fiscal year 2004.

As stated above, the petitioner's net current assets of $78,555 were sufficient to meet the $39,924.20 difference in 2000 and show the petitioner's ability to pay the proffered wage.

In 2001, the petitioner's net current assets of $69,729 were sufficient to pay the difference of $44,769.20 between actual wages and the proffered salary and demonstrate the petitioner's ability to pay the proposed wage.

In 2002, the petitioner's net current assets of $79,848 were enough to cover the difference of $51,759.20 between actual wages paid and the proffered wage and establish the petitioner's ability to pay during this period.

Similarly, the net current assets of $83,241 and $73,942 as shown on the fiscal year tax returns of 2003 and 2004, respectively, were sufficient to cover the $55,259 difference between actual wages paid to the beneficiary and the proffered wage. It may be concluded that the petitioner met its burden of proof in establishing that it had the ability to pay the proffered wage to the beneficiary.

Relevant to the beneficiary's possession of the requisite educational credentials as set forth on the certified labor certification as having a two year college technical degree in any technical major, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to CIS to determine whether the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).[3]

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. CIS must "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(Emphasis added).

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[3] The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

It is noted that the petitioner submitted a Russian "certificate of incomplete secondary education" on August 21, 1987 from a secondary school #2 in Tasymlyansk, Rostov region, also described by the beneficiary as the "High School, City of Volgodosk," (Russia) in Part B of the ETA 750. Based on the beneficiary's birth date of March 3, 1972, he received this certificate at about age 15 ½. He thereafter entered the "technical secondary vocational school #69" in Volgodosk and received a diploma on June 25, 1990 in the study of "fitter of ferroconcrete constructions and welder." The beneficiary received this diploma at about age 18 and 3 months as referenced by counsel in the response to the request for evidence issued by this office. The petitioner also submitted the corresponding grade transcript from the technical secondary vocational school #69.

The petitioner additionally submitted evaluations of these credentials from [redacted] of The Trustforte Corporation. The earlier evaluation, dated February 28, 2006, was based only on the beneficiary's diploma from the #69 vocational school, which [redacted] describes as an institution of post-secondary education in which admission is based on the completion of preliminary high school studies and a competitive entrance examination. He concludes that a diploma from this school is the U.S. educational equivalent of the completion of an Associate of Science Degree in Engineering Technology from an accredited college or university in the United States.

The second evaluation is dated March 26, 2008 and claims that the first year of the beneficiary's studies at the technical secondary vocational school #69 represents the equivalent of the completion of upper secondary studies in the United States. [redacted] also states the second and third year of studies completed by the beneficiary at the school represents post-secondary studies and practical training in the field of Engineering Technology. He again concludes that this diploma represents U.S. educational equivalent of the completion of an Associate of Science Degree in Engineering Technology from an accredited college or university in the United States.

The petitioner also provided extractions from online resources which indicate that after graduating 9th grade a pupil receives a Certificate of Incomplete Secondary Education and "subsequently may choose one of the following ways to complete his secondary education: to continue education for two more years at the secondary school or to pursue an associate degree at a Tradesmen School. The latter variant usually takes three to four years to complete but provides a pupil with educational qualifications that is sufficient for most blue-collar jobs." (Petitioner's Exhibit E in response to request for evidence) Compulsory schooling consists of elementary school for ages 6-7 to 10; senior school for ages 10 to 16; and high school from 16 to 17-18. Secondary general education ends when students are 17-18. (Petitioner's Exhibit D in response to request for evidence). Although it is noted that one of the online sources referenced by petitioner generically refers to the pursuit of an associate degree at a Tradesmen School, neither resource speaks to the U.S equivalent degree and both refer to a pupil's pursuit of one of these methods to complete his secondary education.

Moreover, as advised in the request for evidence issued to the petitioner by this office, including the enclosures provided from the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO), we find the AACRAO evaluation is more probative of the beneficiary's educational credentials. AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page

for EDGE, http://aacraoedge.aacrao.org/register, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE indicates that a Russian Diploma of Secondary Vocational Education is awarded after two to three years of combined academic/vocational studies. In the credentials advice section of EDGE referring to this diploma, it states that it is comparable to a "vocational or other specialized high school curriculum in the United States."

It is noted that we do not conclude that the Trustforte evaluation is probative of this beneficiary's educational credentials in determining that they are comparable to an Associate of Science Degree in Engineering Technology from an accredited U.S. college. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The Form ETA 750 provides that the minimum academic requirements for the certified position are two years of college and a technical degree in any technical major. Rather, as EDGE indicates, his diploma from the technical secondary school #69 equates to a vocational or other specialized U.S. high school curriculum. There is no indication on the ETA 750 that the academic requirement might be met through a lesser degree or defined equivalency. In this case, based on a review of the evidence it may not be concluded that the beneficiary, as of the priority date, had the requisite two years of college and a technical degree in any technical major as set forth on the Form ETA 750 as certified. He does not qualify for the preference visa classification under section 203(b)(3) of the Act. *See also 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).

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

ORDER: The appeal is dismissed.