identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 14 2009

SRC 06 217 51293

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the case will be remanded to the director for further investigation and entry of a decision relevant to the beneficiary's qualifications for the certified position.

The petitioner is a wireless networking design and development firm. It seeks to employ the beneficiary permanently in the United States as software engineer. 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 that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

One of the central issues underlying the director's decision to deny the petition was the petitioner's refusal, for privacy reasons, to provide its federal tax returns, audited financial statements or annual reports in order to demonstrate its continuing ability to pay the proffered wage. In the interests of administrative efficiency, in this case, the AAO will utilize the federal tax returns provided by the petitioner in an Immigrant Petition for Alien Worker (Form I-140), (LIN 07 101 53493) filed on February 21, 2007. This petition, which seeks to use the same ETA 750 on behalf of the same beneficiary has not yet been initially adjudicated. The receipt file is at this office and is riding with the alien file under current review. For the reasons set forth below, the AAO finds that the petitioner has demonstrated its ability to pay the proffered wage.[1] The case, however, will be remanded to the director to conduct further investigation as to the beneficiary's qualifications to perform the duties of the position as set forth by the terms of the ETA 750.

[1]The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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(g)(2) states:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 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. In appropriate cases, additional evidence , such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [United States Citizenship and Immigration Services (USCIS)].

The petitioner must establish that its ETA 750 job offer to the beneficiary is realistic. 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 petitioner must also demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date, the day the 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 ETA 750 was accepted for processing on November 7, 2003. The proffered wage as stated on Part A of the ETA 750 is $7,250 per month, which amounts to $87,000 per year. On Part B of the ETA 750, signed by the beneficiary on October 10, 2003, the beneficiary claims to have worked for the petitioner since November 2002 to the present (date of signing).

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on July 11, 2006, the petitioner states that it was established in 2000, employs over fifty workers, and claims an annual income of over 10 million dollars.

As discussed above, in support of its continuing financial ability to pay the proposed wage offer of $87,000 per annum, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2003, 2004, and 2005. The returns contain the following information:

	2003	2004	2005
Net Income[2]	-$ 7,016,384	-$10,919,673	-$ 8,247,133
Current Assets	$ 12,636,384	$ 6,108,666	$15,146,988
Current Liabilities	$ 648,634	$ 902,504	$ 2,076,659
Net Current Assets	$11,987,750	$ 5,206,162	$13,070,329

As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Based on the foregoing, although the petitioner's net income was reported as losses in each year, its net current assets of $11,987,750 in 2003; $5,206,162 in 2004, and $13,070,329 in 2005 significantly exceeded the certified wage of $87,000 and would establish the petitioner's

---

[2] For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28. (taxable income before net operating loss deduction and special deductions) USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage. Based on the two copies of the petitioner's 2004 corporate tax returns, it appears that the petitioner amended this year's return in order to change to a fiscal year running from February 1 to January 31 of the following year. The 2004 return dated October 12, 2005 is represented in the above table.

[3] 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.

continuing ability to pay the proffered salary. As mentioned above, the director's decision relating to this issue is withdrawn.

Relevant to the beneficiary's qualifications for the certified position of software engineer, as noted above, it must be demonstrated that any educational, training or experiential credentials were obtained as of the priority date of November 7, 2003.

To determine whether the beneficiary is eligible for an employment-based visa, USCIS examines whether the beneficiary's credentials satisfy the requirements of the ETA 750. USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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).

Part A of the ETA 750 describes the terms and conditions of the petitioner's offer of employment. Item(s) 14 and 15 describe the formal education, training and employment experience required in this matter. The instructions for this matter direct the following:

> State in detail the MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties described in Item 13 above.

On this ETA 750, the following is described on Item 14:

Education	Grade School	High School	College	College Degree Required
(Enter number of Years)	N/A	N/A	5+	U.S. or foreign Bachelor's *
				Major Field of Study
				Computer Science, Computer Engineering **
Training	N/A			
Experience	Job Offered	Related Occupation		Related Occupation (specify)
	Yrs. Mos.	Yrs. Mos.		Computer software engineer, Systems engineer ***
	2	2		

Item 15 **Other Special Requirements** reflect the following:

* degree or equivalent
** Computer Science and Engineering or related field.
***or related occupation involving design and/or development of software modules for network applications, including experience involving the development of real-time embedded software, and in the implementation, testing and debugging of device driver, protocol stack, IP routing and network management systems.

****Requirement of Master's degree and 1 year of
See addenda

The AAO notes that the petitioner initially required a U.S. or foreign master's degree in computer science, computer engineering or related field. The regional DOL office approved correction to require only a U.S. or foreign bachelor's degree in Section 14 under the college degree required. The single asterisk referred to in Item 15, Other Special Requirements states "degree or equivalent." Except for the work experience increased from one year in the job offered or one year in a related occupation to two years in the job offered or two years in a related occupation, the terms of Item 14 and Item 15 remain unchanged. As shown above, it is also noted that the "****Requirement of Master's degree and 1 year of" is an incomplete sentence with the additional notation of "*See addenda.*" In response to the director's request for evidence, counsel stated that the addenda was a continuation of the description of the beneficiary's employment experience as requested under Item 15, Part B of the application. He also stated that the addenda was not returned by DOL with the certified Form ETA 750 application and could not be included with the original I-140 petition.

The beneficiary identified his formal education on Part B of the ETA 750, which he signed under penalty of perjury. He claims that he received a Bachelor of Technology from the Indian Institute of Technology Kharagpur, West Bengal, India. His field of study was computer science and engineering and he attended from July 1993 to June 1997. Accompanying educational documents indicate that this was a four-year program. Copies of the beneficiary's statement of marks also suggests eight semesters attended. An academic evaluation, dated March 3, 1999 from The Trustforte Corporation also determines that the beneficiary has the U.S. equivalent of a Bachelor of Science degree in computer engineering.

The AAO concurs with the evaluator's determination. In the instant case, however, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the ETA 750 which, in this case, includes a requirement of more than five years of college. The record also fails to contain the addenda to Item 15. The AAO cannot determine what, if any, other additional educational or other special requirements the beneficiary had to meet. Thus the record does not show that the beneficiary attended more than five years of college or that he has any other requisite special requirements or educational requirements outlined in the addenda that have thus far

not been submitted to the record.

It is noted that the petitioner initially sought a visa classification for the beneficiary in the second preference category, sponsoring the beneficiary as a professional with an advanced degree. The director's December 11, 2006 Notice of Intent to Deny (NOID) permitted the petitioner to change to the third preference classification. Although certain amendments were made before DOL certified the labor certification to change the requirement for a U.S. or foreign Master's degree to a U. S. or foreign bachelor's degree or equivalent, other references to a master's degree requirement in Item 15 and more than five years of university-level studies were not changed and the record does not currently reflect that these requirements are satisfied by the beneficiary's credentials.

The documentation currently contained in the record of proceeding creates ambiguity concerning the actual minimum requirements of the proffered proceeding. The ETA 750 requirements do not indicate that the more than five years of college can be met through a combination of education and work experience, or through a bachelor's degree in the relevant field of study in combination with work experience beyond the requisite two years of work experience already required as of the 2003 priority date.

Because of this ambiguity, the AAO is remanding this case to the director to issue a request for evidence of the petitioner's intent concerning the actual minimum requirements of the position as the intent was explicitly and specifically expressed to DOL while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor application certification application. Such intent may have been illustrated through correspondence with DOL, an explanation of the intent of the amendments to the labor certification application initialed by DOL and the petitioner's organization, recruitment results,[4] or other forms of evidence relevant and probative to

---

[4] The regulation at 20 C.F.R. §§ 656.21(b)(1)(i)(A)-(F) and (ii) states the following (for the reduction in recruitment process permitting the employer to advertise and recruit without the supervision of DOL):

> If the employer has attempted to recruit U.S. workers prior to filing the application for certification, the employer shall document the employer's reasonable good faith efforts to recruit U.S. workers without success through the Employment Service System and/or through other labor referral and recruitment sources normal to the occupation:
>
> (i) This documentation shall include documentation of the employer's recruitment efforts for the job opportunity which shall:
>
> (A) List the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade or technical schools; labor unions; and/or

illustrating the petitioner's intent about the actual minimum requirements of the proffered position as set forth on the ETA 750 and that those minimum requirements were clear to potential qualified candidates during the labor market test.

On Item 21 of Part A of the ETA 750, DOL requested information that describes "efforts to recruit U.S. workers and the results," "specify[ing] sources of the recruitment by name." This item requests recruitment information in order to allow DOL to determine whether the petitioner's organization put forth good faith efforts to recruit U.S. workers which meet the regulatory guidelines found at 20 C.F.R. §§ 656.21(b)(1)(i)(A)-(F) and (ii) or 20 C.F.R. 6565.21(j)(1)(i)-(iv), depending on whether or not the ETA 750 was submitted under a supervised or unsupervised advertising or recruitment process.

For these reasons, the AAO remands the case to the director in order to issue a request to the petitioner that it provide probative evidence of the *documentation at the time it submitted DOL its Form ETA 750 application and attachments,* the requisite "signed, detailed written report" of its reasonable good faith efforts to recruit U.S. workers prior to filing the application for certification. *See* 20C.F.R. §§656.21(b)or (j).[5] The petitioner's submission of the evidence requested may help the director determine whether U.S. workers and other qualified candidates were in fact put on notice that they were eligible to apply for the proffered position, based on the stated actual minimum requirements of the Form ETA 750, and that the petitioner did not exclude U.S. workers from applying for and filling the position. Among documentation to be requested, the director should ask for copies of any evidence that summarizes and reflects the petitioner's recruitment efforts.[6] USCIS should

---

development or promotion from within the employer's organization;
(B) Identify each recruitment source by name;
(C) Give the number of U.S. workers responding to the employer's recruitment;
(D) Give the number of interviews conducted with U.S. workers;
(E) Specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and
(F) Specify the wages and working conditions offered to the U.S. workers; and

(ii) If the employer advertised the job opportunity prior to filing the application for certification, the employer shall include also a copy of at least one such advertisement.

[5] Under DOL's regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. *See* 20 C.F.R. § 656.30(d).

[6] For example, advertisements, posting notices, results of recruitment report, correspondence to DOL, etc.

be in receipt of the complete ETA 750 as certified by DOL, including any attachments which DOL incorporated into the form, before the petition may be approved. *See* section203(b)(3)(C) of the Act; *see also* 8 C.F.R. § 204.5(a)(2)(which mandates that the I-140 be accompanied by the individual labor certification *as certified by DOL*(emphasis added).

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation relevant to the beneficiary's credentials and request any additional evidence from the petitioner pursuant to whether U.S. workers and other qualified candidates were in fact put on notice that they were eligible to apply for the proffered position, based on the stated actual minimum requirements of the Form ETA 750, and that the petitioner did not exclude U.S. workers from applying for and filling the position. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision relevant to this issue.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision.