

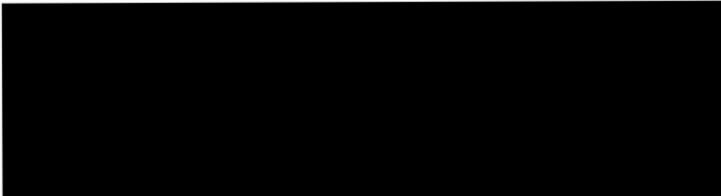


U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

B6



FILE: [REDACTED]
EAC 03 091 52636

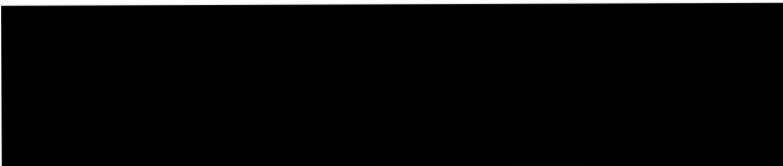
Office: VERMONT SERVICE CENTER

Date: OCT 10 2006

IN RE: Petitioner: [REDACTED]
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:



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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a newspaper. It seeks to employ the beneficiary permanently in the United States as a newspaper editor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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 that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 22, 2004 denial, the two issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 8, 1997.¹ The proffered wage as stated on the Form ETA 750 is \$60,008.00 per year. The Form ETA 750 states that the position requires two years of experience in the job offered or two years of experience as an editor/book publishing.

¹ This office notes that the petitioner has filed two other Form I-140 petitions on behalf of the beneficiary.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² On appeal, counsel submits a brief, the petitioner's amended IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2001, 2002 and 2003, a supporting letter dated November 22, 2004 from the petitioner, the beneficiary's IRS Forms 1099-MISC for 1998, 1999, 2000, 2001 and 2002 issued by the petitioner, and the beneficiary's IRS Forms 1040, U.S. Individual Income Tax Returns, for 1998, 1999, 2000, 2001 and 2002. Other relevant evidence in the record includes the petitioner's IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 1997, 1998, 1999, 2000, 2001 and 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1990 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner from March 1994 to the date he signed the Form ETA 750B.³

On appeal, counsel asserts that the petitioner employed the beneficiary as an independent contractor during all relevant years. Counsel also asserts that the petitioner's previous attorney failed to respond to the director's notice of action which has caused the beneficiary undue hardship. Counsel also submits the petitioner's amended tax returns for 2001, 2002 and 2003 on appeal. Counsel asserts that the petitioner's initial returns contained errors primarily relating to the recording of cash, receivables and other current liabilities. Counsel asserts that based on the amended returns, the petitioner had the ability to pay the proffered wage in 2001, 2002 and 2003. Further, pursuant to its supporting letter, the petitioner asserts that the beneficiary will replace the petitioner's current editor. The petitioner also states that it expects its financial status to improve and that it plans to start a second weekly publication in the future. Finally, the petitioner states that the beneficiary is qualified for the position based on his prior experience with Aryabharathy Printers and Publishers and with J&J Graphics/Print Express.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The first petition was filed in August 1996 and was withdrawn by the petitioner in November 1996. The second petition was filed in April 2000 and was denied in December 2000.

² 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).

³ The beneficiary did not indicate the date on which he signed the Form ETA 750B.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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. In the instant case, the beneficiary's Forms 1099-MISC for 1998, 1999, 2000, 2001 and 2002 show compensation received from the petitioner, as shown in the table below.

- In 1998, the Form 1099-MISC stated compensation of \$24,560.00.
- In 1999, the Form 1099-MISC stated compensation of \$21,380.00.
- In 2000, the Form 1099-MISC stated compensation of \$22,188.00.
- In 2001, the Form 1099-MISC stated compensation of \$23,571.00.
- In 2002, the Form 1099-MISC stated compensation of \$22,566.00.

Therefore, for the years 1997, 1998, 1999, 2000, 2001 and 2002, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 1998, 1999, 2000, 2001 and 2002. Since the proffered wage is \$60,008.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$35,448.00, \$38,628.00, \$37,820.00, \$36,437.00 and \$37,442.00 in 1998, 1999, 2000, 2001 and 2002, respectively.

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, without consideration of depreciation or other expenses. 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).

The record before the director closed on January 20, 2004 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2003 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2002 is the most recent return available. The petitioner's tax returns demonstrate its net income for 1997, 1998, 1999, 2000, 2001 and 2002, as shown in the table below.⁴

⁴ Despite counsel's explanation of the rationale for amending the petitioner's corporate tax returns, because the petitioner amended its returns in the middle of the proceedings, CIS would require IRS-certified copies to corroborate the assertion that the amended returns were actually processed by the IRS. The amended returns submitted by the petitioner simply indicate that they were received by the IRS. The returns are not certified copies. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, CIS will only examine the version of the petitioner's tax returns that were initially submitted and not the amended version as submitted on appeal. This office notes that even if the petitioner's amended tax returns for 2001, 2002 and 2003 were accepted on appeal, the petitioner has still failed to establish that it had the continuing ability to pay the beneficiary the

- In 1997, the Form 1120S stated net income⁵ of \$476.00.
- In 1998, the Form 1120S stated net income of \$10,202.00.
- In 1999, the Form 1120S stated net income of -\$4,316.00.
- In 2000, the Form 1120S stated net income of -\$7,589.00.
- In 2001, the Form 1120S stated net income of \$1,487.00.
- In 2002, the Form 1120S stated net income of \$4,996.00.

Therefore, for the year 1997, the petitioner did not have sufficient net income to pay the proffered wage of \$60,008.00. For the years 1998, 1999, 2000, 2001 and 2002, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 1997, 1998, 1999, 2000, 2001 and 2002, as shown in the table below.

- In 1997, the Form 1120S stated net current assets of -\$4,458.00.
- In 1998, the Form 1120S stated net current assets of -\$29,358.00.
- In 1999, the Form 1120S stated net current assets of -\$24,612.00.
- In 2000, the Form 1120S stated net current assets of -\$10,981.00.
- In 2001, the Form 1120S stated net current assets of -\$7,221.00.
- In 2002, the Form 1120S stated net current assets of \$2,664.00.

Therefore, for the year 1997, the petitioner did not have sufficient net current assets to pay the proffered wage of \$60,008.00. For the years 1998, 1999, 2000, 2001 and 2002, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.⁷

proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets for 1997, 1998, 1999 and 2000.

⁵ Ordinary income (loss) from trade or business activities as reported on Line 21.

⁶ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁷ CIS electronic records show that the petitioner filed two other I-140 petitions which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple

On appeal, the petitioner asserts that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. The petitioner advises that the beneficiary will replace one worker⁸. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. However, in the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be available to prove the ability to pay the proffered wage. In the instant case, the record does not state the wages of Mr. [REDACTED] or verify his full-time employment. Therefore, the petitioner has not established that the position held by [REDACTED] is the same position set forth in the Form ETA 750. Further, the petitioner states that [REDACTED] plans to relinquish his duties as soon as the beneficiary obtains permanent residence. However, the petitioner provides no evidence to support this claim, such as an affidavit from [REDACTED]. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. The petitioner also states that it expects its financial status to improve and that it plans to start a second weekly publication in the future. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2). The other petitions submitted by the petitioner in February 2000 and August 2003 were approved in December 2000 and June 2005, respectively. The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 labor certifications.

⁸ This office notes that in response to the director's request for evidence, the petitioner's previous counsel stated that the beneficiary was never employed by the petitioner and that the proffered job is a newly created position.

The assertions of counsel and the petitioner on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The director also determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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, *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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of newspaper editor. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	blank
	High School	blank
	College	blank
	College Degree Required	none
	Major Field of Study	blank

The applicant must also have two years of experience in the job offered or two years of experience as an editor/book publishing. The duties of the offered job are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for the petitioner from March 1994 to the date he signed the Form ETA 750B, that he worked as an editor for J&J Graphics Printer Press from March 1991 to March 1994 and that he worked as an editor/publisher for Aryabharathy Printers and Publishers from August 1977 to June 1990. He does not provide any additional information concerning his employment background on that form.

With the petition, the petitioner submitted the beneficiary's transcripts from University of Kerala and St. Berchman's College in India, a letter dated February 14, 1991 from Mangalam Publications stating that the beneficiary is a contributor to the publication, a letter dated January 10, 1991 from Oriental Writer's Forum stating that the beneficiary is an active member of the forum, a letter dated February 2, 1991 from Aryabharathy Printers and Publishers confirming the beneficiary's employment as its founder and editor and a letter dated

October 10, 1977 from [REDACTED] confirming that the beneficiary edited and published 19 Shakespeare plays in Malayalam.

On appeal, counsel submits an additional letter dated February 2, 1991 from Aryabharathy Printers and Publishers confirming the beneficiary's employment as an editor/book publishing from 1977 to 1990 and a letter dated February 26, 1993 from J&J Graphics/Print Express confirming the beneficiary's employment as the chief editor of its Malayalam newspaper in 1993.

The regulation at 8 C.F.R. § 204.5(1)(3) 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.

The letter submitted by the petitioner on appeal dated February 2, 1991 from Aryabharathy Printers and Publishers gives the name, address, and title of the beneficiary's previous employer and a description of the beneficiary's experience. Therefore, the letter meets the regulatory requirements of 8 C.F.R. § 204.5(1)(3). The preponderance of the evidence demonstrates that the beneficiary acquired over two years of experience as an editor/book publishing. Thus, the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. However, as detailed herein, the petitioner has not demonstrated that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.