

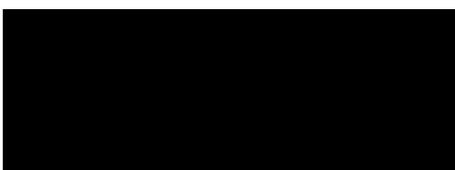
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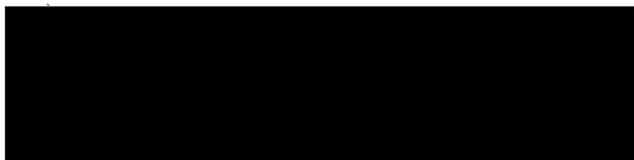
File: [Redacted]
SRC-04-244-51204

Office: TEXAS SERVICE CENTER Date: OCT 26 2006

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

Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a plant nursery and seeks to employ the beneficiary permanently in the United States as an agronomist ("Agronomist Assistant"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's March 26, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

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.¹

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as an 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.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential 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.

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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on May 19, 2003. The proffered wage as stated on Form ETA 750 for the position of an agronomist is \$13.50 per hour, 40 hours per week, which is equivalent to \$28,080.00 per year. The labor certification was approved on July 22, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on September 16, 2004. Counsel listed the following information on the I-140 Petition related the petitioning entity: date established: February 4, 1999; gross annual income: see attachments; net annual income: see attachments; and current number of employees: "over 5."

On February 17, 2005, the Service Center issued a Notice of Intent to Deny ("NOID") allowing the petitioner 30 days to submit additional evidence to overcome the potential denial, specifically: further information related to the petitioner's ability to pay, including the petitioner's 2003 federal tax return, and W-2 Forms for the beneficiary for 2003, and 2004 if employed; to submit a copy of the beneficiary's job offer letter; and to completed part 4, question 6 on page 2 of Form I-140. Finally, the NOID provided the petitioner an opportunity to correct an error on the Form. The petitioner filed for a "skilled worker" requiring two years of experience, but the certified ETA 750 listed only that one year of experience was required for the position, which would result in the application for an unskilled worker. The NOID requested that the petitioner state its desire to change the petition's classification to an unskilled worker, or to "submit a new ETA 750 indicating the correct requirements (at least two years experience) for INA Section 203 (b)(3)(A)(i) skilled worker."²

Counsel responded to the NOID on the petitioner's behalf and provided its 2003 federal tax return, an offer letter from the petitioner, and a letter and translation to document the beneficiary's prior experience abroad. Counsel additionally indicated that the petitioner sought to petition for the beneficiary as a skilled worker and provided "a corrected and duly executed ETA 750."³

On March 26, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, on the Form ETA 750B, signed by the beneficiary, the beneficiary did not list that he has been employed with the petitioner. However, the petitioner provided a letter, which indicated that the beneficiary has been employed with the petitioner since November 1, 2004. The petitioner submitted a W-2 form for 2004:

<u>Year</u>	<u>Wage Payment</u>
2004	\$5,400

The amount paid to the beneficiary in 2004 is significantly less than the proffered wage of \$28,080, and alone would not establish the petitioner's ability to pay the proffered wage.

² Submission of new ETA 750 forms listing two years of required experience would first require certification of the position through the DOL as a new application.

³ We note that counsel changed the required experience to two years on the "corrected" ETA 750, but that the "corrected" ETA 750 position was not advertised, filed with the Department of Labor, and certified by DOL as required. The petition will be considered as unskilled.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$28,080 per year from the priority date. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	not submitted ⁴
2003	-\$8,293
2002	-\$33,023

From the above net income, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage.

Further, the petitioner cannot demonstrate its continuing ability to pay the required wage under a second test used based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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 net current assets were as follows:

<u>Year</u>	<u>Amount</u>
2004	not submitted

⁴ The petitioning company pays its taxes based on a fiscal year from February 1 to January 31. The petitioner's accountant provided a letter stating that the petitioner had obtained an extension and that the petitioner's 2004 taxes were due by October 15, 2005. Accordingly, the petitioner's 2004 taxes were not available at the time of filing, or at the time that the petitioner responded to the NOID, or filed its appeal.

⁵ 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.

2003	-\$97,708
2002	-\$57,689

As demonstrated above, the petitioner did not have sufficient net current assets in any year to pay the beneficiary the proffered wage.

To address counsel's additional arguments on appeal, counsel contends that the petitioner's 2003 federal tax return shows that the petitioner had "total income" of \$64,272 in 2003, which demonstrates an increase over 2002, and that "this shows a clear and direct ability to pay the proffered wage." As noted above, the figure considered is the petitioner's net income as opposed to the petitioner's gross receipts or total income.

Based on the foregoing, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage. Further, we note that the petitioner has filed an I-140 Petition for a second employee, and that petition is currently pending. The petitioner would be required to demonstrate that it could pay both beneficiaries the proffered wages from the priority dates until the beneficiaries obtain permanent residence. As the petitioner has failed to demonstrate this ability for one employee, the petitioner would be unable to demonstrate its ability to pay for two employees.

A second point not raised in the director's denial was the petitioner's failure to document that the beneficiary had all of the education, training, and experience as required in the certified ETA 750. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (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). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d).

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

(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 beneficiary must demonstrate that he had the required skills by the priority date of May 19, 2003. On the Form ETA 750A, the "job offer" states that the position requires one year of experience in the job offered, as an "Agronomist Assistant" with job duties including: "Care and development of plant material, chemical for plants and trees, watering schedules, check plant material." The petitioner did not list any qualifying "related occupation." Further, the petitioner listed that the position required four years of high school education in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, the beneficiary listed prior experience as: Calamar Farm, Caldas, Colombia, Agronomist Assistant, for 40 hours per week, October 10, 1996 to November 15, 1998. The Form ETA 750B also listed that the petitioner attended "Dempresa," where according to a letter from the petitioner he has a degree as an Agronomy Technician.⁶

As evidence to document the beneficiary's qualifications, the petitioner submitted the following letter:

Letter from the Calamar Farm, signed by Pablo Velez Jaramllo, owner;
Dates of employment: October 1, 1996 to November 15, 1998 (the letter does not specify whether the position was full-time or part-time, and does not list the number of hours worked per week);
Title: Technical Consultant "specialized in the Bananas, Yucca and pasture's grower;"
Job Duties: not listed.

The letter is insufficient to document that the beneficiary has the required one-year of experience as an agronomist assistant. The letter does not list the beneficiary's job duties, so that we cannot verify that his work as a "Technical Consultant" was similar to that of an agronomist assistant, or that he worked in a position similar to the duties listed on the certified application. Based on a strict reading of the labor certification, the certified position requires one year of experience as an "agronomist assistant," and the certified position does not list a "related occupation," such as "consultant" for agronomy, or similar activities. Further, the letter does not verify whether the beneficiary worked on a part-time basis, or a full-time basis. As the beneficiary has listed that he attended "Dempresa" during part of the same time period, it may be possible that the beneficiary worked part-time for some of the time period in question, which would reduce the time period of experience verified. The petitioner did not submit any further documentation to demonstrate the beneficiary's prior experience. Therefore, based on the letter submitted, the petitioner has failed to document that the beneficiary met the requirements as set forth in the certified Form ETA 750.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the record does not demonstrate that the beneficiary meets the position's experience requirements certified on the Form ETA 750. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁶ The ETA 750B completed and signed by the beneficiary does not indicate the field of study at "Demprasa," or that the beneficiary received any degree or certificate.