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U.S. Citizenship
and Immigration
Services

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[REDACTED]

File: [REDACTED]
SRC-03-260-51343

Office: TEXAS SERVICE CENTER Date: **JAN 22 2007**

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:

[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 Acting Director, Texas Service Center (“director”), 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 business that installs and dismantles clear span structures and seeks to employ the beneficiary permanently in the United States as the company’s president. 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 June 14, 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 a professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

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

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).

petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on November 14, 2001. The proffered wage as stated on Form ETA 750 for the position of president is \$117,200 per year based on a 40 hour work week. The labor certification was approved on April 26, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on September 29, 2003. Counsel listed the following information on the I-140 Petition related to the petitioning entity: **date established: 1999; gross annual income: \$426,715.09; net annual income: \$85,000.00; and current number of employees: 2.**

On January 31, 2005, the director issued a Request for Additional Evidence ("RFE"), requesting that the petitioner submit additional evidence, specifically: related to the petitioner's ability to pay, including the petitioner's federal tax returns for 2003; quarterly Forms 941; I-9 copies for employees; W-2 wages paid; and information related to the corporation: the petitioner's lease or mortgage; a copy of a phone book listing; evidence of business registration; copies of newspaper or trade journal ads; a statement regarding the beneficiary's proposed employment duties, the employees that he will supervise; and a summary of the beneficiary's employment history since he entered the U.S.

On June 14, 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 and the matter is now before the AAO.

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 on October 8, 2001, the beneficiary listed that he has been employed with the petitioner from June 2001 to the present (October 8, 2001, the date of signature).² The petitioner did not submit W-2 Forms or Forms 1099 for the beneficiary. However, the beneficiary is a 50% owner of the petitioner.³ The petitioner's federal tax returns, Schedule K, reflect the following payment to the beneficiary:

<u>Year</u>	<u>Amount paid</u>
2002	\$40,611

We note that on the beneficiary's Form G-325 filed with his I-485 Adjustment of Status application that the beneficiary listed that he was employed with [REDACTED] from April 1999 to the present (signed on November 15, 2003), and that he ended his employment with his prior L-1 sponsor in April 1999.

³ We note that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." If the petitioner did not make the relationship clear to the DOL prior to certification of the ETA 750, then the bona fides of the job offer are unclear.

2001 \$47,012

While the Schedule K payments exhibit partial wage payment to the beneficiary, the petitioner cannot establish its ability to pay the beneficiary the proffered wage based on prior wage payment alone. Therefore, the petitioner must demonstrate that it can pay the difference between the wages paid, and 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, Citizenship & Immigration Services ("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 petitioner is structured as an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). Line 21 shows the following income:

<u>Tax year</u>	<u>Net income or (loss)</u>
2002	\$81,222 ⁴
2001	-\$13,373

The petitioner's net income alone would not allow for payment of the beneficiary's proffered wage in any of the foregoing years. The petitioner's combined net income and wages paid to the beneficiary for 2002 would reflect \$121,833 and demonstrate the ability to pay for 2002, but not in 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets

⁴ The petitioner's 2003 federal tax return was not available at the time that the petitioner initially filed the I-140 Petition. The petitioner further indicated in its response to the January 2005 RFE that the petitioner's 2003 federal tax return was not available at that time. The petitioner did not submit its 2003 or 2004 tax returns on appeal.

and current liabilities.⁵ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2002	\$14,480
2001	\$19,057

Following this analysis, the petitioner's federal tax returns shows that the petitioner would lack the ability to pay the proffered wage in either of the above years under the net current asset test as well even if wages paid to the beneficiary were combined with net current assets.

Further, we note that the petitioner's tax returns do not demonstrate significant gross receipts, and in fact demonstrate inconsistent and decreasing revenues. In 2001, the petitioner showed \$957,925 in gross receipts. In 2002, gross receipts declined to \$426,715.

On appeal, counsel cites to an AAO non-precedent case: *In Re Matter of [Name not Provided]*, [REDACTED] (VSC April 7, 2004) for the principle that the petitioner only needs to demonstrate its ability to pay the proffered wage from the time of the priority date, and may pro rate the wage required from the priority date. Based on this theory, if the petitioner filed the labor certification in November 2001, the petitioner would only need to demonstrate the ability to pay the proffered wage in the amount of \$15,776.92, representing seven weeks of pay from the November date. Therefore, counsel contends that the petitioner may demonstrate its ability to pay in 2001 based on the petitioner's net current assets, or prior payment to the beneficiary in the amount of \$47,012 reflected on the petitioner's tax return.

First, while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Second, we will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. Therefore, the petitioner has failed to demonstrate that it can pay the proffered wage in 2001.

Counsel then cites to other AAO non-precedent cases: *In Re Matter of [Name not Provided]*, EAC-00-088-52775 (October 1, 2001), where the employer's tax return demonstrated a net loss, but the AAO examined the tax return and determined that depreciation, cash on hand at year end and taxable income resulted in a figure which was larger than the proffered wage. Further, counsel cites *In Re Matter of [Name not Provided]*, EAC-01-018-50419 (May 13, 2002); and *In Re Matter [Name not Provided]*, EAC-02-103-53128 (January 10,

⁵According 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) and notes that depreciation, cash on hand and taxable income were considered to find the ability to pay the proffered wage, and adverse decisions were reversed in favor of the petitioner.

Further, counsel contends that the beneficiary travels in his role as president and that the corporation paid \$23,143 in travel expenses, which should be considered as a cash resource to pay the proffered wage. We note that the beneficiary's travel expenses would be business expenses and not available cash to demonstrate the petitioner's ability to pay the proffered wage.

We note again that the cases counsel has cited are non-precedent cases. Further, cash on hand, and net current assets are considered in conjunction with wages paid to the beneficiary as analyzed above. In the case at hand, even if the petitioner's net current assets were combined with the wages paid to the beneficiary, this would not demonstrate the petitioner's ability to pay the proffered wage.

The AAO will consider the petitioner's totality of the circumstances in determining the petitioner's ability to pay. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In looking at the petitioner's business, including the length of time in business, gross receipts, net income, net current assets and other factors, we would not conclude that the petitioner has the ability to pay. The petitioner can demonstrate payment of the wage in one year, but not in 2001. Further, the petitioner failed to submit evidence for the years 2003, and 2004. The petitioner's tax returns show significant declining gross receipts between 2001 and 2002. Therefore, the totality of the petitioner's business circumstances does not lead us to conclude that the petitioner can demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

Further, although not raised in the director's denial, the petitioner has failed to show that the beneficiary meets the requirements of the certified ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" position description provides:

Plan, develop and establish policies and business objectives for the installation and dismantling of clearspan structures. Responsible for directing manages in business contract negotiations, hiring and training of subcontractors and purchasing. Confer with management to develop

organization policies and to coordinate functions and operations. Review activity reports and financial statements to determine if objectives are being met. Direct and coordinate formulation of financial programs to provide funding for new and continued operations.

Further, the job offered listed that the position required:

Education: Bachelor of Science*
Major Field Study: Operations Management or related field.

Experience: 5 years in the job offered, President
or 5 years in the related occupation of Operations Manager

Other special reqs: *Will accept any combination of education and experience equivalent to a B.S. degree.
** Experience which may have been obtained concurrently must include:
1. 5 years experience in the field of clearspan structures; and
2. 5 years experience in the hiring and training of subcontractors.

On the Form ETA 750B, signed by the beneficiary on October 8, 2001, the beneficiary listed prior education as: (1) Bishops High School, Hereford, U.K.; and (2) Holme Lacy College of Agriculture, Holme Lacy, U.K., Field of Study: Forestry Management; from September 1981 to May 1983, for which he received a "diploma."

The petitioner submitted an academic equivalency evaluation from the Foundation for International Services (FIS).⁶ The FIS evaluation considered the beneficiary's progressively responsible work experience as a tent installer, manager of field operations, and as a tent supervisor for the time period April 1987 to April 2000. Based on the beneficiary's thirteen years of experience, and the applied formula of three years of experience would be equivalent to one year of academic education, twelve of the beneficiary's years of work experience would be equivalent to the Bachelor's degree in operations management that the position required, leaving only one year of experience remaining.

The petitioner would then need to demonstrate that the beneficiary had the required five years of experience, including the special requirements listed.

On the Form ETA 750B, the beneficiary listed his relevant experience as: (1) [REDACTED], Fort Lauderdale, FL, June 2001 to present, President; (2) [REDACTED] Hollywood, FL, April 1996 to May 2001, Field Operations Manager; (3) [REDACTED] Budingen, Germany, July 1993 to March 1996, Field Operations Manager; (4) [REDACTED] Budingen, Germany, January 1990 to June 1993, Tent Supervisor; (5) [REDACTED] Oxford, England, April 1987 to December 1989, Tent Installer.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(3), which provides:

⁶ We note that the FIS is a member of the National Association of Credential Evaluation Services (NACES). The U.S. Department of Education refers individuals to NACES, private credential evaluation services, to determine the equivalence of foreign degrees to American degrees. The objective of NACES is to raise ethical standards in the types of credential evaluations provided by the private sector.

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To document the beneficiary's experience, the petitioner submitted the following letters:

1. Letter from [REDACTED], President, [REDACTED] dated April 24, 2001;
Position title: Field Project Manager;
Dates of employment: August 22, 1994 to April 9, 1999;
Description of duties: "managed the installation of clear span structures and dismantling of temporary clear span structures for special events." He also coordinated hiring of subcontractors, and was responsible for training all field personnel and coordinating client installation schedules.
2. Letter from [REDACTED], Vice President - Finance, [REDACTED] dated March 29, 1996;
Position title: Tent supervisor from January 1989 to December 1992; and Manager of Field Operations, January 1993 to present (March 29, 1996);
Description of duties: Not listed

While the letters would be relevant, the evaluation to determine the beneficiary's educational equivalency has relied on the years documented above to determine that the beneficiary had the required degree. The petitioner did not provide any evidence that the beneficiary's prior studies were considered in the evaluation, or any documentation to show that education. Since all but one year of the beneficiary's experience was utilized to show the degree equivalency, the beneficiary cannot rely on the same experience to demonstrate five years of experience in operations management. Consequently, if we accept the degree equivalency, then the petitioner has not demonstrated that the beneficiary meets the five-year work experience requirement of the certified labor certification. The beneficiary may not rely on the same experience to show the degree equivalency and the prior work experience. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Further, documentation conflicts regarding the beneficiary's start date with the petitioner. Some evidence suggests that the beneficiary was employed with the petitioner as early as April 1999. The beneficiary signed documentation related to the petitioner's incorporation in April 1999. The beneficiary's Form G-325 filed with his I-485 Adjustment of Status application listed that he was employed with [REDACTED] from April 1999 onward, and that he ended his employment with his prior L-1 sponsor in April 1999. The letter from his prior L-1 employer lists an employment end date of April 1999. If the beneficiary left his prior employment in April 1999, this would leave a gap in his work status until the present petitioner filed an H-1B petition on his behalf in June 2001. Further, the conflicting evidence raises doubts on the petition's credibility.

See Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988), which states: “Doubt raised on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.”

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 petitioner has failed to establish that the beneficiary met the requirements of the certified 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.