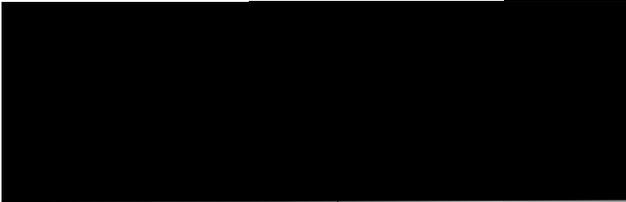


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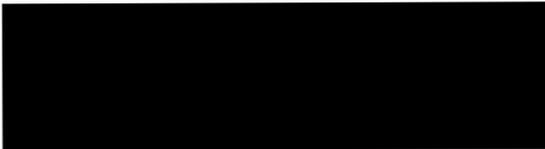
Office: TEXAS SERVICE CENTER Date:

MAR 15 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:



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 (“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 operates a dry cleaning business, and seeks to employ the beneficiary permanently in the United States as an alteration tailor (“Alteration cum Ironer”). 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 September 15, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification 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 an immigrant visa and classify the beneficiary as a professional or a skilled worker. 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 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

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).

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 March 20, 2001. The proffered wage as stated on Form ETA 750 is \$9.86 per hour for an annual salary of \$20,508.80 per year. The labor certification was approved on June 20, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on September 6, 2005. Counsel listed the following information on the I-140 Petition related to the petitioning entity: established: August 23, 1996; gross annual income: \$270,880; net annual income: \$19,809; and current number of employees: 2.

On September 15, 2005, the director determined that the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage, and denied the petition. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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. On Form ETA 750B, signed by the beneficiary on March 31, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner did not claim that it previously employed the beneficiary, and has not submitted any W-2 Forms to show that he was employed. Therefore, the petitioner cannot establish its ability to pay based on prior wage payment to the beneficiary.

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.

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's tax returns reflect that it is structured as a C corporation. 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 tax returns submitted state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	\$19,809
2003	-\$18,753
2002	\$10,553 ²

From the above net income, the petitioner did not have sufficient net income in any year to demonstrate its ability to pay the beneficiary the proffered wage.

Next, we will examine the petitioner's continuing ability to pay the required wage under a second test based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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 net current were as follows:

<u>Year</u>	<u>Net Current Assets</u>
2004	-\$8,453
2003	-\$33,673
2002	-\$44,704

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

The petitioner additionally submitted bank statements for the three months ending April, May, and June 2005, which show a low balance of \$1,731.34, and a high balance of \$3,746.52.

First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable to establish a petitioner's ability to pay the proffered wage. This regulation allows for consideration of additional material "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Further, if we were to examine the bank statements submitted, nothing contained therein leads 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 as the petitioner has only provided statements for three months in 2005. The statements do not provide any evidence that the petitioner could pay the wage in 2001, the year of the priority date, or in any year thereafter.

² We note that the priority date of the petition is March 20, 2001. The petitioner would need to demonstrate its ability to pay from this date onward until the beneficiary obtains permanent residence. The petitioner did not submit its 2001 federal tax return, or any other evidence to demonstrate its ability to pay for the year 2001.

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.

Further, the petitioner has not provided any evidence that the funds listed on the bank statements represent cash assets in addition to cash listed on the petitioner's Form 1120 Schedule L already considered above.⁴

On appeal, counsel provides that the decision was "unjust and capricious." Further, counsel provides that the petitioner's president is the sole shareholder of the company, and that he has sufficient funds to pay the beneficiary the proffered wage. In support, counsel submitted a letter from the Pioneer Muslim Credit Union in the petitioning company's president's name exhibiting that he had the following bank balances: 2001: \$7,353.30; 2002: \$9,989.71; 2003: \$9,853.33; and 2004: \$6,782.93. Counsel asserts that these balances combined with the petitioner's net income would exhibit the petitioner's ability to pay, and that the small differential under the proffered wage would be minor.⁵

The petitioner here is structured as a C corporation, not as a sole proprietor, and therefore, personal assets of the petitioner's sole shareholder would not be considered. In the case of a corporation, CIS may not "pierce the corporate veil" and look to the assets of the owner to satisfy the petitioner's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Therefore, while the petitioner's owner may have individual assets, those assets are not relevant in the case at hand. Assets of the shareholders (or of other enterprises or corporations) cannot be considered in determining the petitioner's ability to pay the proffered wage.

Counsel has provided no other evidence and no other arguments on appeal. Based on the foregoing the petitioner is unable to demonstrate its continued ability to pay the beneficiary the proffered wage from the time of 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*

⁴ Further, the record of proceeding does not contain the required regulatory prescribed evidence for the year 2005 to allow us to properly assess the petitioner's ability to pay the proffered wage for that year.

⁵ We note that even if the petitioner's net income were combined with the company president's individual bank balances (which as noted above, cannot be done), the combined amounts would not demonstrate the ability to pay the proffered wage in 2001, or in 2003.

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:

To press [iron] regular clothes. To joint and repaires [sic] the fabric garments. To remove spots with using appropriate spots removing chemicles [sic]. To sew by hand, needles & thereads [sic]. To do profesional [sic] looking alteration work on required clothes & garments. To Iron & do alteration specifically on Indian sari & Pakistani Salwar-Kamiz. To follow alteration instructions on sari, salwar & kamiz given by elated customers & satisfied their requirements [sic.]

Further, the job offered listed that the position required:

Education: 12 years high school
Major Field Study: none
Experience: 2 years in the job offered, Alteration cum Ironer
or 2 years in the related occupation of Alteration
Other special requirements: None.

On the Form ETA 750B, the beneficiary listed his relevant experience as: Deluxe Dry Cleaners, Cypress, Texas, from July 1999 to the present (date of signature, March 31, 2001), position: Alteration cum Ironer.

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

To document the beneficiary’s experience, the petitioner submitted the following letter:

Letter from [redacted] [sic] Dry Cleaner, undated;
Position title: Alteration cum Ironer
Dates of employment: July 1999 to May 2001;

Description of duties: responsible for sorting dresses based on work required; removing spots; hand sewing; shortening and lengthening sleeves, and legs; repair or replace defective garment parts.

The letter documents that the beneficiary does not have the full two years of experience required, but instead may be one month to three months deficient of the required two years. For example, if the beneficiary began in mid or late July 1999 and ended his employment in early May 2001, his experience might be three months less than the required two years. Further, the letter does not provide whether the beneficiary was employed on a full-time or a part-time basis, which would also affect the overall length of the beneficiary's experience. We additionally note that the beneficiary would need to have the required two years of experience by the priority date of March 20, 2001. As of March 20, 2001, the beneficiary would have had one year, and eight or nine months of experience, not the full two years required by the certified ETA 750. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner did not submit any other letters to document any additional experience that the beneficiary may have had. Further, we note that the beneficiary did not list on Form ETA 750B that he had any additional related experience. Accordingly, the petitioner has failed to document that the beneficiary had the required full two years of experience necessary to meet the requirements of the certified ETA 750 job offer.

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.