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U.S. Citizenship and Immigration Services

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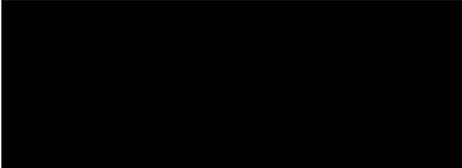
Office: TEXAS SERVICE CENTER Date:

NOV 29 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 is in the business of Internet advertising, and seeks to employ the beneficiary permanently in the United States as a manager, advertising (“Sales Manager, Advertising”). 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 August 26, 2005 decision, the case was denied based on the petitioner’s failure to demonstrate that the beneficiary had the experience required by the certified ETA 750.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).<sup>1</sup>

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 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 the 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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 25, 2001. The proffered wage as stated on Form ETA 750 is \$750 per week, based on a 40 hour work week, which is equivalent to \$39,000 per year.<sup>2</sup> The labor certification was approved on May 1, 2004, and the petitioner filed the I-140 on the beneficiary’s behalf on November 10, 2004. The petitioner represented the

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<sup>1</sup> 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).

<sup>2</sup> The petitioner initially listed the rate of pay as \$400 per week, but DOL required that the petitioner increase the wage prior to certification. We note that the petitioner initialed the change and provided a posting notice, which shows that the position was reposted at the higher wage.

following information on the I-140 Petition: date established: December 31, 1900; gross annual income: \$27,060 (the petitioner additionally listed the “parent” company’s income as \$1,082,654; net annual income: 984 (parent income \$553,176); and current number of employees: four.

On February 21, 2005, the director issued a Request for Additional Evidence (“RFE”) for the petitioner to submit documentation that the beneficiary had the required two years of prior experience; and that the petitioner had the ability to pay the proffered wage for the years 2001, 2002, and 2003. Further, the RFE requested that the petitioner provide Forms W-2 if the petitioner employed the beneficiary.

On May 31, 2005, the director denied the petition based on abandonment as the petitioner failed to timely respond to the RFE. On June 6, the petitioner requested that the petition be reopened as the petitioner asserted that it had timely responded to the RFE. Subsequently, the petitioner received the RFE response returned to them by mail with a notice that read “the final decision has already been made on your case and the information is no longer needed.” On August 11, 2005, the petitioner filed an appeal, which provided, “documents submitted in timely response to RFE were erroneously rejected by the adjudicating officer. Subsequent attempts to point out the clerical error have been unsuccessful, and we therefore appeal.”

On August 26, 2005, the director withdrew the prior decision of abandonment and reopened the case. The director then issued a decision on the same date. The director denied the petition on the basis that the petitioner failed to document that the beneficiary had the required two years of experience as required by the certified ETA 750. The petitioner appealed and the matter is now before the AAO.

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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> 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, “manages a team of four sales representatives who sell Internet advertising.” Further, the job offered listed that the position required:

Education:	
High School:	4 years
Experience:	2 years in the job offered, <sup>3</sup> Sales Manager, Advertising, or 2 years in a related occupation of sales management.

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<sup>3</sup> The petitioner initially listed that the position required four years of experience, but the experience was reduced to two years. The petitioner has initialed the change, but we note that Form ETA 750 does not contain the usual “DOL stamp” accepting the changes. We note that the stamp is also absent from the wage, which was increased. However, it is unlikely that the petitioner would voluntarily raise the wage, so that the changes appear legitimate. The petitioner should provide definitive documentation that DOL accepted both

The petitioner did not list any other special requirements.

On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary listed his prior experience as: (1) Winston-Salem Journal, Winston-Salem, NC, from September 1999 to March 2000, position: Circulation District Manager; (2) Marketing Mix, Buenos Aires, Argentina, from 1994 to 1999, position: Accounts Executive; and (3) Imagen Publicad, Buenos Aires, Argentina, from 1990 to 1993.

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.

The petitioner did not provide any documentation to evidence the beneficiary's prior experience. The director requested evidence of the beneficiary's prior experience in her February 21, 2005. The petitioner failed to provide any evidence of the beneficiary's experience in its response.

On appeal, counsel provides that "documentation of employment in Argentina difficult to obtain [sic]. Beneficiary now provides evidence of five years' experience as a Sales and Marketing Manager in addition to two years in Ciruculation [sic] Sales."

The petitioner submitted the following evidence:

Letter from [REDACTED], President, Marketing Mix, dated August 15, 2005;  
Position title: Sales Manager, Marketing and Publicity;  
Dates of employment: May 1994 to February 1999;  
Description of duties: not listed.

Letter from [REDACTED], Winston-Salem Journal, September 6, 2005;  
Position title: "full-time employee in our circulation department in the position of Circulation Sales Coordinator;  
Dates of employment: September 13, 1999 to October 8, 2001;<sup>4</sup>  
Description of duties: not listed.

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changes in any further proceeding.

\* We note that the beneficiary's experience gained with [REDACTED] was partially obtained after the priority date of April 25, 2001, and would be less than two years of experience.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

In the petitioner's RFE response submitted, the petitioner does not reference the beneficiary's prior work experience at all, or that the petitioner was in the process of trying to obtain documentation to verify the beneficiary's prior work experience. The petitioner makes no mention of the beneficiary's prior work experience, but instead provides that the beneficiary has obtained a new position and should be approved based on the American Competitiveness in the Twenty-First Century Act (Public Law 106-313) and Related Legislation (Public Law 106-311) and Public Law 106-396.

Further, on appeal, the petitioner notes that it was hard to obtain verification for the beneficiary's experience in Argentina. The second letter was obtained from a U.S. source, which should have been readily obtainable.

Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, we will not accept this evidence, and affirm the director's decision.

Further, although not raised in the director's denial, we find that the petitioner also failed to establish its ability to pay the beneficiary the proffered wage. 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*, 229 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). 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.

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 director requested in her RFE that the petitioner provide evidence of its ability to pay the proffered wage for the years 2001, 2002, and 2003. The record of proceeding contains the petitioner's partial tax returns for 2002 and 2003, but not for the year of the priority date 2001. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The

petitioner further did not provide this evidence on appeal. Accordingly, the petitioner has failed to establish its ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

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.