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U.S. Citizenship
and Immigration
Services

B6

[Redacted]

File: [Redacted]
EAC-05-209-52416

Office: VERMONT SERVICE CENTER

Date: OCT 18 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 Director, Vermont Service Center (“director”), denied the immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a publication, and seeks to employ the beneficiary permanently in the United States as a graphic designer (“Desktop Publisher”). 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 January 31, 2006 decision,¹ the petition 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 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).²

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 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).

¹ On April 25, 2006, the director issued a decision that the petitioner’s March 6, 2006 appeal was untimely filed as it was “filed over the prescribed period of 33 days.” We note that based on the January 31, 2006 decision that the petitioner’s response would have been due on Sunday, March 5, 2006. As the date due falls on a weekend, the petitioner would be allowed until Monday, March 6, 2006 to timely file its submission. Accordingly, the appeal was timely filed and will be adjudicated.

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). 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).

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001.³ The proffered wage as stated on Form ETA 750 is \$58,766 per year⁴ based on a 40-hour work week. The labor certification was approved on April 3, 2003, and the petitioner filed the I-140 Petition on the beneficiary's behalf on June 30, 2005. The petitioner listed the following information: established: October 16, 1998; gross annual income: not listed; net annual income: not listed; and current number of employees: four.

On September 15, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide evidence of the petitioner's ability to pay the proffered wage from the date of April 30, 2001 onward, including an annual report or audited financial statement as the petitioner's tax returns showed a loss. The RFE additionally requested that the petitioner provide W-2 statements if the petitioner employed the beneficiary. The petitioner responded. On January 31, 2006, 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 April 26, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner provided in response to the RFE that the beneficiary began working for the petitioner on October 31, 2005 following receipt of his work authorization.

³ The petitioner listed on Form ETA 750 is "[REDACTED]". The petitioner submitted tax returns on behalf of [REDACTED].

⁴ The petitioner initially listed an annual salary of \$47,500 per year, but DOL required the wage to be increased to \$58,766 prior to certification.

On appeal, the petitioner provided the beneficiary's 2005 Form W-2, which exhibited wages paid to the beneficiary in the amount of \$8,050. As the amount paid is less than the proffered wage, the petitioner is unable to establish its ability to pay the beneficiary the proffered wage based on prior wage payments. The petitioner must show that it can pay the full proffered wage in the years 2001, 2002, 2003, and 2004, and that it can pay the difference between the wages paid and the proffered wage in 2005.

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 record demonstrates that the petitioner is 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). The petitioner does not list any additional income so we will take the petitioner's net income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2005	\$45,687
2004	\$18,225
2003	not provided ⁵

⁵ The petitioner submitted its 2004 and 2005 federal tax returns on appeal, and indicated that it had also submitted its 2003 federal tax return. However, the petitioner appears to have inadvertently left out

2002 -\$89,674
2001 -\$61,030

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years, even if the wages paid to the beneficiary in 2005 were added to the petitioner's net income.

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 and current liabilities. 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>
2005	\$91,262
2004	\$45,575
2003	not provided
2002	-\$6,036
2001	-\$4,983

Based on the petitioner's net current assets, it would be able to demonstrate its ability to pay the proffered wage in 2005, but not in any other year.

The petitioner's accountant additionally provided a statement that the petitioner had earned gross revenues of \$117,199 in 2003, and \$154,990 in 2004. As noted above, based on *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the petitioner's net income figure, rather than the petitioner's gross income is the proper figure to rely on.

The petitioner's president provided that he was a practicing physician and was willing and able to contribute his earnings as a physician to the business. The petitioner's accountant also provided a statement listing the president's earnings as a physician. 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.

On appeal, the petitioner's president provides that he is the sole shareholder, that he has "invested and lost a considerable sum of my own money since 1999 in organizing [the petitioner] into a media company." Further, he provides that the company had some difficult times after September 11, 2001, but that the company has showed signs of profitability since 2004. He continues that "any additional

its 2003 tax return in its submission as the 2003 return is not contained in the record.

expenses incurred by [the petitioner] have been paid from my personal income as a practicing physician.”

As noted above, since the petitioner is formed as an S Corporation, the petitioner president’s personal assets or of other enterprises or corporations cannot be considered in determining the petitioning corporation’s ability to pay the proffered wage.

The petitioner’s president additionally provides that, “as the president of [the petitioner], I will be solely responsible for his salary and all other expenses, if needed until the company is successful enough to do so.” 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).

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation’s taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner’s figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that the petitioner’s president holds 100 percent of the company’s stock. However, none of the petitioner’s tax returns submitted show that the petitioner’s president has received any wages in the form of Officer Compensation. The petitioner’s president in his capacity as a sole shareholder would have no resources to allocate to pay the beneficiary the proffered wage. As noted above, the president’s personal assets, or assets from other unrelated ventures would not be considered in determining the petitioner’s ability to pay the proffered wage.

Accordingly, the petitioner has failed to establish its ability to pay the proffered wage.

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” description for a Desktop Publisher provides:

Format typescript and graphic elements for a magazine in the Bangla language, a weekly in Bangla newspaper and an English bi-weekly newspaper.

Further, the job offered listed that the position required:

Education: none
Major Field Study: none

Experience: 2 years in the job offered, Desktop Publisher;

Other special requirements: none listed.

On the Form ETA 750B, the beneficiary listed his relevant experience as: Bangladesh Society Inc., New York, New York, from February 1998 to present (date of signature April 26, 2001), position: desktop publisher.

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 letters:

1. Letter from [REDACTED] General Manager, Sanatech Printing Corporation, dated May 3, 2004;
This is to certify that [the beneficiary] . . . is very well known to me since 1999. He is a very professional and an excellent graphics designer. As we don’t have our own graphics designer, we refer all of customers to get the Graphics Design.
2. Letter from [REDACTED] Office Manager, Thikana, Prometheus International Inc., New York, New York, dated November 21, 2004;
I have the pleasure to certify that [the beneficiary] . . . is very well known to us since 1999. He worked in this organization as a Graphics Designer from April 2001 to

February 2002. Presently we use to hire him as a Graphics & Technical Consultant as and when we need help. As we know him personally, he is possessing very wide and sound knowledge on Graphics Design and having vest [sic] Technical/software support knowledge on Bengali/English bilingual interface system (Apple Mac OS Platform).

3. Letter from [REDACTED] General Secretary, Bangladesh Society Inc., New York, New York, dated December 23, 2003;

This is to certify that [the beneficiary] . . . has been working as a Graphics Designer in this organization from February 1998 to April 2001. He bears a good moral character and holds very sound knowledge on his professional work.

Letter three from the General Secretary of the Bangladesh Society would be the most relevant. However, based on the letter provided it is not clear whether the beneficiary was employed on a full-time or a part-time basis. It is unclear whether based on the first letter, from the General Manager of Sanatech Printing Corporation, the beneficiary performed work for other parties in addition to his work for the Bangladesh Society, or whether both positions were part-time. This would be important to know as if the work was less than full-time, the experience may not equate to a full two-years of prior work experience. Further, the third letter does not provide what the beneficiary's job duties were.

Additionally, regarding the first letter provided, the letter does not account for any specific dates of work, only that the author knew the beneficiary since 1999, and again, the letter does not account for the hours or amount of work that the beneficiary performed. The second letter accounts for experience, which was all gained after the priority date, and accordingly could not be considered to show that the beneficiary meets the requirements of the position. 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)

The foregoing letters are insufficient to demonstrate that the beneficiary meets the requirements of 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 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.