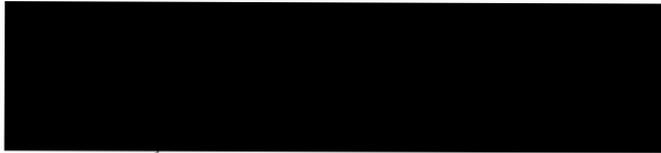




U.S. Citizenship  
and Immigration  
Services

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B6



File:   
SRC-06-128-50645

Office: TEXAS SERVICE CENTER Date: OCT 18 2007

In re: Petitioner:  
Beneficiary:



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:

SELF-REPRESENTED

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 petitioner appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner operates a travel agency, and seeks to employ the beneficiary permanently in the United States as a manager, travel agency. The petition filed was submitted with a copy of Form ETA 750A, Application for Alien Employment Certification, approved by the Department of Labor (DOL).<sup>1</sup> As set forth in the director’s July 19, 2006 decision, 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. Further, the petitioner failed to provide evidence that the beneficiary met the requirements of the certified Form 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>2</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 permanent residence and classify the beneficiary as a professional. The regulation at 8 C.F.R. § 204.5(1)(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.”

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<sup>1</sup> A petitioner is required to submit an original certified Form ETA 750 (Parts A and B). The regulation at 8 C.F.R. § 103.2(b)(4) provides:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with the Service.

In the case at hand, the petitioner submitted a copy of Form ETA 750A, but not part B. The unaccredited representative that filed the Form ETA 750, and Form I-140 indicated that the labor certification had been certified and was mailed to the source’s prior address, and, therefore, not received.

The regulation at 20 C.F.R. § 656.30(e) provides that DOL may issue duplicate labor certifications “upon the written request of a Consular or Immigration Officer.” CIS requested a duplicate Form ETA 750, however, no duplicate has been received to date.

<sup>2</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).

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 23, 2003. The proffered wage as stated on Form ETA 750 is \$79,539 per year based on a 40 hour work week.<sup>3</sup> The labor certification was approved on September 12, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on March 17, 2006. The petitioner listed the following information: established: October 1, 1989; gross annual income: \$1,926,759; net annual income: \$227,060; and current number of employees: five.

On April 15, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to provide evidence that the beneficiary had complied with the National Security Entry-Exit Registration System ("NSEERS");<sup>4</sup> to

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<sup>3</sup> The petitioner initially listed a salary of \$38,709 per year, but DOL required that the petitioner increase the salary to \$79,539 per year prior to certification.

<sup>4</sup> NSEERS was established September 11, 2002 to monitor individuals entering and leaving the U.S. NSEERS required nonimmigrants from [REDACTED] as designated by the Federal Register to comply with NSEERS registration at ports of entry, as well as nonimmigrants designated by the U.S. Department of State, and any other nonimmigrant regardless of nationality, identified by an immigration officer in accordance with 8 CFR § 264.1(f)(2). The NSEERS requirement was expanded to include other groups of nationals, and nationals from the designated groups were to report for Special Registration in four separate "call-in groups." Lebanon, the beneficiary's country of origin, was listed for call-in registration between January 27 and February, 7, 2003. *See* 68 Fed. Reg. 2366 (January 16, 2003). Group 2 additionally included: citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. *Id.* at 2366. Group 3 included citizens or nationals of Pakistan or Saudi Arabia. *See* 68 Fed. Reg. 33 (February 19, 2003). Group 4 expanded NSEERS and Special Registration to include citizens or nationals of Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. *Id.* at 33. On December 2, 2003, the Department of Homeland Security ("DHS") suspended the automatic 30-day and annual re-registration requirements for NSEERS. *See* <http://www.ice.gov/pi/specialregistration/index.htm>, accessed April 5, 2007.

submit the original Form ETA 750 parts A and B, or explain the absence of the original; to submit evidence of the petitioner's ability to pay the proffered wage for the years 2004 and 2005 in the form of either federal tax returns, annual reports, or audited financial statements, or an explanation of why such documents cannot be submitted and to submit alternate documents such as bank statements, profit-loss statements, or payroll records. The petitioner responded.

On July 19, 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. Further, the director specifically provided that although not raised in the RFE, the petitioner failed to provide evidence that the beneficiary met the education or experience requirements as listed on Form ETA 750, and that the petitioner should address this issue in any further filings. 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 G-325A, signed by the beneficiary on January 11, 2006, the beneficiary did list that he has been employed with the petitioner from May 2001 to the present (date of signature, January 11, 2006).<sup>5</sup> The petitioner provides that the beneficiary has been employed in H-1B status, however, the petitioner did not provide any Forms W-2, or paystubs to evidence the petitioner's payments to the beneficiary, or other evidence such as quarterly wage payments listing employees paid, or Forms W-3 evidencing payments to all employees. Therefore, the petitioner cannot establish its ability to pay the beneficiary the proffered wage through prior wage payments.

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

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The petitioner submitted a copy of the beneficiary's passport page evidencing a fingerprint identification number ("FIN"), which demonstrated that he was registered in NSEERS.

<sup>5</sup> The record of proceeding does not contain either a copy or the original of Form ETA 750B, which would list the beneficiary's present and prior work experience. The petitioner did submit Form G-325A, Biographic Information, which is a required form filed with Form I-485, Adjustment of Status application. Here, the beneficiary has not filed an adjustment application. Form G-325A is not required for an I-140 petition.

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 is 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 <sup>6</sup> | -\$30,568                   |
| 2003              | \$1,970                     |
| 2002 <sup>7</sup> | not provided                |

Based on the petitioner's net income, it is unable to demonstrate its ability to pay the proffered wage in either year.

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.<sup>8</sup> 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 are as follows:

| <u>Tax Year</u> | <u>Net Current Assets</u> |
|-----------------|---------------------------|
| 2004            | \$26,679                  |
| 2003            | \$76,747                  |
| 2002            | not provided              |

The petitioner's net current assets would reflect that it can pay the proffered wage in one year, based on its 2003 federal tax return, but not in 2004. Further, as noted above, the petitioner did not provide its 2002 federal tax return, which based on its tax year would be required to show its ability to pay from the time of the priority date. Additionally, we note that CIS records reflect that the petitioner has filed for a second

<sup>6</sup> The petitioner files its returns based on a tax year, which runs from October 1 through September 30, so that the petitioner's 2005 tax return was not available at the time of filing the petition, or at the time of response to the RFE. The petitioner's 2004 tax return, for example, reflects filing for the time period of October 1, 2004 through September 30, 2005.

<sup>7</sup> Based on the petitioner's date of filing Form ETA 750, the petitioner also should have submitted its 2002 federal tax return, which would reflect the time period of October 1, 2002 to September 30, 2003, and encompass the time from the priority date of April 23, 2003 until September 30, 2003. The record of proceeding contains no regulatory prescribed evidence in accordance with 8 C.F.R. § 204.5(g)(2) for this time period.

<sup>8</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

individual. The petitioner would need to demonstrate that it could pay the proffered wage for both beneficiaries from the respective priority dates.

On appeal, the petitioner provides that it can pay the proffered wage:

Whereas the petitioner has already established that the beneficiary has already been employed under H-1B1 status prior to the filing of the Labor Certification until present with the petitioner and the petitioner has already paid the proffered wages as clearly establishing the ability to pay the proffered wages during the year 2003, 2004, and 2005 as stated in the Labor Certification. As established by the AAU that when the beneficiary was actually paid during the year when the Labor Certification was filed and paid thereafter can be a source of proof as the ability to pay the proffered wage.

As noted above, a petitioner's prior wage payments to the beneficiary are considered in determining the petitioner's ability to pay the proffered wage. Here, the petitioner provided a copy of the beneficiary's H-1B approval notice as authorization to work for the petitioner. In response to the RFE, the petitioner contended that the federal tax returns exhibit that it has paid salaries in the amount of \$82,303 for the year 2004, and \$90,285 for 2003. However, Form I-140 reflects that the petitioner employs five individuals. The petitioner submitted no evidence to demonstrate that part, or any of the wages paid and reflected on the petitioner's federal tax returns were paid to the beneficiary, and not to the petitioner's other workers. The fact that the petitioner has employed the beneficiary in H-1B status is irrelevant without additional documentation to show that it has paid the beneficiary the required wage as listed on Form ETA 750, or that it has the ability to pay the proffered wage from its net income or net current assets.

As the petitioner has not provided any additional evidence on appeal, we conclude that the petitioner is unable to demonstrate its ability to pay the proffered wage.

Further, as raised in the director's denial, the petitioner has failed to show that the beneficiary meets the educational or experience requirements of the certified Form ETA 750.

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" description for a Manager, Travel Agency provides:

Must be able to supervise travel agents, pricing control, time scheduling of employees, hire and train employees, maintain account of sales and purchases, handle cash flow and bank deposits, deal with airlines for travel dates and tickets, deal with hotels for

accommodation arrangements, maintain public relations, control the functions of employees.

Further, the job offer listed that the position required:

|                             |  |
|-----------------------------|--|
| Education:                  | Bachelor's degree  |
| Major Field Study:          | none   |
| Experience:                 | 2 years in the job offered, Manager Travel Agency or<br>2 years in the related occupation of Supervisor of Travel Agents |
| Other special requirements: | None.  |

The regulations define professional under the third preference category as 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." See 8 C.F.R. § 204.5(l)(2). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for professional classification that:

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The petitioner failed to submit any evidence with the initial filing, or on appeal, that the beneficiary had a degree, or the foreign equivalent thereof in accordance with 8 C.F.R. § 204.5(l)(3)(ii).<sup>9</sup>

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.

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<sup>9</sup> 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 failed to provide any evidence that the beneficiary had the two years of required prior experience. Accordingly, the petitioner has failed to demonstrate that the beneficiary had the required education or prior experience as listed on 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. 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.