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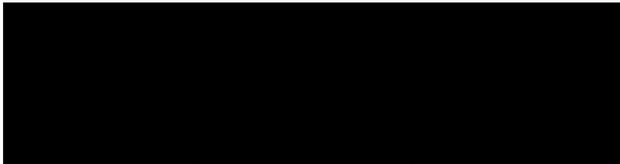
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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EAC-04-140-53226

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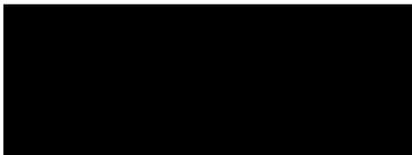
Date: **SEP 20 2007**

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:



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 operates a health spa and club, and seeks to employ the beneficiary permanently in the United States as a manager, recreation facility (“manager, health spa and club”). 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 12, 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.

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.<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 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.

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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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on March 19, 2001.<sup>2</sup> The proffered wage as stated on Form ETA 750 is \$17.03 per hour for an annual salary of \$35,422.40 per year based on a 40 hour work week. The labor certification was approved on August 16, 2001, and the petitioner filed the I-140 Petition on the beneficiary's behalf on April 6, 2004.<sup>3</sup> The petitioner listed the following information: established: 2001,<sup>4</sup> and failed to list anything for the petitioner's gross annual income, net annual income, and current number of employees.

On March 9, 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, as well as evidence that the beneficiary had the required two years of experience to meet the requirements of the certified Form ETA 750. The petitioner responded. On June 12, 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

<sup>2</sup> We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

<sup>3</sup> The petitioner listed on Form ETA [REDACTED] d/b/a Riverside Health Spa" with an address of [REDACTED]. The petitioner listed on Form I-140 is: "SKP, Inc. t/a Riverside Health Spa," with an address of: [REDACTED] Annandale, VA, and a federal tax identification number of: [REDACTED].

<sup>4</sup> We note that incorporation documentation on the tax return shows that the business incorporated on April 26, 2001. Whether the business existed in another corporate form prior to that is unclear. However, the petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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. In the case at hand, the priority date is March 19, 2001. From the record, it is not clear that the petitioner had a full-time position available as of the priority date for the beneficiary.

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 12, 2004, the beneficiary did not list that he was employed with the petitioner. Counsel provides in response to the RFE that the petitioner has employed the beneficiary since August 2004. The petitioner submitted the following W-2 Forms:

<u>Year</u>	<u>W-2 Wages Paid</u>
2005	\$35,422.44
2004	\$8,855.61

SKP, Inc. issued the W-2 statements to the beneficiary. As noted above VA Riverside Inc. d/b/a Riverside Health Spa is listed as the petitioner on Form ETA 750. SKP, Inc. t/a Riverside Health Spa is listed as the petitioner on the I-140 Petition. The petitioner did not provide any documentation to show that VA Riverside Inc. is the same entity as SKP, Inc., or that either organization operated d/b/a or t/a Riverside Health Spa.

If SKP, Inc. could demonstrate that it was the same entity as VA Riverside Inc., then the wages paid to the beneficiary in 2005 would be sufficient for that year. The record does not, however, contain any evidence to document that the two companies are one and the same, such as incorporation documentation, certificate of name change, doing business as, or fictitious name information.<sup>5</sup> Wages paid, and financial information related to one company, cannot be used to satisfy the petitioner's need to demonstrate that it can 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.

Further, counsel has not provided any information to demonstrate that SKP Inc. is the successor-in-interest to VA Riverside Inc. To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Therefore, the wages paid to the beneficiary in 2005 would not be considered as evidence of the petitioner's ability to pay the proffered wage for that year. Conversely, even if we were to accept that the wages SKP Inc. paid in 2005 could establish VA Riverside Inc.'s ability to pay the proffered wage, which we do not, the petitioner must still establish that it can pay the beneficiary the proffered wage from the priority date of 2001 onward. Consequently, the petitioner must still demonstrate that it can pay the full proffered wage in 2001, 2002, and 2003, and that it can pay the difference between the wages paid and the proffered wage in 2004.

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

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<sup>5</sup> A corporate entity search at <http://s0302.vita.virginia.gov/servlet/resqportal/resqportal> accessed August 21, 2007, does not reflect that the company does business under a fictitious name, or that it previously used another name, or that the company has merged since its incorporation.

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.

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The tax returns submitted are for "SKP, Inc." with an address of [REDACTED] Annandale, VA. The tax returns do not designate d/b/a or t/a Riverside Health Spa. As noted above, it is unclear that the information for SKP, Inc. can be used to demonstrate VA Riverside Inc.'s ability to pay the proffered wage.

SKP, Inc.'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 <sup>6</sup>	\$38,207
2003	\$61,589
2002	not provided
2001	\$63,143

The tax returns would establish SKP, Inc.'s ability to pay the proffered wage in 2001, 2003, and 2004. However, we again note that it is not clear that SKP, Inc. and VA Riverside Inc. are the same entities, or that the tax returns for SKP, Inc. can demonstrate VA Riverside Inc.'s ability to pay the proffered wage. Further, the petitioner did not submit any regulatory prescribed evidence for the year 2002, and, therefore, cannot establish its ability to pay in that year. No explanation was provided for the lack of evidence for the year 2002.

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>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1

<sup>6</sup> On appeal, counsel submitted an amended Form 1120 for SKP, Inc. for 2004, which provided that the net income remains the same, but that an interest expense listed on the initial filing should have instead been listed as a rental expense. We note that the amended return similarly does not affect SKP, Inc.'s net current assets.

<sup>7</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

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 assets for SKP, Inc. were as follows:

<u>Year</u>	<u>Net Current Assets</u>
2004	\$63,701
2003	\$23,941
2002	not provided
2001	-\$110,997

As demonstrated above, SKP, Inc. could show sufficient net current assets in 2004, but not in any other years. We again note that the petitioner has failed to demonstrate the relationship between SKP, Inc. and VA Riverside Inc. No federal tax return was submitted for 2002.

Based on the foregoing, VA Riverside Inc. cannot demonstrate its ability to pay the proffered wage.

On appeal, counsel provides that the tax returns submitted reflect that the petitioner can pay the proffered wage based on net income in 2001, 2003, and 2004, and that the petitioner paid the beneficiary a salary equivalent to the proffered wage in 2005.

First, we note that counsel fails to address or provide any regulatory prescribed evidence for the year 2002, or any explanation for the lack of evidence for that year. 8 C.F.R. § 204.5(g)(2) provides that the petitioner must demonstrate its ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence for the year 2002 is relevant to our inquiry. No evidence was provided. Further, the record contains no evidence that the petitioner listed on Form ETA 750 is the same entity as the petitioner listed on Form I-140, or that SKP, Inc. is the successor-in-interest to VA Riverside, Inc.

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

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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.

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, Health Spa and Club provides:

Supervise and coordinate activities of workers engaged in health spa and club: interview, hires, trains and evaluates employees; prepares contracts and issues membership; demonstrates operation and explains purpose of equipment and instructs patrons in their use; supervise and/or perform other spa services as bathhouse attendant including body scrubbing.

Further, the job offered listed that the position required:

Education: none  
Major Field Study: none

Experience: 2 years in the job offered, Manager Health Spa & Club

Other special requirements: Body scrubbing experience.

On the Form ETA 750B, the beneficiary listed his relevant experience as: [REDACTED] Sports Health Club, Seoul, Korea, from February 2001 to August 2003, position: Sports and Health (Spa) Manager.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(I)(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] President, Park Eun Hee Sports Health Club, February 20, 2004;  
Position title: Sports and Health (Spa) Manager;  
Dates of employment: February 1, 2001 to August 31, 2003;

Description of duties: not listed.

The letter documents that the beneficiary has the two years of experience, but does not list or document that the beneficiary had the required job duties or special skill of "body scrubbing experience." Further, the certification does not address the beneficiary's job duties during the time of his employment. The petitioner did not submit any other letters to document any additional experience that the beneficiary may have had. The foregoing letter is 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.