

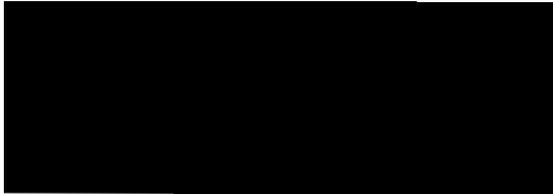


U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
EAC 04 171 50377

Office: VERMONT SERVICE CENTER

Date: MAR 17 2008

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.<sup>1</sup> The appeal will be dismissed.

The nature of the petitioner's business<sup>2</sup> is landscaping. It seeks to employ the beneficiary permanently in the United States as a system administrator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. The director transmitted a notice of intent to deny the petition dated August 18, 2005 to the petitioner at the address stated in the petition ([REDACTED]) with a copy to the petitioner's substitute counsel, [REDACTED] at his present address. The petitioner did not respond to the notice of intent to deny the petition,<sup>3</sup> therefore the director denied the petition.

The record demonstrated that the appeal was properly filed, timely and made 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.

Notwithstanding the petitioner's lack of response to the director's notice of intent to deny the petition dated August 18, 2005, the AAO shall review the appeal. 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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>4</sup>

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<sup>1</sup> A chronology of the case is as follows: the I-140 petition was filed on May 14, 2004; a notice of intent to deny the petition dated August 18, 2005 was transmitted to the petitioner at the address stated in the petition ([REDACTED]) with a copy to the petitioner's substitute counsel, [REDACTED] at his present address; and as no response was received from the petitioner, the director denied the petition on May 30, 2006. Substitute counsel appealed the director's decision. The petitioner's prior counsel, [REDACTED] was convicted of various counts regarding the falsifying of labor certification applications and conspiracy to submit false labor certifications. The petition requests the preference classification of skilled worker.

<sup>2</sup> According to the Virginia State Corporation Commission website <http://s0302.vita.virginia.gov> accessed January 31, 2008, the petitioner's corporation status was purged on September 30, 2003. According to a news report retrieved from the website <http://www.washingtonpost.com> accessed January 31, 2008, SEGAD Enterprises, doing business as LAMCO (Lithuaman American Co.) Landscaping & Maintenance Co. located at [REDACTED] e., Rockville, Maryland, filed for Chapter 7 bankruptcy (liquidation) on December 28<sup>th</sup> (bankruptcy case no. [REDACTED]).

<sup>3</sup> Neither the petitioner nor substitute counsel has offered an explanation as to why no response was made to the notice of intent to deny the petition dated August 18, 2005. Counsel stated on appeal that the petitioner did not receive that notice but we note substitute counsel has not stated that substitute counsel did not receive the notice. If this matter is pursued, this matter should be examined.

<sup>4</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

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.

*Ability to Pay the Proffered Wage*

The regulation at 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 16, 2001.<sup>5</sup> The proffered wage as stated on the Form ETA 750 is \$46,000.00 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a cover letter from prior counsel dated May 7, 2004; a letter from [REDACTED] dated May 3, 2004, produced on the computer generated letterhead of [REDACTED] Rockville Maryland 20850 offering the beneficiary a permanent employment position as a system administrator at the proffered wage; a statement from [REDACTED] of "Kraitene," UAB "Kraitene," Fabriko g. 8 Lt-4520 Marijampole, Lietuva (i.e. Lithuania) stating that the beneficiary was employed from February 1998 to July 2000 at UAB "Kraitene" as a "Network/Systems administrator;" and the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2000 and 2001.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1991.<sup>6</sup> According to the tax returns in the record,

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<sup>5</sup> It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>6</sup> The petitioner's certificate of incorporation listed in the record states that the petitioner was incorporated in Virginia in 1996.

the petitioner's fiscal year is based on a calendar year. No net income and gross annual income amounts were stated on the petition. On the Form ETA 750 signed by the beneficiary on March 30, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, substitute counsel asserts that the director issued the denial "based on the unrelated conduct of the petitioner's prior counsel and not on any direct evidence of falsification in this case."

Accompanying the appeal, counsel submits an explanatory letter dated June 23, 2006 and additional evidence that includes the following documents: an affidavit from [REDACTED] dated June 20, 2006; the petitioner's U.S. Internal Revenue Service Form 1120S tax returns for 2002, 2003 and 2004; a corporate charter certificate from the Commonwealth of Virginia dated April 9, 1996, for the petitioner; six photographs of computer equipment; and several of the petitioner's electric bills ; and three business invoices of LAMCO Landscaping & Maintenance Co. in 2006.

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 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. 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 evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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, without consideration of depreciation or other expenses. 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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's tax Form 1120S returns<sup>7</sup> demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001 the Form 1120S<sup>8</sup> stated net income (Schedule K, Line 23) of \$29,858.00.
- In 2002 the form 1120S stated net income of \$29,420.00.
- In 2003 the form 1120S stated net income of \$16,328.00.
- In 2004 the form 1120S stated a loss of <\$1,619.00><sup>9</sup>.

Since the proffered wage is \$46,000.00 per year per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2001, 2002, 2003 and 2004.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>10</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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.

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<sup>7</sup> Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date.

<sup>8</sup> 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).

<sup>9</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>10</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- The petitioner's net current assets for 2001 were <\$55,427.00>, for 2002 <58,131.00>, for 2003 were <\$24,674.00>and for 2004 were <\$139,078.00>.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

### *The Beneficiary's Qualifications*

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 16, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the 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).

As already stated above, with the petition, the petitioner submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a cover letter from prior counsel dated May 7, 2004; a letter from [REDACTED] dated May 3, 2004, on the computer generated letterhead of Segad Enterprises Inc., [REDACTED] Rockville Maryland 20850 offering the beneficiary a permanent employment position as a system administrator at the proffered wage; and a statement from [REDACTED] of "Kraitene," UAB "Kraitene," Fabriko g. 8 Lt-4520 Marijampole, Lietuva (i.e. Lithuania) stating that the beneficiary was employed from February 1998 to July 2000 at UAB "Kraitene" as a "Network/Systems administrator."

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of system administrator. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |                         |            |
|-------------------------|------------|
| 14. Education           |            |
| Grade School            | <u>0</u>   |
| High School             | <u>0</u>   |
| College                 | <u>0</u>   |
| College Degree Required | <u>N/A</u> |
| Major Field of Study    | <u>N/A</u> |

The applicant must have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A is relating to other special requirements stated "none."

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she represented that she had been employed in the business of childcare as an au pair at a residence in Clifton, Virginia from August 2000 to February 2001. During this employment period, the beneficiary supervised children's activities, prepared meals and laundered children's clothing.

From February 1998 to July 2000 the beneficiary stated that she was employed by UAB "Kraitene," Fabriko g. 8 Lt-4520 Marijampole, Lietuva (i.e. Lithuania) as a systems administrator. She does not provide any additional information concerning her employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident. The beneficiary provided additional information concerning her employment history on CIS Form G-325 found in the record of proceeding. From March 2001 to May 2001 the beneficiary was unemployed. From June 2001 to August 2003 she was employed by the Holiday Inn in Washington, DC as a waitress. From September 2003 to the present time (i.e. May 5, 2004) she was employed by SafeNet Security in Burtonsville, Maryland as an administrative assistant.

The regulation at 8 C.F.R. § 204.5(l)(3) 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 labor certification requires only two years of experience as a system administrator. Because of those requirements, the proffered position is for a skilled worker.

Examining the record of proceeding and particularly the form ETA 750, Part B, block 11, 12, 13 and 14, the beneficiary stated no education and no "Special qualifications and skills." Other than the one employment reference by [REDACTED] of "Kraitene," UAB "Kraitene," Fabriko g. 8 Lt-4520 Marijampole, Lietuva, the petitioner has submitted no other indicia of the beneficiary's qualifications as a system administrator (or a database administrator). There is no information in the record as to the identity of Mr. [REDACTED] or if he is employed or connected to "Kraitene." No job or management title is stated in the experience verification letter. There is no recitation in the letter that education and/or on-the-job training was

provided to the beneficiary. There is no indication that the beneficiary could perform the tasks mentioned in the letter such as maintaining and configuring the company's computer network, administering Internet based computer systems, or operating Windows NT operating system servers and work stations without prior education or occupational experience obtained prior to the Kraitene employment and without education provided by that employer on-the job. No prior education or occupational experience is stated by the beneficiary. The letter does not verify the beneficiary's full-time employment at Kraitene. As aforementioned, the letter fails to meet the requirements of 8 C.F.R. § 204.5(1)(3) since there is no title of the trainer or employer, or a description of the training received or the experience of the alien.

The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience in the offered job from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The evidence submitted also fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.