



U.S. Citizenship
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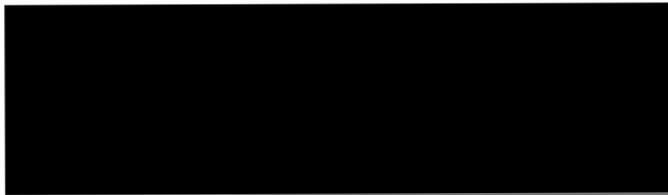
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAR 17 2008**
WAC-04-047-52299

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is an international trade, real estate and website consulting firm. It seeks to employ the beneficiary permanently in the United States as an office manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that the beneficiary had the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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.

As set forth in the director's April 28, 2005 denial, the only issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position prior to the priority date.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also 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).

The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The priority date for the instant petition is August 3, 2001. On the Form ETA 750B, signed by the beneficiary on June 27, 2001, the beneficiary did not claim to have worked for the petitioner.

The Form I-140, Immigrant Petition for Alien Worker, was submitted on December 9, 2003. On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$109,495.00, and to currently have 12 employees.

On appeal and in response to the AAO's request for evidence (RFE) dated November 13, 2007, counsel asserts that the beneficiary's experience gained from the employment with Shang-Lin-Dian Café in Taiwan meets the minimum experience requirements set forth by the Form ETA 750 because the approved labor certification requires experience in "any industry."

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 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).

To determine whether a beneficiary is eligible for an employment-based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth on the Form ETA 750. **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, Madany 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). The Form ETA-750A, at blocks 14 and 15, sets forth the minimum education, training and experience that the applicant must have for the proffered position as follows:

- | | | |
|-----|------------------------------|--|
| 14. | Education (number of years) | |
| | Grade School | 8 years |
| | High School | 4 years |
| | College | 4 years |
| | College Degree Required | Bachelor's degree or equivalent |
| | Major Field of Study | Any field |
| | Training (number of years) | (no training required for the position) |
| | Experience (number of years) | |
| | Job Offered | 1 year or |
| | Related Occupation | 1 year |
| | Related Occupation (specify) | Office Manager or Assistant Office Manager
in any industry |
| 15. | Other Special Requirements | Will also accept additional 2 years of experience in job offered or in related occupation in lieu of required educational training |

Item 17 indicates that the beneficiary will supervise two to three (2-3) employees.

The Form ETA 750 clearly indicates that the petitioner set forth an alternate requirement in addition to the primary requirement. The primary requirement consists of four years of college studies, a bachelor's degree

or equivalent in any major and one year of experience as an office manager or assistant office manager in any industry while the alternate requirement is three years of experience in the job offered or in a related occupation. Therefore, the director properly evaluated the instant petition under the skilled worker category since the minimum requirements could consist of two to four years of work-related experience.

The regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification “must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification.”

On the Form ETA 750B, the beneficiary also set forth his work experience. He listed his experience as a “Vice President” from July 1997 to the present, i.e., June 27, 2001, the date when the Form ETA 750B was signed, as a “District Officer Manager” from December 1996 to June 1997, as a “Manager” from June 1995 to November 1996 and as a Manager from October 1986 to May 1995 at various locations of Shang-Lin-Dian Café.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien’s experience or training will be considered.

In corroboration of the experience requirements on the Form ETA-750, the petitioner provided an experience letter dated July 17, 2001 from [REDACTED] Director of Shang-Lin-Dian Café (Shang-Lin-Dian Café July 17, 2001 letter) as evidence to establish the beneficiary’s qualifications for the proffered position. This letter is on Shang-Lin-Dian Café’s letterhead, and was signed by [REDACTED] as the director of the company. In response to the director’s October 28, 2004 RFE, the petitioner submitted another experience letter dated January 5, 2005 from [REDACTED] the secretary of the same company (Shang-Lin-Dian Café January 5, 2005 letter). This letter is on the same Shang-Lin-Dian Café’s letterhead as the Shang-Lin-Dian Café July 17, 2001 letter, but was signed by [REDACTED] as the secretary of the company. Both letters include the name and title of the writer, name, address and telephone number of the company, and a specific description of the duties performed by the beneficiary, and thus appear to be experience letters from the beneficiary’s former employer required by the regulation at 8 C.F.R. § 204.5(g)(1). The Shang-Lin-Dian Café January 5, 2005 letter provides the same but more detailed information about the beneficiary’s work experience. Pertinent parts of the letter are quoted as follows:

This is to certify that [the beneficiary] was the sole owner of Shang-Lin-Dian Café since 1986 and was engaged in the following managerial and administrative positions during the period from 1986 through 2003. Shang-Lin-Dian Café started with one café and is currently having 5 café stores in Taipei City. The company’s administrative office is located at No. 2 [REDACTED]. Phone number [REDACTED].

We will be more than happy to provide additional documents to verify [the beneficiary]’s employment history with Shang-Lin-Dian Café whenever is required.

<u>Position</u>	<u>Employment Period</u>	<u>Location</u>	<u>Duties</u>
Manager (Full-time)	10/86 to 05/95	Chung Shan Chiu	Managing the daily Operations of the café
Manager (Full-time)	06/95 to 11/96	Datung Chiu	Managing the daily operations of the café
District Office Manager (Full-time)	12/96 to 06/97	Sungshan Chiu	Supervising and managing 4 café store managers
Vice President (Full-time)	07/97 to 05/03	Jungshan Chiu	Formulating company policy & directing all managerial staff

This is to further certify that [the beneficiary] is an outstanding business owner and manager. He was able to build a very successful café chain in Taipei and the business is still going on at this time. Although the business is now under the control of other individuals, [the beneficiary]'s contributions to the business success in early years was a clear indication of his managerial and entrepreneurial abilities.

The director determined that the petitioner has not shown that the beneficiary's experience as a manager, district office manager, or vice-president clearly fills or related to the experience requirements required by the ETA 750 since the labor certification states that the experience must be in the job offered or in a related occupation. On appeal, counsel argues that the experience gained does not need to be in a related field or industry, but simply in a related occupation, as the ETA 750 clearly states that the experience gained can be in "any industry."

The record of proceeding shows that the employer, now the petitioner, states its experience requirements in several places. The Form ETA 750 Item 14 states the proffered position requires one year of experience in the job offered (that is office manager or executive secretary or administrative assistant as DOL ascribed to the proffered position) or in a related occupation as office manager or assistant office manager in any industry in addition to the educational requirements. Item 15 describes the additional 2 years of experience which is acceptable in lieu of required educational training as "experience in job offered or in related occupation." In response to the AAO's RFE, counsel also submits recruitment efforts pertinent to the instant case, including newspaper advertisements, internal posting notice and internet posting. While the newspaper advertisements did not specify what kind of experience the proffered position requires and the internal job posting just repeated the requirements of the Form ETA 750, the internet advertisement place on Yahoo classifieds stated "a total of 3 y[ea]rs [of] related experience in any industry;" and college job posting placed with California State Polytechnic University stated "total of 3+ years [of] experience." The record does not contain any evidence showing that the petitioner intended to limit the experience requirements into the job offered or any specific occupation or industry. The AAO finds that U.S. workers were on notice during the petitioner's labor market test before DOL that three years of experience in the related occupation in any industry would meet the minimum experience requirement in the instant case.

The Shang-Lin-Dian Café January 5, 2005 letter is an experience letter from the beneficiary's former employer as required by the regulation as the letter is from the company's secretary on behalf of the company on the company's letterhead. It is noted that the beneficiary was the sole proprietor and owner during the period,

however, the company was the beneficiary's employer for his self-employment period. The regulation does not prohibit using self-employed experience to qualify the beneficiary for the proffered position. The beneficiary's manager, district office manager or vice president position is a related occupation to the proffered position (office manager, executive secretary or administrative assistant) as required by the petitioner. The beneficiary's experience in the café industry is experience in any industry as indicated on the Form ETA 750. Therefore, the AAO concurs with counsel's assertions on appeal and in response to the AAO's RFE and finds that the Shang-Lin-Dian Café January 5, 2005 letter meets the evidence requirements to demonstrate the beneficiary's prior experience as set forth at 8 C.F.R. § 204.5(g)(1), and that the petitioner has demonstrated that the beneficiary meets the requisite three years of work experience as set forth on the Form ETA 750.

Counsel's assertions on appeal and in response to the AAO's RFE overcome the director's ground of denial. The director's April 28, 2005 decision is hereby withdrawn.

However, beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss this issue below. 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).

On February 7, 2005, the director issued a notice of intent to deny (NOID) finding that records indicate that the petitioner was suspended by the Franchise Tax Board on November 11, 2004 and suspended by the California Secretary of State on September 17, 2004. In response to the director's NOID, counsel submitted a letter dated March 8, 2005 and asserted that the petitioner contacted the California Secretary of State office and the Franchise Tax Board and was able to resolve the issues address in the director's NOID. However, on March 2, 2008, this office accessed the California Secretary of State official website for business entity database at <http://kepler.ss.ca.gov/corpdata/ShowAllList?QueryCorpNumber=C2169330>. The record shows that the petitioner in the instant case, EWT International, Inc., is currently in "suspended" status. The petitioner would therefore no longer be an employer as defined by the regulations at 20 C.F.R. § 656.3 and 8 C.F.R. § 204.5(1)(1). Further, the petitioner failed to rebut the grounds stated in the director's NOID. Therefore, the petition is not approvable.

In addition, the regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The 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. DOL. *See* 8 CFR § 204.5(d). The priority date in this case is August 3, 2001. The proffered wage as stated on the Form ETA 750 is \$18.30 per hour (\$38,064 per year).

The petitioner submitted its Form 1120 U.S. Corporation Income Tax Return for 2001 through 2003 and establish its ability to pay the beneficiary the proffered wage in these years with its net income or net current assets. However, the record does not contain the petitioner's tax returns or other regulatory-prescribed evidence for 2004 and 2005.

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 asserted that the beneficiary had worked for the petitioner since May 2004. However, the petitioner did not submit the beneficiary's W-2 form or any other evidence showing that the petitioner hired and paid the beneficiary in 2004. For 2005, the petitioner submitted a copy of the beneficiary's paystub for a period from January 1, 2005 to January 15, 2005 showing the petitioner paid the beneficiary \$1,600 for this pay period, which is equal to or higher than the proffered wage level. The petitioner failed to demonstrate that it paid the beneficiary the full proffered wage in 2004 with W-2 forms or other documentary evidence.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition, which the petitioner did for the years 2001 and 2003. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). The petitioner is also obligated to pay the prevailing wage to each of its H-1B employees. *See* 20 C.F.R. § 655.731.

On the petition, the petitioner claimed that it currently employs 12 workers. However, CIS records show that the petitioner had filed seven (7) Immigrant Petitions for Alien Worker (Form I-140) including the instant petition and other petitions on behalf of the instant beneficiary, and eight (8) nonimmigrant petitions (Form I-129). The petitioner must establish its ability to pay all the proffered wages to the beneficiaries of approved and pending immigrant petitions as well as the prevailing wages to the H-1B employees. The record does not contain information about the proffered wages for other petitions.

Given the record as a whole, the petitioner's history of filing immigrant and nonimmigrant petitions, we cannot determine that the petitioner established its continuing ability to pay all the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence.

In view of the foregoing, the petition is remanded to the director to request any additional evidence to consider whether the petitioner is in good standing status as a corporation and whether the petitioner had the ability to pay all the beneficiaries in 2001 and continues to the present. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The petition is remanded to the director for further action consistent with this decision.