

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



FILE: [Redacted]
SRC-06-183-51875

Office: TEXAS SERVICE CENTER

Date: APR 06 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an industrial refrigeration installation company. It seeks to employ the beneficiary permanently in the United States as a refrigeration-system installer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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.

As set forth in the director's January 19, 2007 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 DOL. See 8 C.F.R. § 204.5(d). The petitioner must also 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 DOL 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 23, 2001. The proffered wage as stated on the Form ETA 750 is \$13.20 per hour (\$27,456.00 per year).¹ The Form ETA 750 states that the position requires one year of experience in the job offered.

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.² On appeal, the petitioner has submitted a letter from [REDACTED] President and CEO; a copy of the beneficiary's 2006 Form W-2 Wage and Tax Statement; a historical summary of the beneficiary's wage progression from his date of hire; and copies of pay stubs issued to the beneficiary. Other evidence in the record includes copies of Form W-2 Wage and Tax Statements issued by the petitioner for the years 2001 through 2005. There is no other evidence in the record relevant to the petitioner's ability to pay the proffered wage.

On the I-140 petition, the petitioner claimed to have been established in 1999 and to currently have 151 employees. The petitioner listed its gross annual income as \$17,000,000.00 and its net annual income as \$250,000. On the Form ETA 750B the beneficiary claimed to have worked for the petitioner since February 1997.

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. 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, U.S. Citizenship and Immigration Services (USCIS) 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 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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

¹ The director incorrectly stated that the proffered wage was \$14.27 per hour (\$29,861.16 per year).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

petitioner's ability to pay the proffered wage. In the instant case, the petitioner has provided copies of W-2 Wage and Tax Statements issued for the years 2001 through 2005. The name listed on the Form W-2 Wage and Tax Statements is [REDACTED]. The beneficiary's name is [REDACTED]. [REDACTED] The record does not contain any evidence to establish the common identity of [REDACTED] and [REDACTED].³ However, even if we were to assume for the purposes of this decision that the amounts listed in the Form W-2 Wage and Tax Statements represent wages paid by the petitioner to the beneficiary, the petitioner has failed to establish that it had the ability to pay the proffered wage beginning on the priority date.

The wages listed on the Form W-2 Wage and Tax Statements for the years 2001 through 2005 are represented in the table below.

<u>Year</u>	<u>Wages Paid</u>
2001	\$7,052.77
2002	\$27,575.92
2003	\$28,543.87
2004	\$32,132.57
2005	\$23,319.14

The W-2 forms reflect wages paid in excess of the prevailing wage in 2002, 2003 and 2004. The petitioner did not pay the full proffered wage in 2001 or 2005. Therefore, the petitioner must establish that it had the ability to pay the difference between the proffered wage and the wages actually paid in 2001 and 2005: \$20,403.23 in 2001 and \$4,136.86 in 2005.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS 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.

³ The record contains a letter from [REDACTED] which states: "Please accept this letter as a formal offer of full-time employment to [REDACTED] SSN: [REDACTED] by [REDACTED]." This statement is insufficient to establish the common identity of [REDACTED] and [REDACTED]. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, to the extent that the beneficiary has used a social security number that does not belong to him, the AAO notes that misuse of another individual's social security number is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on an individual's Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 USCIS should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner has not submitted any corporate tax returns or other regulation-prescribed evidence of its continuing ability to pay for the years 2001 through 2005. Therefore, the petitioner has not established that it had sufficient net income to pay the proffered wage for the years 2001 through 2005.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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. As noted above, the petitioner failed to submit its corporate income tax returns or other regulation-prescribed evidence of its continuing ability to pay. Therefore, the petitioner has failed to establish that it had sufficient net current assets to pay the proffered wage for the years 2001 through 2005.

⁴According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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.

On appeal, the petitioner has submitted copy of a 2006 Form W-2 Wage and Tax Statement issued to [REDACTED] a historical summary of the beneficiary's wage progression from his date of hire; and copies of pay stubs issued to the beneficiary. The 2006 Form W-2 shows that the petitioner paid the beneficiary \$27,146.01 in 2006, which is \$309.99 less than the proffered wage. The record does not contain a tax return or other documentation to show that the petitioner had the ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2006. Copies of the pay stubs issued to the beneficiary do not establish the petitioner's ability to pay the proffered wage, as wages paid to the beneficiary have already been considered through the Form W-2 Wage and Tax Statements. Nor does the historical summary of the beneficiary's wage progression establish the petitioner's ability to pay the proffered wage.

The petitioner also submitted a letter from its president and CEO, [REDACTED]. The letter takes issue with the fact that the proffered wage was based on a forty hour work week. However, The petitioner stated on the ETA 750 that the basic hours of the proffered position were 40 per week. Also, the petitioner stated on the Form I-140 that the wages per week for the position were \$530.00, which roughly equates to the hourly wage listed on the ETA 750 (\$13.20) multiplied by 40.⁶ Therefore, the director was correct in calculating the proffered wage based on a 40 hour work week although, as noted above, the director used an incorrect hourly wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner failed to provide sufficient evidence of the beneficiary's qualifications for the proffered position.⁷ 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

⁵ As noted above, the record does not contain any evidence to establish the common identity of [REDACTED] and the beneficiary, [REDACTED].

⁶ The exact figure would be \$528.00 for a 40-hour work week.

⁷ 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*, 229 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).

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

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 refrigerator system installer. Item 14 states that the applicant must have one year of experience in the job offered.

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.

(D) *Other workers*. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petitioner did not provide any evidence of the beneficiary's experience with I-140 petition. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position with one year of experience in the proffered position.

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.