

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

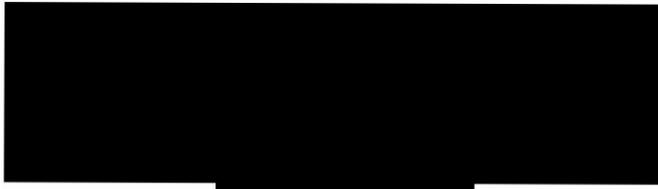
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:



Office: TEXAS SERVICE CENTER

Date: JAN 28 2009

SRC 08 188 51105

IN RE:

Petitioner:



Beneficiary:

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:



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 Director, Texas Service Center, denied the visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a freight forwarding company. It seeks to employ the beneficiary¹ permanently in the United States as a marketing Russian customer service representative.² As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor.³ The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage because the petitioner had not submitted any of the evidence described at 8 C.F.R. § 204.5(g)(2) to the record. The director also noted that the petitioner had not submitted evidence to establish that the beneficiary had the required one year of prior work experience as a marketing Russian customer service representative. 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 September 16, 2008 denial, the primary issues in this case are 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 and whether the petitioner established that the beneficiary has the requisite one year of previous work experience as a marketing Russian customer service representative. The AAO will examine each issue respectively.

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

¹ The record also contains a Form I-130, Application for Relative Petition, that was denied on April 19, 2007, for lack of prosecution of the petition after the beneficiary and her spouse failed to appear for an interview scheduled for November 9, 2006 at the New York USCIS District Office in accordance with procedures enumerated in *Stokes v. INS* No. 74 Civ. 1022 (S.D. N.Y. November 10, 1976).

² The AAO notes that on the Form ETA 750, the petitioner identified the job title as "Marketing Russian Customer Service Representative" while the petitioner identified the position on the I-140 petition as "marketing/customer service representative" with Department of Labor (DOL) classification as 43-4051, "Customers-Services Rep."

³ The petitioner failed to submit an original Form ETA 750 in accordance with 8 C.F.R. § 103.2(b)(4). The petitioner did not indicate why this document was not available. The petition should have been denied on this basis as well. 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).

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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [United States Citizenship and Immigration Services (USCIS)].

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). 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 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 20, 2001.⁴ The proffered wage as stated on the Form ETA 750 is \$200 a week, or \$10,400 per year.⁵ The Form ETA 750 states that the position requires one year of work 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

⁴ The director in his decision erroneously utilized the I-140 petition receipt date, May 27, 2008, as the priority date.

⁵ The Foreign Labor Certification Data Center Online Wage Library identifies the hourly wage for customer service representatives, DOT Classification 43-4051.00 in Queens County, New York in 2001 as \$8.93 an hour or \$18,571 per annum. The record indicates that the petitioner would employ the beneficiary in a full-time basis. Thus, the petitioner appears to be paying the beneficiary considerably less than the prevailing wage. See <http://www.flcdtatcenter.com/OesArchiveResults.asp?area=5600&code=43-4051.02>. (Available as of January 23, 2009.) This information suggests that either the DOL certified the proffered wage in error or alterations were made to the document. As the original Form ETA 750 is not in the record, the AAO cannot properly establish whether \$200 per week was the actual certified proffered wage. The petitioner must resolve this issue in any further filings.

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.⁶ On appeal, counsel submits the following evidence:

A copy of the first three pages of the petitioner's Form 1120 for tax year 2007; and

Copies of the petitioner's bank statements from its JPMorgan Chase Bank, Baton Rouge, Louisiana checking account. The bank statements are for the months from July 2007 to August 2008, with the exception of March and April 2007.

The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on January 1, 1994, and to currently employ one worker. The petitioner did not indicate its gross annual income or net annual income on the I-140 petition. On the Form ETA 750B, signed by the beneficiary on April 16, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel states that the petitioner's 2007 tax return was filed on June 18, 2008 and it was not available as of the date of filing the instant petition on May 27, 2008. The petitioner asserts that it filed for an extension of filing with the Internal Revenue Service (IRS). Counsel also notes that the average monthly balance for each of the petitioner's banking statements submitted on appeal was more than the proffered wage of \$10,400.

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, 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).

⁶ 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).

As the director erroneously identified the priority date in the instant matter as May 27, 2008, rather than the date of receipt by the Department of Labor on April 20, 2001, this determination by the director is withdrawn.

The petitioner has to establish its ability to pay the proffered wage as of the April 20, 2001 priority date until the beneficiary obtains permanent legal residence. While the petitioner has submitted an incomplete copy of its 2007 Form 1120 to the record, this is insufficient to establish the petitioner's ability to pay the proffered wage as of the 2001 priority date and onward. Nevertheless, for illustrative purposes, the AAO will comment further in this proceeding on the petitioner's 2007 tax return.

The AAO will consider the proffered wage as \$200 a week. However, as noted above, this wage is less than the prevailing wage for the respective position and jurisdiction, and the record does not contain the original Form ETA 750. Thus, this wage is in question.

In addition, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L in determining the petitioner's net current assets.⁷

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 petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary during the relevant period of time. Thus the petitioner has to establish its ability to pay the entire proffered wage from 2001 to 2007.

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

⁷ The AAO also notes that the petitioner did not submit all bank statements identified by counsel on appeal. The record does not contain the petitioner's bank statements for March and April 2007. Further the record does not contain any bank statements from 2001 to 2006. Thus, even if the petitioner's bank statements were to be considered in this proceeding, they are incomplete and would not establish the petitioner's ability to pay the proffered wage from 2001 to 2007.

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 and wage expense 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.

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 the Service 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* 719 F. Supp. at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the wage listed of \$10,400 per year from the priority date:

- In 2007, the Form 1120 stated a net income⁸ of -\$1,972.

Therefore, for 2007, the petitioner did not have sufficient net income to pay the proffered wage. The record does not reflect any further evidentiary documentation with regard to the petitioner's net income in tax years 2001 to 2006, and therefore the petitioner cannot establish its ability to pay the proffered wage from 2001 to 2007 as required.

If the net income the petitioner demonstrates it had available during that 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, USCIS 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

⁸The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

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, USCIS 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.⁹ 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.

In the instant matter, the petitioner submits an incomplete Form 1120, with no Schedule L. Therefore the AAO cannot examine the petitioner's ability to pay the proffered wage in 2007 based on the petitioner's net current assets in 2007. For the years 2001 through 2006, the petitioner has not provided any documentation to establish its ability to pay the proffered wage. In 2007, the petitioner cannot establish its ability to pay the proffered wage either based on its net income or net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL, April 20, 2001, the petitioner has 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.

Counsel asserts in his brief accompanying the appeal that the petitioner's balances in its checking account were sufficient to establish the petitioner's ability to pay the proffered wage. However, as stated previously the petitioner's bank statements are not one of the regulatorily described types of evidence utilized by the AAO to examine the petitioner's ability to pay the proffered wage. Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. Thus, while the director's determination that the priority date for the instant petition was May 27, 2008 will be withdrawn, his decision that the petitioner did not establish its ability to pay the proffered wage is affirmed.

The AAO will now examine whether the petitioner established that the beneficiary was qualified for the position, namely whether she had the requisite one year of prior work experience as a marketing Russian customer service representative.

⁹According 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.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) Other documentation--

(D) *Other Worker*. If the petitioner 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.

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 printing machine operator. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	(blank)
	High School	12
	College	(blank)
	College Degree Required	(blank)
	Major Field of Study	(blank)

The applicant must also have 1 year of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A as follows: "Find Russian customers who import and report to and from the U.S.A. Make calls to prospective clients and respond to inquiries from them. Conduct sales and provide and obtain shipping and receiving information. Complete documentation for each client and follow-up for orders. Networking and personal knowledge of potential clientele." Item 15 of Form ETA 750A reflects the following special requirements: networking and personal knowledge of potential clientele."

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 worked as a sales and marketing employee from 1993 to 1996 for [REDACTED], Russia and described her former employer as an industrial manufacturing entity. The duties of the beneficiary in this job are described as follows: "Sales/marketing, make calls to clients, attend special

introductory meetings to market and introduce products to potential clients, shipping of products.” She does not provide any additional information concerning her employment background on that form.

The petitioner did not submit any evidentiary documentation with regard to the beneficiary’s prior work experience with the I-140 petition. On appeal, counsel submits a translated Russian language document that states the beneficiary worked for [REDACTED] as a sales economist in the supply and sales department.¹⁰ from April 11, 1994 to January 15, 1996. The document was signed by [REDACTED], with no date noted. The document also noted that “based on the Belgorod Registration Chamber certificate about changes in constituent documentation Number [REDACTED] from 10.6.1977,” the closed joint stock company [REDACTED]” was renamed into closed joint stock company [REDACTED].

The AAO notes that the translated letter of work verification submitted on appeal contains dates that are inconsistent with the beneficiary’s declaration on Form ETA 750, Part B. The translated letter states that the beneficiary worked for [REDACTED] from April 11, 1994 to January 15, 1996, while the beneficiary stated she worked for [REDACTED] from 1993 to 1996. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: “It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.” Without further clarification of this discrepancy, the AAO would only give limited weight to the letter of work verification submitted to the record on appeal.¹¹ Further, the record contains no documentation as to the beneficiary’s graduation from high school, the only educational requirement listed on the ETA Form 750. Thus the AAO determines that the petitioner did not submit sufficient evidence that the beneficiary is qualified to perform the duties of the proffered position.

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.

¹⁰ The letter of work verification identifies the beneficiary’s work duties as follows: “making supply contracts for the enterprise production supplies, attending exhibitions, phone consultations with customers, production assortment, terms of delivery and payment, railway or motor transport delivery paperwork, barter contract bargaining etc.”

¹¹ The AAO does acknowledge that the beneficiary, based on either the periods of time outlined in the letter of work verification or in the ETA Form 750, does appear to have performed duties similar to those of the proffered position for more than one year; however, the discrepancy as to the actual dates of employment needs to be clarified, prior to determining that the beneficiary is qualified to perform the duties of the proffered position.