

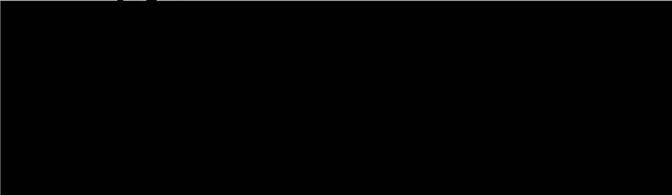
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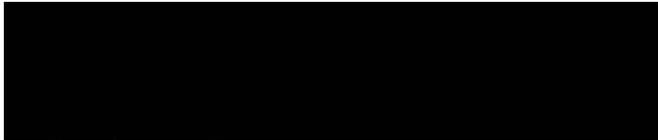
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PUBLIC COPY



FILE: LIN-04-165-50885 Office: NEBRASKA SERVICE CENTER Date: SEP 29 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a building maintenance repairer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

The petitioner files an appeal without additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$17.78 per hour (\$36,982.40 per year). The Form ETA 750 states that the position requires two (2) years of experience in the job offered. On the Form ETA 750B signed by the beneficiary on April 17, 2001, the beneficiary claimed to have worked for the petitioner since May 1997.

On the petition, the petitioner claimed to have been established in 1968, to have a gross annual income of \$288,000, to have a net annual income of \$65,000, and to currently employ four (4) workers.

The petition was filed without any documents pertinent to the petitioner's ability to pay the proffered wage. On June 23, 2004, the director issued a request for additional evidence (RFE) requesting evidence to establish that the petitioner had the financial ability to pay the proffered wage as of April 24, 2001, and continue to have such ability in the form of latest annual report, latest U.S. tax return, or audited financial statements. In response to the RFE, the petitioner submitted a contract of sale evidencing the previous employer [REDACTED] was merged into [REDACTED] and [REDACTED], a letter from [REDACTED] the owner of the predecessor enterprise, about the beneficiary's own financial situation with various documents for the beneficiary's financial status and a supporting letter from US Senator, [REDACTED] expressing careful consideration of the submitted documentation. Because the documentation submitted was not sufficient to warrant favorable consideration of the petition, the director issued a second RFE on October 11, 2004. In the

second RFE, the director requested the beneficiary's W-2 earnings records with the petitioner for 2001 through 2004. In response to the RFE, the petitioner submitted the beneficiary's W-2 and 1099 forms for years 2000 through 2003. On February 3, 2005, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the time the priority date was established and continuing to the present and denied the petition accordingly.

On appeal, the petitioner asserts that the denial was based on misinformation given to them by former counsel.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 submitted W-2 and 1099 forms for the beneficiary for 2001 through 2003 from the predecessor entity to the petitioner, [REDACTED]. The W-2 forms and Form 1099-Misc for 2001 show that the petitioner hired and paid the beneficiary \$5,890.10 in 2001. Although the petitioner claims that the amount of \$8,640.56 reflected on Form 1099-Misc for 2002 was paid to both [REDACTED] and the beneficiary, it cannot be accepted as evidence of compensation for the beneficiary since the 1099 form was issued to [REDACTED] only. The petitioner failed to document the beneficiary's compensation for 2002. In 2003 the petitioner issued a Form 1099-Misc to the beneficiary in the amount of \$7,760. For 2004 the petitioner claimed that it issued a Form 1099-Misc in the amount of \$6,310 for the beneficiary, however, the petitioner did not submit the 1099 form to support the claim. Therefore, the petitioner is still obligated to demonstrate that it could pay the beneficiary the difference of \$31,092.30 in 2001 and \$29,222.40 in 2003 between wages actually paid to the beneficiary and the proffered wage, and the proffered wage of \$36,982.40 in 2002 and 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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).

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, CIS will review the petitioner's net current assets which are reflected on Schedule L to corporate tax returns.

If the petitioner is a sole proprietorship, CIS will consider net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. Since a sole proprietorship is not legally separate from its owner, therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In the instant case, the petitioner did not submit its federal tax returns or any other documentation, and therefore, it is unclear whether the petitioner is structured as a corporation or sole proprietorship. The petitioner did not submit any other regulatory-prescribed evidence pertinent to its ability to pay the proffered wage. Since the record of proceeding does not contain regulatory-prescribed evidence of the petitioner's ability to pay the proffered wage, the AAO cannot determine whether the petitioner had the continuing ability to pay the beneficiary the difference between wages actually paid to the beneficiary and the proffered wage in 2001 and 2003 or the full proffered wage in 2002 and 2004.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for those years from the priority date to the present. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

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.

The petitioner claims that the appeal is based upon the former counsel's misinformation. Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

However, the appeal filed by the petitioner does not meet these requirements. Therefore, the petitioner's assertions on appeal cannot overcome the director's decision.

Beyond the director's decision and the petitioner's appeal, the AAO will discuss an issue whether the petitioner established that the beneficiary possessed the requisite two years experience as required by the Form ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 24, 2001.

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).

The certified Form ETA 750 in the instant case states that the position of maintenance supervisor requires two (2) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary set forth his work experience. He listed his experience as a "Maintenance Supervisor" at [REDACTED] in Vida, Oregon from May 1997 to the present, as a self-employed "Landscaper" in Eugene, Oregon from February 1997 to April 1997, and as a "Maintenance Supervisor" at Lassen Construction in Eugene, Oregon from July 1994 to January 1997.

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) of 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.

The record of proceeding does not contain any evidence that meets the requirements set forth at the above regulation to demonstrate that the beneficiary possessed the requisite two years of experience as required by the Form ETA 750. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior two years of experience as a maintenance supervisor.

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