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U.S. Citizenship
and Immigration
Services

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FILE: WAC 05 094 51990 Office: CALIFORNIA SERVICE CENTER Date: APR 02 2007

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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 on appeal. The appeal will be dismissed. The director's decision will be affirmed in part and withdrawn in part.

The petitioner is a manufacturers corporation. It seeks to employ the beneficiary permanently in the United States as an assistant manager. 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 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, and, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience as an assistant manager. 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 denial dated August 23, 2005, an 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)(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, 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 March 31, 1998.¹ The proffered wage as stated on the Form ETA 750 is \$21.66 per hour (\$45,052.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

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, and, a letter from [REDACTED] December 20, 2004. According to the letter, a company [REDACTED] was dissolved and a new company, [REDACTED] was formed at the same location.

Additional documents submitted were State of California corporate documents as follows: a Certificate of amendment stating that [REDACTED] amended its name on July 26, 2004, to [REDACTED] Inc.;³ Articles of Incorporation for [REDACTED] Inc. dated May 1, 2000; a Certificate of Liability Insurance for [REDACTED] d/b/a [REDACTED] a State of California, Certificate of Registration for [REDACTED] d/b/a [REDACTED] as a garment manufacturer; a State of California, seller's permit as well as a Los Angeles County Health License.

Ability to Pay the Proffered Wage

Because the director determined the evidence, *inter alia*, submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date (no information was provided), consistent with 8 C.F.R. § 204.5(g)(2), the director requested on June 14, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures and dates, and audited financial statements from 1998 to present. The director also requested California and Nevada Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the States of California and Nevada. The director requested that the forms should include the names, social security numbers and number of weeks worked for all employees.

As the Form ETA 750 stated that the petitioner employed the beneficiary since 1992, the director also requested that the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statements for 1996 until the present. The director requested a job verification from the petitioner on its letterhead with the beneficiary's job title, duties, dates of employment and number of hours worked.

¹ It has been approximately nine 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."

² 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).

³ After the amendment changing the name of [REDACTED] Inc. on July 26, 2004, to Lipstick Inc., it would be incorrect to state that [REDACTED] does business as [REDACTED]. The name of the company became [REDACTED] Inc.

In response to the director's request, the petitioner submitted, *inter alia*, a statement dated July 12, 2005, that the beneficiary was employed by ██████████ for a period of 12 years; W-2 Wage and Tax Statements from ██████████ Inc. d/b/a ██████████ or from ██████████ to the beneficiary for the years 1996, 1999, 2000, 2001, 2002, 2003 and 2004; and, W-2 Wage and Tax summaries from ██████████ to the beneficiary for 1997 and 1998.

Further, ██████████ Inc. d/b/a ██████████ and ██████████ submitted redacted California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for 2002, 2003, 2004, and the first quarter of 2005.

On the petition, the petitioner claimed to have been established in 1990 and to currently employ 35 workers. On the Form ETA 750B, signed by the beneficiary on March 20, 1998, the beneficiary did claim to have worked for the petitioner since February 1992.

The director denied the petition on August 23, 2005, finding, *inter alia*, that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal on this issue, concerning the petitioner's ability to pay the proffered wage, counsel has submitted copies of the following documents to accompany the appeal: the director's decision; letters from ██████████ dated July 19, 2005, and, September 19, 2005, a Certificate of Amendment stating that ██████████ Inc. amended its name on July 26, 2004, to ██████████; **Articles of Incorporation for ██████████ Inc. dated May 1, 2000**; a **Certificate of Liability Insurance for ██████████ d/b/a ██████████** a State of California, Certificate of Registration for ██████████ d/b/a ██████████ as a garment manufacturer; and, a State of California, Seller's Permit as well as a **Los Angeles County Health License**; reviewed financial statements from ██████████ Inc., ██████████ Inc., or ██████████ Inc. d/b/a ██████████ for 1998, 1999, 2000, 2001, 2002, 2003 and 2004, as well as a reviewed financial statement as of April 30, 2005. Further, a statement from counsel dated September 21, 2005 that was submitted along with the beneficiary's W-2 Wage and Tax statement for 1991 from ██████████ Inc. of Ft. Lauderdale, Florida along with a pay statement to the beneficiary.

Upon appeal, counsel has not identified or stated on the Form I-290B an erroneous conclusion of law or a statement of fact made by the director as a basis for the appeal.

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

⁴ It is not clear from the record that ██████████ Inc. is a successor in interest to ██████████ Inc. or ██████████ Inc. If this matter is pursued, evidence should be submitted concerning this issue. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 CFR § 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 paid the beneficiary the following wages for the years stated: in 1996 from [REDACTED] \$13,528.00; in 1997 from [REDACTED], \$18,024.12; in 1998 from [REDACTED]s, \$19,848.18; in 1999 from [REDACTED], \$23,366.61; in 2000 from [REDACTED] \$21,158.04; in 2001 from [REDACTED]s, \$24,115.16; in 2002 from [REDACTED] \$22,125.49, and from [REDACTED] d/b/a [REDACTED] \$119.93; in 2003, from [REDACTED] d/b/a [REDACTED] \$18,754.18; and, in 2004, from [REDACTED] d/b/a [REDACTED] \$22,036.40. Since the proffered wage is \$45,052.00 per year, the petitioner has not demonstrated that it paid the beneficiary the proffered wage in the years examined.

On appeal, counsel submitted the petitioner's reviewed financial statements for from [REDACTED] Inc., [REDACTED] Inc., or [REDACTED] Inc. d/b/a [REDACTED] for 1998, 1999, 2000, 2001, 2002, 2003 and 2004, as well as a reviewed financial statement as of April 30, 2005. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1. and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

No tax returns were submitted by the petitioner in response to the director's request for evidence dated June 14, 2005. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). There was no explanation why tax returns were not submitted, and in light of the petitioner's statement in the petition that it has gross annual income of \$3.5 million, inexplicable under the circumstances.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. Thus, the AAO affirms the portion of the director's decision concerning this issue.

The Beneficiary's Qualifications

The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience as an assistant manager.

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 March 31, 1998.

As already noted, the AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Upon appeal, counsel has not identified or stated on the Form I-290B an erroneous conclusion of law or a statement of fact as a basis for the appeal.

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 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).

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 an assistant manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
- Grade School 8
- High School 4
- College Blank
- College Degree Required Blank
- Major Field of Study Blank
- Experience
- Job Offered
- Years/Months 2/-
- Related Occupation.....Blank

As stated above, the applicant must also 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 states the special requirements "Past Work Experience Letter."

The beneficiary set forth his credentials on Form ETA-750B and signed his 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, he represented that he has work experience as an assistant manager from February 1992 to present (i.e. March 20, 1998) for [redacted] in Los Angeles, California. The job duties described are the same duties stated in ETA 750 A, Part 13. Before that employment, the beneficiary stated that he was an assistant manager for [redacted] Inc., of Gardena, California, from January 1990 to February 1992. According to the information submitted, the beneficiary's duties there were similar to the job duties recited in Part 13 of the Form ETA 750A. The beneficiary does not provide any additional information concerning his employment background

on that form. Lipstik Inc. provided a letter dated July 12, 2005, stating that the beneficiary had been employed by Belt Boys and Lipstick companies, and, that the beneficiary was a reliable employee.

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.

According to a letter dated September 19, 2005, in the record, the company ██████ was closed, dissolved, and purchased by ██████ Inc. According to a letter from ██████ dated July 19, 2005, the beneficiary was transferred to the ██████ payroll on or about 2003. That letter was written by the Human Resources Department providing the name, address and title of the employer, and, it described the beneficiary's full-time duties as an assistant manger from 1992 through 2003. Thus, the letter conforms to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(a).

The petitioner has submitted the beneficiary's W-2 statements and pay statements for prior employers from 1996 through 2004. The beneficiary's earliest employment is with ██████ Inc. from January 1990 to February 1992. The petitioner has submitted an affidavit dated September 17, 2005, from a co-worker of the beneficiary at ██████ Inc. company attesting that the beneficiary worked there as an assistant manager from 1991 to 1992. We find the evidence submitted on this issue credible. See 8 C.F.R. § 103.2(b)(2)(i). The evidence in the record demonstrates that the beneficiary acquired two years of qualifying employment experience prior to the priority date in 1998.

Since the priority date is 1998, we find that the beneficiary acquired two years of experience as assistant manager in the manufacturers industry described in the Form ETA 750A, Part 13, from the evidence submitted into this record of proceeding and, thus the petitioner has demonstrated that he is qualified to perform the duties of the proffered position from the priority date. Therefore, we withdraw the portion of the director's decision concerning the beneficiary's qualifications.

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

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.