



U.S. Citizenship
and Immigration
Services

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FILE:

LIN-05-118-50440

Office: NEBRASKA SERVICE CENTER

Date: APR 12 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is an insulation installation company. It seeks to employ the beneficiary permanently in the United States as an insulation worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary met the minimum requirements of the approved Form ETA 750 at the time the request for certification was filed. 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 September 15, 2005 denial, the only issue in this case is whether or not the petitioner has demonstrated that the beneficiary met the minimum requirements set forth on the Form ETA 750 prior to the priority date of the visa petition.

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 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 April 27, 2001.

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 appeal¹. Relevant evidence in the record includes letters dated October 3, 2003 and May 6, 2004 from counsel to the Colorado Department of Labor in connection with the labor certification application, letters dated January 14, 2004 and July 20, 2004 from the Colorado Department of Labor and Employment (Colorado DOL) to counsel regarding the labor certification application, 3 days of advertisements published in the Glenwood Springs Post Independent, a job opening notice posted from March 26, 2004 to April 12, 2004, and an affidavit of [REDACTED]

The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the employer deleted the special requirements on the Form ETA 750 before the labor certification was approved, and therefore, the beneficiary met the minimum requirements for the proffered position.

¹ 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 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 original certified 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 insulation worker. The item 14 describes the requirements of the proffered position as follows:

14.	Experience	
	Job Offered	Blank
	Related Occupation	2 years in commercial & residential insulation installation

The duties 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 reflects other special requirements as "Blow Machine Operator Certification; Blow-In Blanket System Journeyman Certification."

The instant I-140 petition was submitted on March 10, 2005 without evidence pertinent to the beneficiary's qualifications as required by the above regulation. The director issued a request for additional evidence (RFE) on May 24, 2005 requesting the petitioner to "[s]ubmit evidence that the alien obtained Blow Machine Operator Certification and Blow-In Blanket System Journeyman Certification prior to April 27, 2001." In response to the director's RFE, counsel claimed that the petitioner deleted the special requirements after the initial filing and before the final determination by the DOL and submitted counsel's October 3, 2003 letter, letters dated January 14, 2004 and May 6, 2004 from the Colorado DOL, two in-house postings and the three newspaper advertisements and affidavit of [REDACTED]. The director determined that the petitioner did not demonstrate that the beneficiary met the minimum requirements of the approved Form ETA 750 at the time the request for certification was filed.

The first issue in the instant case is whether or not the beneficiary needs to meet the special requirements set forth on the Form ETA 750 Item 15. Counsel claims that the special requirements were deleted before DOL's final certification and submitted some letters from counsel and the Colorado DOL. The petitioner's letters and affidavit show that the employer requested the deletion of the special requirements on the form, however, none of letters from the Colorado DOL indicate that the deletion was accepted and incorporated into the final certification. No copy of Form ETA 750 submitted in the record shows the deletion was made. Instead the original certified Form ETA 750A submitted with the initial filing clearly indicates "Blow Machine Operator Certification; Blow-In Blanket System Journeyman Certification" as Other Special Requirements at Item 15. The Form ETA 750A Item 15 does not contain any marks such as crossed out language, or initials and dates for deletions or changes. The employer did not change or delete the special requirements on the form as it alleged. The Colorado DOL clearly instructed the petitioner that upon returning the Form ETA 750, "[a]ll changes made on Forms ETA 750, Part A or B, must be initialed and dated by the person who signed the form." Counsel submitted the postings and newspaper advertisements to support his assertion of the deletion of the special requirements. Counsel argues that the postings and advertisements were posted and published

without the special requirements. However, the postings and advertisements submitted in the record do not appear as part of the final recruitment for the instant case. The postings were posted from March 26, 2004 to April 12, 2004 and the newspaper advertisements were published on Sunday, February 29, 2004 through Tuesday, March 2, 2004. However, on July 20, 2004 the Colorado DOL returned the labor certification application because the prevailing wage as determined in accordance with the provisions of 20 C.F.R. § 656.40 was \$27.18 per hour. Both the postings were posted and advertisements were published with the offered wage of \$14.12 per hour. The petitioner would have had to re-do its advertising and recruitment phase to reflect the accurate prevailing wage rate. *See* 20 C.F.R. §§ 656.21(e), (f), and (g). Therefore, the petitioner failed to establish that the special requirements were deleted prior to the final determination, and thus further failed to demonstrate that the beneficiary possessed the requisite blow machine operator certification and blow-in blanket system journeyman certification at the time the labor certification application was filed.

The second issue is whether or not the petitioner demonstrated that the beneficiary possessed the requisite two years of experience in commercial and residential insulation installation as set forth on the Form ETA 750 Item 14. As noted above the Application for Alien Employment Certification, Form ETA-750A, Item 14 expressly requires two years of experience in commercial & residential insulation installation.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on April 25, 2001 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 been working as a full time "Crew Leader" since January 2001, and worked as a "Blow Machine Operator" from July 1998 to December 1999, and as an "Insulation Installer" from January 1998 to June 1998 for the petitioner. He did not provide his employment information for the year of 2000, nor did he provide any additional information concerning his employment background on that form.

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.

However, the record of proceeding does not contain any experience letters from current or former employer(s) or trainer(s) relevant to the beneficiary's qualifications for the proffered position prior to the priority date under the requirement set forth at 8 C.F.R. § 204.5(g)(1). Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the related occupation for the proffered position as required by the Form ETA 750.

Therefore, the petitioner did not establish with regulatory-prescribed evidence that the beneficiary met the minimum requirements as set forth on the approved Form ETA 750, and further failed to establish that the beneficiary is qualified for the proffered position. Counsel's assertions on appeal fail to overcome the ground of denial in the director's decision.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. 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).

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). As noted previously, the priority date in this case is April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$14.20 per hour (\$29,536 per year)².

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 did not submit the beneficiary's W-2, 1099 forms or any other compensation documents although the beneficiary claimed to have worked for the petitioner since January 1998. Therefore, the petitioner failed to demonstrate its ability to pay through examination of wages paid. The petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage each of the years 2001 through the present with its net income or net current assets.

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). 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 CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's

² As previously discussed, although the certified Form ETA 750 indicates the proffered wage of \$14.20 per hour, the letter (which was alleged by counsel for the instant case) dated July 20, 2004 from Colorado DOL states that the prevailing wage is \$27.18 per hour or \$56,534.40 per year.

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. [CIS] 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* at 537.

The record contains the petitioner's tax return for 2003. The evidence shows that the petitioner is structured as a limited liability company (LLC) and its fiscal year is based on a calendar year. The petitioner's 2003 tax return demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage in 2003:

- In 2003, the Form 1065 stated net income³ of \$89,774.

Therefore, for the year 2003, the petitioner had sufficient net income to pay the beneficiary the proffered wage.

The regulation 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. In the instant case, the priority date is April 27, 2001, therefore, the petitioner must demonstrate its ability to pay the proffered wage beginning in 2001. However, the petitioner did not submit its tax returns for 2001 and 2002. The record before the director closed on August 16, 2005 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2004 should have been available. However, the petitioner did not submit its 2004 tax return, nor did counsel explain why the 2004 tax return was not submitted. 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). 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 record of proceeding does not contain any other regulatory-prescribed evidence for 2001, 2002

³ Where a LLC's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on Line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065, U.S. Partnership Income, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 22." Where a LLC has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K (page 3 of Form 1065) is a summary schedule of all the partners' shares of the partnership's income, credits, deductions, etc. The net income is reported on Analysis of Net Income (Loss) line 1 Net income (loss). See Internal Revenue Service, Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>.

and 2004, such as annual reports, or audited financial statements. 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 to 2004 except for 2003 through an examination of wages paid to the beneficiary, or its net income or net current assets.

In addition, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker at the same wage, using the same priority date, reflected on a Form ETA 750. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.