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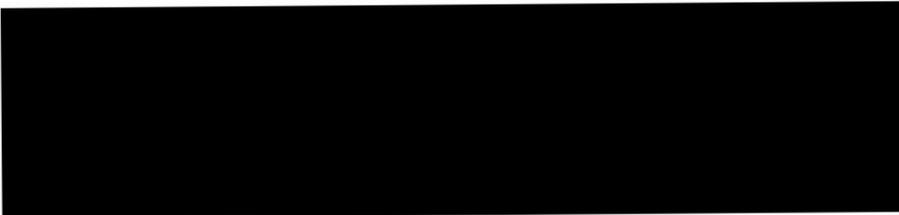
Petitioner:

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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). As set forth in the director's July 13, 2006 denial, the director determined that the evidence did not establish that the petitioner has the ability to pay the proffered wage at the time of priority date was established and continuing to the present because the petitioner failed to establish that the petitioner and [REDACTED] are the same entity. 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.

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 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).

The record shows that the petitioner, [REDACTED] filed a Form ETA 750 on behalf of the instant beneficiary on April 30, 2001 and the Form ETA 750 was certified on October 24, 2005 to the petitioner. The proffered wage as stated on the Form ETA 750 is \$600 per week (\$31,200 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on April 10, 2001, the beneficiary claimed to have worked for the petitioner as a full-time cook since 1996. On December 7, 2005, the petitioner, [REDACTED] filed the instant I-140 immigrant petition based on the certified labor certification. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$2,342,117, and to currently employ 20 workers. However, the petitioner did not provide information about its net annual income on the petition.

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 appeal¹. On appeal counsel submits Certificate of Incorporation of [REDACTED] Certificate of Authority of [REDACTED]

[REDACTED] to collect sales tax and a voided check of [REDACTED]. Other relevant evidence in the record includes [REDACTED]'s corporate tax returns for 2001 through 2005, W-2 forms for 2001 through 2005 issued by [REDACTED] to the beneficiary, the beneficiary's individual tax returns for 2001 through 2005 and a letter dated May 8, 2006 from [REDACTED], the president of the petitioner. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

On appeal, counsel asserts that the additional evidence submitted on appeal and the letter from [REDACTED] should have been sufficient to prove the relationship between the petitioner and [REDACTED].

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, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner filed the instant petition without any documentary evidence showing that the petitioner had paid the beneficiary the proffered wage from the priority date to the present, or that the petitioner had sufficient net income or net current assets to pay the beneficiary the proffered wage during the relevant years. Instead, the petitioner submitted [REDACTED]'s corporate tax returns as evidence of the petitioner's ability to pay.

However, the record contains no evidence that [REDACTED] qualifies as a successor-in-interest to the petitioner or that the petitioner and [REDACTED] are the same entity, although the petitioner claimed the same federal employer identification number for both entities and also asserted in the May 8, 2006 letter that "[the petitioner] is doing business as [REDACTED] and is one in the same." The successor-in-interest or same entity status requires documentary evidence. **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)).

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).

Counsel submits Certificate of Incorporation of [REDACTED] on appeal as evidence establishing the relationship between the petitioner and Malpaque. However, the certificate of incorporation does not contain any contents concerning the relationship between the petitioner and [REDACTED] nor does the certificate even indicate the name of the petitioner. Therefore, the certificate of incorporation of [REDACTED] does not establish the relationship between Malpaque and the petitioner.

On appeal, counsel submits a copy of a certificate of authority. The certificate of authority was issued by New York State Department of Taxation and Finance – Sales Tax for [REDACTED] to collect sales and use taxes under Articles 28 and 29 of the New York State Tax Law at the location of [REDACTED] Scarsdale, NY 10583². The certificate indicates that the petitioner used the same address as [REDACTED]. However, the fact that [REDACTED] is doing business at the same location as the petitioner cannot establish that [REDACTED] is the same entity as the petitioner. Furthermore, the submitted copy of the certificate of authority itself is not sufficient to prove that [REDACTED] is doing business at that location. Therefore, the certificate of authority does not establish the relationship between [REDACTED] and the petitioner.

The third item counsel submits on appeal as evidence to establish that the petitioner and [REDACTED] are the same entity is a void blank check drawn from a business bank account. On the check, the account holder is listed as [REDACTED] Scarsdale, NY 10583. This check is the only item the petitioner submitted directly showing that [REDACTED] is doing business as the name of the petitioner, [REDACTED] at the petitioner's address. However, a bank check is not a legal document to establish the business status because the check itself does not show whether the bank verified [REDACTED] trade name with the proper governmental entity at the time when the bank account was opened. The record of proceeding does not contain any copies of cancelled checks from this bank account, it is not clear whether the petitioner has used or is still using this account for its business, and thus the AAO cannot determine whether [REDACTED] has been doing its business as [REDACTED] at that location.

In addition, this check is not supported by or provides inconsistent information with the other evidence submitted in the record. According to this void blank check, [REDACTED] is doing business as [REDACTED] while the petitioner asserted in the May 8, 2006 letter that "[REDACTED] is doing business as [REDACTED]" The record contains copies of [REDACTED]'s corporate tax returns and W-2 forms for the beneficiary for 2001 through 2005. However, none of these documents show that [REDACTED] has ever had or used [REDACTED] as its trade name. Instead, a copy of filing receipt accompanying the certificate of incorporation of [REDACTED] from the New York State Department of State, Division of Corporations and State Records, used the following as address for process for [REDACTED] Rye, NY 10580." [REDACTED] filed its 2001 tax return and issued all W-2 forms for 2001 through 2005 to the beneficiary with this address, [REDACTED] Rye, NY 10580.

The AAO finds that the petitioner in the instant case, [REDACTED] has not submitted persuasive evidence that indicates that [REDACTED] qualifies as a successor-in-interest to the petitioner or that the petitioner and [REDACTED] are the same entity. The petitioner failed to establish that the relationship exists between the petitioner and [REDACTED]. The record does not contain any regulatory prescribed evidence showing that the petitioner has already paid the beneficiary the full proffered wage since the priority date, or that the petitioner had sufficient net income or net current assets to pay the beneficiary the proffered wage of \$31,200 per year in 2001 through the present. Thus, the petitioner further failed to establish its ability to pay the proffered wage from the priority date to the present. Therefore, the petition must be denied.

² The validation period of the certificate is not clearly shown.

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 the beneficiary's qualifications for the proffered position prior to the priority date. 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 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 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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 restaurant cook. In the instant case, item 14 describes the requirement of the proffered position is two years of experience in the job offered, i.e. cook.

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. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The only evidence submitted in the record pertinent to the beneficiary's requisite two years of experience in the job offered as required by the above regulation is a letter dated April 11, 2001 from [REDACTED]. This letter stated concerning the beneficiary's work experience in pertinent part that:

This letter is to verify that [the beneficiary] was employed at the [REDACTED] as a cook, working 40 hours per week, from March 1992 to July 1996.

The letter is from [REDACTED] as the owner of [REDACTED], therefore, it is an experience letter from the beneficiary's former employer. This letter verifies that the beneficiary was employed as a full time cook from March 1992 to July 1996, for more than four years. However, this letter does not contain a specific description of the duties performed by the beneficiary as required by the regulations. Without a specific description of the duties performed by the beneficiary at [REDACTED] the AAO cannot determine whether the beneficiary's

experience with his former employer qualifies him to perform the duties of the proffered position described in item 13 of the Form ETA 750A. Because of this omission, the experience letter from Horseneck Tavern cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case. The record does not contain any other evidence to establish the beneficiary's qualifications. Therefore, the petitioner did not establish with regulatory-prescribed evidence that the beneficiary met the experience requirements for the proffered position prior to 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.