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U.S. Citizenship
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FILE:



Office: TEXAS SERVICE CENTER

Date: JAN 31 2008

SRC-06-170-51419

IN RE:

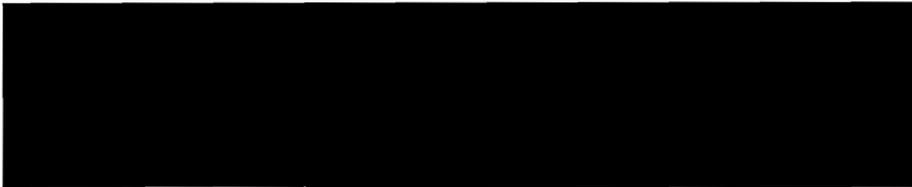
Petitioner:

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

The petitioner is a sculpture paint finisher. It seeks to employ the beneficiary permanently in the United States as a sculpture paint finisher. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification (ETA Form 9089 or labor certification), approved by the Department of Labor (DOL), 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. 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 October 13, 2006 denial, the single 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 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 ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *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 ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 is with the priority date of July 8, 2004¹. The proffered wage as stated on the ETA Form 9089 is \$13.13 per hour (\$27,310.40 per year). The ETA Form 9089 states that the position requires twenty-four (24) months of experience in the job offered. On the petition, the petitioner claimed to have been established in 1972, to have a gross annual income of \$5,742,900, to have a net annual income of \$121,197,

¹ Although new DOL regulations concerning labor certifications went into effect on March 28, 2005, the petitioner filed the instant ETA Form 9089 utilizing the filing date from previously submitted Application for Alien Employment Certification (Form ETA 750). *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

and to currently employ 43 workers. On the ETA Form 9089, the beneficiary claimed to have worked for the petitioner since November 30, 2003.

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 petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 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 submitted the beneficiary's W-2 forms for 1990 through 2005 and paystubs for some periods in November 1997 through July 2006 from the petitioner and [REDACTED]. However, compensation paid to the beneficiary by another business entity cannot be used to establish the petitioner's ability to pay the proffered wage in the instant case. In addition, W-2 forms and paystubs from the petitioner for the period before 2004 are not necessarily dispositive because the priority date in the instant case is July 8, 2004. The beneficiary's W-2 forms and paystubs issued by the petitioner for 2004 through 2006 show that the petitioner paid the beneficiary \$28,761.43 in 2004, \$24,853.71 in 2005 and \$13,932.19 as of August 5, 2006 at the rate of \$11.55 per hour during the first seven months of 2006. Therefore, the petitioner demonstrated that it paid the beneficiary equal to or greater than the full proffered wage in 2004, however, failed to establish its ability to pay through examination of wages paid to the beneficiary in 2005 and 2006. The petitioner is obligated to demonstrate that it could pay the difference of \$2,456.69 in 2005 between wages actually paid to the beneficiary and the proffered wage and the difference of \$1.58 per hour in 2006 between the hourly wage actually paid to the beneficiary and the proffered hourly wage.

The petitioner did not submit any other evidence to establish its continuing ability to pay the proffered wage for 2005 onwards with its initial filing. Therefore, the director issued a request for evidence (RFE) on July 15, 2006 requesting the petitioner to submit a copy of the corporation's annual federal tax return, including copies of all schedules and any additional evidence of ability to pay for each year, as needed, such as copies of bank account records, payroll records or profit-loss statements for each of the years, 2003 through 2005. The director received the response to the RFE on August 22, 2006. Instead of the petitioner's corporate federal tax returns for 2003 through 2005, counsel also submitted a letter dated July 25, 2006 from [REDACTED] Chief Executive Officer of the petitioner addressed to CIS ([REDACTED]'s July 25, 2006 letter). The letter stated in pertinent part that:

In accordance with 8 CFR 204.5(g)(2), we hereby state and confirm that Starlite Originals, LLC employs over 43 employees and is fully capable of meeting payroll for [the beneficiary], and as proof, we are submitting copies of W-2 and pay stubs for 2003 to 2005 as request. If necessary, you may contact our banker, [REDACTED] to confirm our financial viability.

(Emphasis in original.)

Although 8 C.F.R. § 204.5(g)(2) allows the director to accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage in a case where the prospective United States employer employs 100 or more workers, the petitioner in the instant case employs 43 employees, and therefore, the director does not need to exercise its discretion to accept the [REDACTED] July 25, 2006 letter as a statement from a financial officer of the prospective employer to establish its ability to pay the proffered wage. 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). In addition, the record of proceeding does not contain any financial documents that reveal the petitioner's gross receipts, paid salaries and wages and other costs of labor so that it can be concluded that the petitioner is a viable business.

As the Beckerman's July 25, 2006 letter mentioned, counsel also submitted the beneficiary's W-2 forms and paystubs from the petitioner and [REDACTED] in response to the director's RFE. However, these documents did not demonstrate that the petitioner could pay the difference of \$2,456.69 in 2005 and \$1.58 per hour in 2006 between actually wages paid to the beneficiary and the proffered wage with the petitioner's net income or net current assets. Therefore, the director determined that the petitioner failed to establish its ability to pay the proffered wage in 2005 onwards and accordingly denied the petition.

On appeal, counsel submits incomplete copies of the petitioner's corporate tax returns for 2003 through 2005 without any assertions. 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) and this office usually considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. However, the record in the instant case provides reasons to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). 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,² the petitioner declined to provide copies of its tax returns for 2003 through 2005. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to

² The director's July 15, 2006 RFE states in pertinent part that:

- Please submit the following for each of the years, 2003 through 2005.
- A copy of the corporation's annual federal tax return, including copies of all schedules.
 - Submit any additional evidence of ability to pay for each year, as needed, such as copies of bank account records, payroll records, or profit-loss statements.

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). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

In addition, counsel does not submit a brief with the appeal. All counsel states on the Form I-290B is that "[t]he employer is submitting the corporate tax returns for the qualifying period – 2003, 2004, 2005." Counsel did not identify specifically any erroneous conclusion of law or statement of fact for the appeal, nor did counsel explain why the evidence requested in the director's RFE was not submitted. Consequently, the appeal will be dismissed.

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.