



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date: OCT 22 2008

SRC-08-028-52595

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

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:

[REDACTED]

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant cook (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). The director determined that the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience as stated on the labor certification petition. 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 July 7, 2008 denial, the primary issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 30, 2001.

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 appeal.¹ On appeal, counsel submits a letter undated from [REDACTED] Restaurant in Greece ([REDACTED] letter), and a letter undated from [REDACTED] International Grille, Inc. in Baltimore, Maryland ([REDACTED] s undated letter). Other relevant evidence in the record includes a letter dated May 15, 2003 from [REDACTED] ([REDACTED] s May 15, 2003 letter) and a letter dated November 20, 2002 from [REDACTED] ([REDACTED] November 20, 2002 letter). The record does not contain any other evidence relevant to the beneficiary's qualifications.

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).

On appeal, counsel asserts that the [REDACTED] letter was submitted in response to the director's May 28, 2008 request for evidence (RFE) but was apparently never reviewed or possibly misplaced, and that the newly submitted letter establishes that the beneficiary possessed the requisite two years of experience for the proffered position prior to the priority date.

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

- | | | |
|-----|--------------------|--------------|
| 14. | Experience | |
| | Job Offered | 2 [years] or |
| | Related Occupation | 2 [years] |

Item 14 does not specify the related occupation. The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, need not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on April 24, 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 was not presently employed, and that he worked 40 hours per week as a cook for a restaurant called [REDACTED]'s International Grille, Inc. located at [REDACTED], Baltimore, MD 21228 from May 2000 to September 2002. He did not 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.

The instant I-140 petition was submitted on August 14, 2007 with the [REDACTED] May 15, 2003 letter as evidence pertinent to the beneficiary's qualifications as required by the above regulation. In the May 28, 2008 RFE, the director expressly requested evidence that the beneficiary possessed the required two years of experience as a Cook as of the priority date on the ETA 750, (April 30, 2001) among others. In response to

the director's RFE, counsel submitted the [REDACTED]'s November 20, 2002 letter, a letter from an accountant regarding the relationship between Koros, Incorporated and Double T Diner, an inspection report from Baltimore County and the petitioner's tax returns for 2001 through 2006.

The issue here in the instant case is whether the petitioner with these experience letters established the beneficiary's requisite two years of experience prior to the priority date under the requirement set forth at 8 C.F.R. § 204.5(g)(1). The regulation requires such evidence must be in the form of a letter from a current or former employer or trainer and must 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. The [REDACTED]'s May 15, 2003 letter submitted with the initial filing is on computer-created letterhead of [REDACTED]'s International Grille, Inc. and was dated May 15, 2003 and signed by [REDACTED]. However, the letter did not include the title or position of [REDACTED] with the company. It is not clear whether [REDACTED] was authorized to issue and sign an experience letter on behalf of the company, and therefore, the letter cannot be accepted as regulatory-prescribed evidence to establish the beneficiary's requisite experience.

The [REDACTED]'s November 20, 2002 letter submitted in response to the director's May 28, 2008 RFE was signed by [REDACTED] as the owner of the company. However, this letter is on computer-created letterhead of [REDACTED] International Grille, Inc. but in a different format from the [REDACTED]'s May 15, 2003 letter. The inconsistencies between the two letters raise doubts about the authenticity of the letters, especially since the petitioner did not submit the [REDACTED]'s November 20, 2002 letter from the owner with its initial filing of the petition since it would have existed at that time. Further, the [REDACTED]'s November 20, 2002 letter verified the beneficiary's work experience for two years and four months from May 2000 to September 2002. However, in the instant case, the priority date falls on April 30, 2001 and the precedent requires the beneficiary to be qualified for the position prior to the priority date. Therefore, the beneficiary's experience on or after the priority date cannot towards his qualifying experience. Even if the [REDACTED]'s November 20, 2002 letter is authentic, it would verify the beneficiary's qualifying experience for eleven months only and would not be sufficient to demonstrate that the beneficiary had possessed the requisite two years of experience prior to the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

As previously mentioned, counsel submits two experience letters on appeal and claims that these letters were submitted in response to the director's RFE. One of the letters is the [REDACTED] undated letter which was also signed by [REDACTED] as the owner of the company, on the same formatted letterhead and content as the [REDACTED]'s November 20, 2002 letter. However, it is obviously not the copy of or the same [REDACTED] November 20, 2002 letter because while the November 20, 2002 letter was dated, this letter was not. Counsel's assertion that this letter was submitted in response to the director's RFE is without any evidentiary support. Further, the signature of [REDACTED] on the [REDACTED]'s undated letter appears quite different from the one on the [REDACTED]'s November 20, 2002 letter. That raises suspicion that either the [REDACTED]'s November 20, 2002 letter or the [REDACTED]'s undated letter may be fraudulent.

The other letter counsel submits on appeal and claims that they were submitted in response to the director's RFE is the [REDACTED] letter. The [REDACTED] letter was signed by [REDACTED] as the president of [REDACTED]

Restaurant in Athens, Greece. However, the letter is submitted without any supporting evidence and because of the timing of its submission and other inconsistencies noted in the record above, this letter alone is insufficient to demonstrate the beneficiary's qualification. For example, counsel did not submit any foreign language documents and did not submit any evidence showing that this letter originated in Greece and how and when it was mailed or otherwise transmitted to the United States. Counsel did not indicate whether [REDACTED] is fluent in English, whether he wrote this letter personally in English or in Greek originally, or whether the Greek company usually uses an English language letterhead. The [REDACTED] letter is not supported by the beneficiary's own representations. As mentioned above, the beneficiary set forth his credentials on Form ETA-750B. He represented that he worked as a cook for [REDACTED]'s International Grille, Inc. in Baltimore, MD from May 2000 to September 2002. Form ETA 750 Item 15 expressly instructs that applicants "[l]ist all jobs held during past three (3) years. Also list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9." However, the beneficiary did not provide any additional information concerning his employment background on that form but signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury.

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 did not submit any documents to demonstrate the beneficiary's experience other than [REDACTED]. On appeal, counsel asserts that the petitioner submitted an experience letter from [REDACTED]. The record contains a copy of the submission letter from counsel with the response to the director's RFE, which indicated that among the responsive documents there is a "letter of experience for beneficiary." However, the letter did not specify the author of the letter and the record of proceeding does not show that any letter from [REDACTED] was submitted in response to the RFE. 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.* As it is not established that the [REDACTED] letter was previously submitted into the record, the AAO need not consider the sufficiency of the evidence submitted on appeal. However, as discussed above, the AAO does not consider the evidence submitted on appeal as sufficient despite application of *Soriano*.

It is also noted that the beneficiary provided inconsistent information on the Form ETA 750. While the beneficiary stated that he was not presently employed, he represented that he worked for [REDACTED] from May 2000 to September 2002. The record does not contain any evidence to establish whether the beneficiary was unemployed or working for [REDACTED] at the time he signed the Form ETA 750 on April 24, 2001. Neither counsel, the petitioner nor the beneficiary explained how the beneficiary knew and stated that he would have worked for [REDACTED] until September 2002 when he completed and signed the form on April 24, 2001. The Form ETA 750 does not indicate any late correction.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." With the unresolved inconsistencies in the instant case, the AAO cannot solely rely on a letter that the petitioner failed to submit in response to the RFE despite the directors express request but submitted on appeal for the first time to demonstrate that the beneficiary possessed the requisite two years of experience prior to the priority date. The petitioner needs to submit independent objective evidence² to support the beneficiary's two years and three months of represented employment experience from June 1, 1995 to September 1, 1997 with [REDACTED] and eleven months of experience from May 2000 to April 30, 2001, the priority date, with [REDACTED].

The record of proceeding does not contain sufficient evidence to demonstrate the beneficiary's requisite two years of experience. Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered for the proffered position as required by the ETA 750 with regulatory-prescribed evidence, 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. The appeal must be dismissed.

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

² Examples include, but are not limited to, corporate and operating documents, personnel and payroll records, and the beneficiary's taxation or income records.

previously, the priority date in this case is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$400 per week (\$20,800 per year).

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 for any relevant years. The petitioner failed to establish its continuing ability to pay the proffered wage through the examination of wages already paid to the beneficiary in relevant years.

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 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 petitioner submitted Form 1120 U.S. Corporation Income Tax Returns filed by [REDACTED] for its fiscal years 2001 through 2006. The record shows that [REDACTED], the petitioner in the instant case, filed a Form ETA 750 with DOL on April 30, 2001, that DOL certified the Form ETA 750 on July 6, 2007 and that the petitioner filed the instant petition with CIS. However, the petitioner did not submit any evidence showing that [REDACTED] qualifies as a successor-in-interest to the petitioner or that [REDACTED] and the

petitioner are the same entity. This status requires documentary evidence that the successor-in-interest has assumed all of the rights, duties, and obligations of the predecessor. The fact that a business entity is doing business at the same location as the predecessor does not establish that it is a successor-in-interest to the predecessor.

In the RFE dated May 28, 2008, the director requested evidence establishing the relationship between Koros, Inc. and the petitioner. In response to the RFE, counsel submitted a letter dated June 20, 2008 from Nick T. Smyrnioudis of Smyrnioudis & Wilhelm, public accountants (accountant's letter) and a copy of an inspection report from Baltimore Country (inspection report). The accountant letter states that Koros, Inc is a Maryland **Closed corporation trading as the Double T Diner. However, 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)). The inspector put Koros, Inc. as the name of the business and Double T Diner as the trade name and [REDACTED] as the address on the inspection report issued on May 3, 2008. Similar with successor-in-interest status, the fact that a business entity is doing business at the same location as the other does not establish the relationship of the same entity each other. Further, the main purpose of an inspection report is to record the results of an inspection not to establish a business entity's trade name. The petitioner did not submit any documents showing that it applied for the trade name of Double T. Diner for Koros, Inc. or that the trade name of Double T Diner was approved by the relevant authority for Koros, Inc. Moreover, while the petitioner identified itself with federal employer identification number (FEIN) 52-1908022, the tax returns filed by Koros, Inc. for 2001 through 2006 use [REDACTED] as its FEIN. Therefore, the petitioner Double T Diner and Koros, Inc. should be considered as two separate business entities. The record does not contain sufficient independent objective evidence showing that the petitioner is the trade name of Koros, Inc. and thus, Koros, Inc. is responsible for all obligations of the petitioner.

In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate 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). Even if the petitioner had proven that it uses the trade name of Koros, Inc., the petition might have to establish the continuing ability to pay the proffered wage beginning on the priority date of April 30, 2001. The petitioner submitted Koros, Inc.'s tax returns for the fiscal years 2001 through 2006. The tax returns show that Koro's Inc.'s fiscal year runs from December 1 to November 30. The petitioner submitted Koros, Inc.'s tax returns which cover from December 1, 2001 (Tax Return for fiscal year 2001) to November 30, 2007 (Tax Return for fiscal year 2006), however, these tax returns do not cover from the priority date of April 30, 2001 in the instant case to November 30, 2001.³ Therefore, the petitioner failed to establish its ability to pay the proffered wage for the year of the priority date.

³ It is also noted that Koros, Inc. filed its tax returns for the fiscal year 2004 from December 1, 2004 to November 30, 2005 but for the fiscal year 2005 from December 31, 2005 to November 30, 2006. Therefore, Koros, Inc. did not file its tax return for the 30-day period from December 1, 2005 to December 30, 2005. In the instant case, thus the Koros, Inc.'s ability to pay the proffered wage for the 30-day period has not been established with any regulatory-prescribed evidence.

The AAO finds that the petitioner in the instant case, Double T Diner, has not submitted persuasive evidence that indicates that Double T Diner is the trade name of Koros, Inc. or that Double T Diner and Koros, inc. are the same entity. The petitioner failed to establish that the relationship exists between the petitioner and Koros, Inc. 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 \$20,800 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 because it failed to establish its relationship with Koros, Inc. Therefore, the petition must be denied.

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.