

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



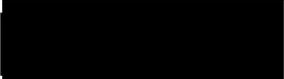
U.S. Citizenship
and Immigration
Services



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DATE: **NOV - 3 2012**

OFFICE: NEBRASKA SERVICE CENTER

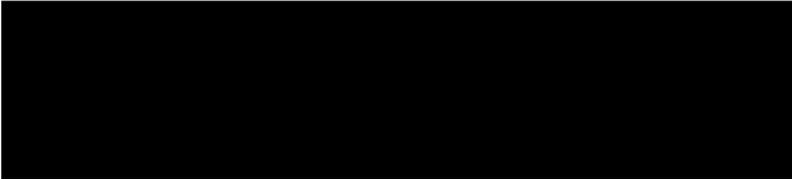
FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The director additionally concluded that the grounds for denial of the petition had not been overcome by counsel's motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is engaged in the retail sale of sandwiches. It seeks to employ the beneficiary permanently in the United States as a "sandwich artist." As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker. The director denied the petition accordingly.

Counsel filed a motion to reopen¹ and submitted a copy of the job order posted with the Illinois State Workforce Agency showing that the job was advertised as requiring less than a year's experience. The director found that the erroneous designation of the skilled worker classification had not been overcome by counsel's motion to reopen and reaffirmed the denial of the petition on August 5, 2011.

On appeal, counsel asserts that it was harmless error that resulted in the designation of the visa classification as a skilled worker on the Immigrant Petition for Alien Worker (Form I-140), rather than the unskilled worker visa classification. He requests that the United States Citizenship and Immigration Services (USCIS) overlook the petitioner's designation of a skilled worker visa classification on the Form I-140 and accept the petition as requesting an unskilled "other worker" visa category.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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. In this case, counsel indicates on appeal that a brief and/or additional evidence will be submitted to the AAO within 30 days. As nothing further has been received to this office more than 12 months later, this decision will be rendered on the record as it stands.

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.

¹ A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed on November 3, 2010. On Part 2.f. of the Form I-140, the petitioner indicated that it was filing the petition for a skilled worker.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that the position requires only 6 months of experience in the job offered as sandwich artist. However, the petitioner requested the skilled worker classification on the Form I-140. There is no provision in statute or regulation, and counsel does not cite other legal authority that compels USCIS to adjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The evidence submitted does not establish that the labor certification requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).²

² 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

It is noted that on Part A of the ETA Form 9089 and pursuant to 20 C.F.R. § 656.17(d), the employer requested to use the filing date from a previously submitted labor certification (Form ETA 750).³ That filing (priority date) was April 16, 2001.⁴ As such, the petitioner is obliged to establish its continuing financial ability to pay the proffered wage from the April 16, 2001, priority date onward. Here, the proffered wage is \$6.91 per hour, which amounts to \$14,372 per year.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the approved labor certification, 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall 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).

³Although the petitioner's owner and the beneficiary share a common surname, the petitioner must address whether the beneficiary is related to the owner in any further filings. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

⁴The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. In this case, the PERM regulations apply because the petitioner filed a labor certification application on ETA Form 9089 seeking to convert the previously submitted ETA Form 750 to an ETA 9089 under the special conversion guidelines set forth in PERM. 20 C.F.R. § 656.17(d) sets forth the requirements necessary for the converted labor certification application to retain the priority date set forth on the former ETA 750.

It is noted that the DOL cover sheet accompanying the ETA Form 9089 states that the date of acceptance of processing is April 4, 2008, while the date of acceptance of processing on page 9 of the ETA Form 9089 is April 16, 2001. It is not clear if the petitioner retained the April 16, 2001, priority date. In any further filings, the petitioner must resolve this discrepancy.

whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁵ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the record does not indicate that the petitioner employed or paid compensation to the beneficiary. Additionally, if the original priority date was retained, the petitioner did not submit any financial documentation for 2001, 2002, 2003, 2004, 2005 and 2006 in compliance with the regulatory requirements of 8 C.F.R. § 204.5(g)(2). Further, the federal tax returns that the petitioner did submit for 2007 and 2008 also failed to establish that either its net income or net current assets could cover the proffered wage. Only its net income reported for 2009 was sufficient to pay the proffered wage. Finally, the petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage from the priority date onward, despite its deficiencies in net income and net current assets.

Accordingly, after considering the petitioner's overall circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a de novo basis).

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.

⁵ *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).