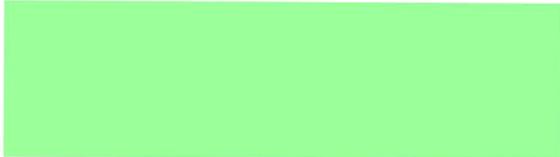


(b)(6)

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



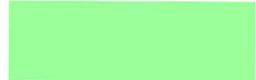
U.S. Citizenship
and Immigration
Services



DATE: NOV 12 2013

OFFICE: NEBRASKA SERVICE CENTER

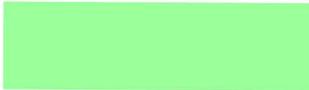
FILE:



IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director of the Nebraska Service Center. The director later served the petitioner with a notice of intent to revoke the approval of the petition (NOIR). In a notice of revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded to the Director of the Nebraska Service Center.

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.

The petitioner claims to be a chiropractor's office. It seeks to employ the beneficiary permanently in the United States as a clinical instructor pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). On the Form I-140, Immigrant Petition for Alien Worker, the petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

As set forth in the June 10, 2013 NOR, the director revoked the approval of the petition and determined that the petitioner had "failed to provide corroborating evidence to establish the authenticity of [an] employment letter" indicating that the beneficiary had been employed with the petitioner in the offered position since June 2012. Further, the director determined that the petitioner had failed to resolve discrepancies in the record, including inconsistencies relating to the number of workers employed by the petitioner.

The petitioner's ETA Form 9089 was filed with DOL on September 13, 2011 and certified by DOL on November 18, 2011. The petitioner subsequently filed a Form I-140 with U.S. Citizenship and Immigration Services (USCIS) on January 23, 2012, which was initially approved on April 6, 2012. As indicated, the Form I-140 approval was subsequently revoked on June 10, 2013.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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).

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof.

In the instant case, the November 16, 2012 NOIR noted that a search of the Illinois Secretary of State’s website reported that the petitioning entity, [REDACTED] had been involuntarily dissolved² on February 10, 2012, which was before the initial approval of the Form I-140. The petitioner was requested to resolve this issue in its response. Additionally, at the time the NOIR was issued, the record contained only a copy of the first page of the petitioner’s 2010 tax return, which pre-dated the September 13, 2011 priority date, and thus, by itself, was insufficient to establish the petitioner’s ability to pay the beneficiary the proffered wage as of that priority date. Accordingly, the NOIR requested a complete copy of the petitioner’s 2011 corporate tax return. The NOIR also requested evidence to establish the authenticity of the petitioner’s employment certification letter, dated July 24, 2012.³ Specifically, the NOIR requested evidence establishing that the beneficiary had been employed by the petitioner since June 2012, including complete copies of the petitioner’s Internal Revenue Service (IRS) Forms 941, Employer’s Quarterly Federal Tax Returns. The petitioner was further requested to submit copies of the beneficiary’s pay vouchers from the petitioner issued during the period from January 1, 2012 to April 6, 2012;⁴ evidence that the wages paid to the beneficiary were deducted from the petitioner’s business checking account; and copies of the petitioner’s checking account statements from January 1, 2012 to April 6, 2012. Lastly, the NOIR requested legal documentation to resolve a discrepancy in the record, as the Form I-140 indicates that the petitioning entity was established on September 26, 2007, but the labor

² If a petitioning organization is not in good standing or no longer in business, then no *bona fide* job offer exists, and the petition is therefore moot. The approval of the petition would be subject to automatic revocation due to the termination of your organization’s business. See 8 C.F.R. § 205.1(a)(3)(iii)(D). Moreover, any concealment of the true status of the organization seriously compromises the credibility of the remaining evidence in the record. See *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

³ The NOIR stated the employment certification letter was received on July 24, 2012, but in fact, the record indicates the letter was dated July 24, 2012 and was received on July 30, 2012, at the beneficiary’s adjustment of status interview.

⁴ The record indicates that the NOIR intended to request corroboration of the petitioner’s employment of the beneficiary as of June 2012, but mistakenly requested evidence of the beneficiary’s wages from the wrong period, January to April 2012, instead of from June 2012 onward.

certification indicates the petitioner commenced business in 2005.

In response to the NOIR, counsel for the petitioner submitted a copy of the petitioner's 2010 corporate tax return; unsigned copies of documents the petitioner claimed to have submitted to the Illinois Secretary of State for reinstatement of the petitioning business; copies of the petitioner's business checking account statements from January to April 2012; the petitioner's IRS Forms 941 for the second and third quarters of 2012; and a sworn statement from the president of the petitioning business certifying the authenticity of an employment certification letter "dated June 29, 2012." The submission did not include legal documentation to resolve the discrepancy in the record regarding the date of the petitioning entity's establishment. However, counsel explained that the petitioning business was first established as a sole proprietorship in 2005 and formally incorporated in 2007 as [REDACTED]. The petitioner did not submit its 2011 tax return; evidence that the beneficiary's wages were deducted from the petitioner's business checking account; or independent, objective evidence of the authenticity of the petitioner's employment certification letter, dated July 24, 2012.

After reviewing the record and the evidence submitted in response to the NOIR, the director issued a Request for Evidence (RFE), dated January 10, 2013, noting that an Illinois Secretary of State's website search still showed the petitioner to have been dissolved and that the record lacked reliable evidence to the contrary. The RFE further observed that the petitioner's two IRS Forms 941 for 2012 submitted in response to the NOIR indicated the petitioner had only three employees in 2012, which appeared to contradict its assertion on the labor certification and Form I-140 that it had twelve employees. Accordingly, the director requested copies of the pay vouchers for the twelve workers employed by the petitioner between the September 13, 2011 priority date and the January 23, 2012 filing of the Form I-140; copies of pay vouchers for the three workers employed from the beginning of the first quarter in 2012 to the date of the RFE; a copy of the petitioner's IRS Form 941 for the last quarter in 2011 (covering the priority date); and two organizational charts for the petitioning business, including a current chart and one dated January 2012.

In response to the RFE, counsel for the petitioner submitted evidence of the petitioner's reinstated status with the Illinois Secretary of State; a copy of the petitioner's quarterly tax return for the last quarter of 2011; a copy of the petitioner's 2011 IRS Form W-3, Transmittal of Wage and Tax Statements (indicating the petitioner issued only two W-2 Forms in 2011); a copy of the beneficiary's 2012 IRS Form 1040, U.S. Individual Income Tax Return and IRS Form 1099-Miscellaneous Income (Form 1099-MISC);⁵ the 2011 Form W-2 for the president of the petitioning entity; and the petitioner's organizational charts indicating that the petitioner had 12 employees/workers in January 2012 and eight as of the time of the RFE response. Counsel further indicated that the last quarterly tax return in 2011 showed only three employees and that the other employees, including the beneficiary, were paid as independent contractors via Form 1099-MISC. Counsel asserted that because of this, pay vouchers for the other employees could not be submitted as requested.

⁵ Schedule C-EZ to the 2012 Form 1040 shows that the beneficiary earned \$23,489 in the "business or profession" of chiropractor.

On June 10, 2013, the director revoked the approval of the I-140 visa petition. The director stated that the petitioner had failed to establish the authenticity of the employment certification letter as requested. The director noted that the petitioner had asserted that pay vouchers for other employees could not be submitted because they were paid as independent contractors via Form 1099-MISC, yet as evidence of the beneficiary's wages, the petitioner submitted a pay voucher (dated June 29, 2012) for the beneficiary, who was also paid as an independent contractor. The director further noted that the petitioner had failed to resolve the discrepancy regarding the number of employees it employed in 2011 and 2012.

Based on the foregoing discrepancies in the record, the director ultimately revoked the approval of the Form I-140.

On appeal, the petitioner does not assert that the director erred in revoking the Form I-140 based on the evidence of record before the director at the time. Instead, counsel for the petitioner submits additional evidence in support of the validity of the petition, including: the beneficiary's employment authorization document; copies of backs and fronts of the beneficiary's paychecks from the petitioner from April 2012 to December 2012, and the beneficiary's 2012 Form 1099-MISC "to show consistency of [the beneficiary's] employment with [REDACTED]" and copies of the 2012 Forms W-2 and Forms 1099-MISC for the petitioner's eight current employees. Counsel asserts that the Form I-140 approval should be reinstated, because the newly submitted evidence shows that the petitioner has the financial ability to pay the beneficiary the proffered wage and the intention to employ the beneficiary.

Upon a review of the entire record, the AAO concludes that the record does not establish the petitioner's continued ability to pay the beneficiary the proffered wage from the 2011 priority date onward. Thus, the director should have revoked the petition's approval on this basis. However, the director's NOR does not clearly set forth this, or any other, basis for the revocation of the petition's approval. Although the NOR refers generally to unresolved discrepancies in the record, it does not clearly establish good and sufficient cause for revoking the petition's approval. Therefore, the director's decision revoking the petition's approval will be withdrawn. However, as the petition is not currently approvable, as discussed below, the matter will be remanded to the director for entry of a new decision.

As noted, the record does not establish the petitioner's ability to pay the beneficiary the full proffered wage from the 2011 priority date onward. 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.

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, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, as noted, the ETA Form 9089 was accepted on September 13, 2011. The proffered wage as stated on the ETA Form 9089 is a range from \$32,656 to \$60,000 per year, and the offered wage listed on the Form I-140 is \$32,656.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2007 and to currently employ twelve workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on an unknown date, the beneficiary did not claim to have worked for the petitioner.

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 Form 9089, 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'l Comm'r 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 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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. The record here contains two copies of the beneficiary's 2012 Form 1099-MISC, the first submitted in response to the director's January 2013 RFE and the second submitted on appeal. The first Form 1099-MISC indicates that the petitioner paid the beneficiary \$23,489 in nonemployee compensation in 2012. The second Form 1099-MISC states that the petitioner paid the beneficiary \$24,750 in nonemployee compensation in 2012. The record provides no explanation or resolution of this discrepancy. This casts doubt on the reliability of the claimed wages the petitioner asserts that it paid the beneficiary in 2012 for purposes of establishing its ability to pay the proffered wage. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). It is incumbent upon 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. *See id.* at 591-92. In any future filings, certified copies of tax forms must be submitted in order to be considered.

Further, on appeal, the petitioner submitted copies of several business checks it claims to have issued to the beneficiary as wages between April and December 2012, in an attempt to establish the actual wages paid to the beneficiary in 2012. In addition, the record contains copies of the petitioner's business checking account statements for January through April 2012. The checks appear to be only a sampling of those that were presumably issued to the beneficiary during the referenced time period, showing only a portion of the wages purportedly paid,⁶ although the AAO observes that it is not entirely clear from this record that the petitioner paid the beneficiary on a regular weekly or biweekly basis.⁷ Moreover, the checks issued to the beneficiary as wages in April 2012 are inconsistent with the petitioner's employment certification letter in the record, dated July 24, 2012,⁸ which states the petitioner had employed the beneficiary as a clinical instructor only since June 2012. In addition, the evidence indicates that the beneficiary was issued a check for wages [REDACTED] dated April 9, 2012, and cashed that same day. This check number appears in sequence on the petitioner's April 30, 2012 business checking account statement from [REDACTED]. The record also contains another check [REDACTED] issued in April to the beneficiary by the petitioner only four days earlier on April 5, 2012. Yet, this earlier issued check is numbered out of sequence and was not cashed until May 5, 2012 (thus, also not appearing on the final bank statement in the record for the period ending April 30, 2012). The record lacks any explanation for these discrepancies, and they cast further doubt on the wages the petitioner maintains it paid the beneficiary. *See Matter of Ho, supra.* The record lacks any independent, competent evidence to resolve the noted discrepancies. Accordingly, the petitioner has not established that it paid the beneficiary an amount at least equal to the proffered wage during any relevant timeframe, including the period from the priority date in 2011 or subsequently.

⁶ The checks total \$14,198.00.

⁷ The offered position on a labor certification must be a full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). Based on the above, the record does not show that the beneficiary is currently employed with the petitioner in a permanent, full-time capacity. Although the petitioner is not obligated to employ the beneficiary on a full-time basis until after the latter has obtained lawful resident status in the United States, it does have the burden to show that offered position on the labor certification will be for a full-time position.

⁸ The reliability of the July 24, 2012 letter, certifying the beneficiary's employment with the petitioner since June 2012, is called into doubt as a result of these inconsistencies. This is further exacerbated by the fact that the signature of the president of the petitioning entity on the letter appears, on its face, to be distinctly different from the same individual's signature found on the labor certification, Form I-140, and January 5, 2012 letters from the petitioner, all three of which appear the same. The president of the entity later proffered an affidavit, dated December 10, 2012, claiming to have personally reviewed and signed the job verification letter, dated June 29, 2012, regarding the beneficiary's employment with the petitioning entity. However, the AAO observes that the letter being verified is actually dated July 24, 2012, and the president's signature on the affidavit does not match the July 24th letter.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). 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 Haw., 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. 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).

However, in the instant case, the record does not contain the petitioner's tax returns, audited financial statements, or annual reports from the priority date onward as required pursuant to 8 C.F.R. § 204.5(g)(2). The record before the director closed on April 4, 2013 with the receipt by the director of the petitioner's submissions in response to the director's RFE. As of that date, the petitioner's 2012 federal income tax return was due but was not provided. Although the director's November 2012 NOIR requested the petitioner's 2011 corporate tax return, the petitioner did not provide a copy of it in its response or on appeal.⁹ Accordingly, the petitioner's net income and net current assets cannot be determined for 2011 and 2012.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls

⁹ 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).

outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petition indicates that the petitioning business was established in 2007. However, the record lacks evidence of the petitioner's reputation in the industry or in its service area. The record also fails to establish the petitioner's historical growth or the number of workers it employs.¹⁰ Further, the record does not establish the occurrence of any uncharacteristic business expenditures or losses. Finally, the record lacks any evidence to demonstrate the petitioner's net income or net current assets for 2011 onward. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

In view of the foregoing, the director's NOR of June 10, 2013, revoking the approval of the petition, will be withdrawn. However, the petition is not presently approvable as the record fails to establish that the petitioner possessed the ability to pay the beneficiary the proffered wage from the priority date onward. The petition is remanded to the director to consider and fully address this and any other issue the director deems appropriate. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review and consider the entire record and enter a new decision.

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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The decision of the director is withdrawn. However, the petition is not approvable based on the current record of proceeding. The petition is remanded to the director for further proceedings consistent with the foregoing and for entry of a new detailed decision.

¹⁰ The petitioner indicated that it employed fewer workers in 2012 than in 2011.