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FILE:



Office: TEXAS SERVICE CENTER

Date: DEC 10 2008

WAC-06-016-50627

IN RE:

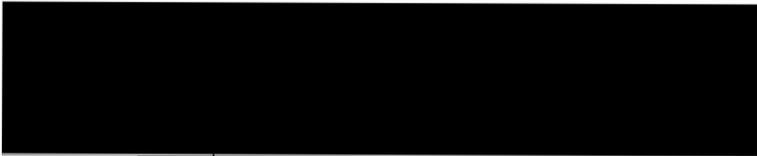
Petitioner:

Beneficiary



PETITION: Immigrant petition for Alien Worker as an Other 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting 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 truck equipment manufacturer and fabricator. It seeks to employ the beneficiary permanently in the United States as a truck painter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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.

The director denied the petition on August 11, 2006, finding that the petitioner had failed to establish that it had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO will also consider the following issues in this case: (1) whether or not the petitioner was a successor-in-interest to the employer listed on the Form ETA 750 submitted with the petition in the instant case; and (2) whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.¹

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal 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 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 Form ETA 750, Application for Alien Employment Certification, 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).

¹ 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*, 229 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).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$9.86 per hour (\$20,508.80 per year). The Form ETA 750 states that the position requires one year of experience in the job offered.

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.² On appeal, counsel submits a signed statement from [REDACTED], manager of D&H Truck Equipment, copies of the petitioner's balance sheets and earnings statements from 2003 to 2006,³ employee earnings history reports from 2003 to 2006, W-2 Wage and Tax Statements issued to the beneficiary by the petitioner and predecessor entity from 2001 to 2005, and the beneficiary's individual income tax returns from 2004 and 2005. Other relevant evidence in the record includes a federal income tax summary for 2003 and 2004, the state wage and tax listing for 2005, a balance sheet from 2004, and an income statement from 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company. On the petition, the petitioner claimed to have been established in 2003 and to currently employ 21 workers. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary claimed to have worked for the petitioner from 1993 to the date that he signed the Form ETA 750B.

On appeal, counsel acknowledges that the petitioner failed to submit evidence of its ability to pay the proffered wage in response to a request for evidence from the director. Counsel states that this was because the petitioner's majority owner had refused to release the information because he believed that it was "confidential." Counsel further states that, following "relentless internal discussions," the petitioner agreed to submit this information in support of its appeal. Counsel states that the newly submitted evidence establishes that the petitioner had the ability to pay the proffered wage.

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 (USCIS) requires the petitioner

² 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).

³ The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. **Unaudited financial statements are the representations of management.** The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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, 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. On appeal, the petitioner has submitted copies of the beneficiary's W-2 forms for the years 2001 through 2005. America's Body Company, the predecessor entity, issued W-2 forms to the beneficiary in 2001, 2002 and 2003. The petitioner issued W-2 forms to the beneficiary in 2003, 2004 and 2005.

The amounts that the petitioner and predecessor entity paid the beneficiary during the years 2001 through 2005 are listed in the table below.

<u>Year</u>	<u>Wages Paid</u>
2001	\$28,170.26
2002	\$28,386.95
2003	\$29,387.46 ⁴
2004	\$33,756.39
2005	\$36,131.72

The petitioner has established that the beneficiary was paid more than the proffered wage from 2001 through 2005. However, as explained below, the petitioner has failed to establish that it is a successor-in-interest to America's Body Company.

In order to file an I-140 Petition for an employment based immigrant, the regulation at 8 CFR § 204.5(l)(3)(i) provides:

Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for a Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Market Information Pilot Program.

Provisions related to the validity and invalidation of labor certifications, 20 C.F.R. § 656.30, provides: "A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification."

In this case, the labor certification was issued to America's Body Company d/b/a D&H Truck Equipment. The I-140 petition was filed by JJS Truck & Equipment, LLC d/b/a D&H Truck Equipment. America's Body Company and JJS Truck & Equipment, LLC are separate companies with separate tax identification numbers. The DOL does not certify a Form ETA 750 labor certification on behalf of a potential employee/beneficiary, but rather to an employer/applicant. Under certain circumstances, the petitioner may substitute a beneficiary. The beneficiary is not permitted, however, to substitute a petitioner. An exception to this rule is triggered if

⁴ The beneficiary was issued two W-2 forms in 2003. One lists wages of \$5,288.13 and appears to have been issued by the predecessor entity. The other was issued by the petitioner and lists wages of \$24,099.33. The amount listed in the table is the sum of the wages from these W-2 forms.



the employer is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In addition, in order to maintain the original priority date, the petitioner must demonstrate that the predecessor entity had the ability to pay the proffered wage from the priority date in 2001 until the date of the change in ownership in 2002. Moreover, the petitioner must establish the financial ability of the successor enterprise to pay the certified wage from the date of the change in ownership. See *Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981).

The record contains two documents related to the issue of whether the petitioner is a “successor-in-interest” to America’s Body Company. The first is a letter from [REDACTED] of D&H Truck Equipment dated July 27, 2006. The letter explains that D&H Truck Equipment has been in business since 1959 and was purchased by America’s Body Company in July of 2000. The letter further explains that America’s Body Company ceased operations in December of 2002 and that a group of employees, operating under the name JJS Truck Equipment, purchased the inventory and assets of D&H Truck Equipment.

A second letter has been submitted on appeal. This letter is from [REDACTED] Manager of D&H Truck Equipment. [REDACTED] states “America’s Body Company (ABC) was the owner of D&H during the period of 2001, 2002 and 2003 until JJS purchased the assets and offered continued employment to key personnel.”

The record does not contain a bill of sale or any other documentation evidencing that the petitioner obtained title to the assets of the predecessor entity. Nor is there any documentation to establish that the petitioner “has assumed all of the rights, duties, and obligations of the predecessor company” pursuant to *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 481. The letters submitted by [REDACTED] and [REDACTED] are insufficient to satisfy the petitioner’s burden of proof. 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)). Therefore, the petitioner has failed to provide evidence that it is the successor-in-interest to the original employer.

In addition, although not noted in the director’s decision, the petitioner failed to provide sufficient evidence of the beneficiary’s qualifications for the truck painter position. To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary’s qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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 truck painter. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School blank
 - High School blank
 - College blank

College Degree Required	blank
Major Field of Study	blank

The applicant must also have one year of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

....

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petitioner did not provide any evidence of the beneficiary's experience with I-140 petition. On May 9, 2006, the director issued a request for evidence which requested "evidence that shows the beneficiary has experience as required per labor certification." In response to the request for evidence, counsel stated "Please refer to the original approved labor certification application describing [REDACTED]' ample experience in the related field and attached certificate of completion of training in auto body & paint." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). No other documentation has been provided to show that the beneficiary has the experience required by the labor certification. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position with one year of experience in the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.