



U.S. Citizenship  
and Immigration  
Services

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*AB6*

[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: **MAY 28 2011**

EAC-05-178-51206

IN RE:

Petitioner:

[Redacted]

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:

SELF-REPRESENTED

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 for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

cc:

[Redacted]

**DISCUSSION:** The Director, Vermont Service Center (“director”), denied the preference visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner operates a restaurant, and seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign food. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s July 12, 2006 decision, the petition was denied based on the petitioner’s failure to demonstrate that the beneficiary met the requirements of the certified labor certification.

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).<sup>1</sup>

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 seeks to classify the beneficiary as a skilled worker. 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 its 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. Department of Labor. *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 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).

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<sup>1</sup> 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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on April 18, 2001. The proffered wage as stated on the Form ETA 750 is \$12.12 per hour, 40 hours per week, which is equivalent to \$25,209.60 per year. The labor certification was approved on April 3, 2003. The petitioner filed an I-140 Petition for the beneficiary on June 8, 2005. The petitioner listed the following information on the I-140 Petition: date established: not listed; gross annual income: "see attached,"<sup>2</sup> net annual income: not listed; and current number of employees: not listed.

The director issued a Request for Evidence ("RFE") on August 23, 2005 requesting that the petitioner provide evidence of its ability to pay the proffered wage from April 18, 2001 to the present; to submit the petitioner's 2001, 2002, and 2003 federal tax returns, including all schedules; to submit the beneficiary's W-2 Forms if the petitioner employed the beneficiary; and to submit evidence that the beneficiary had the two years of prior experience as required by the certified Form ETA 750.

In response to the RFE, counsel, on behalf of the petitioner,<sup>3</sup> submitted a letter dated November 15, 2005 requesting that the director extend the petitioner's time to respond to the RFE until January 17, 2006, so that the beneficiary could obtain a letter to document her experience gained abroad in the Ukraine. The record does not reflect that the petitioner submitted any documentation in response to the RFE after that date. On July 12, 2006, the director denied the petition as the petitioner failed to document that the beneficiary had the required experience to meet the terms of the certified labor certification. The petitioner appealed and the matter is now before the AAO.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, cook, with duties including:

Plan menu and cook dishes and desserts according to the recipes. Prepare meats, soups, sauces, vegetables, prior to cooking. Season, cook, portions and garnish food. Estimate food consumption and requisition supplies.

The petitioner listed no educational requirements in Section 14, and listed no other special requirements for the position in Section 15.

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<sup>2</sup> No information was attached related to the petitioner's gross income.

<sup>3</sup> We note that the record of proceeding does not contain a properly executed Form G-28 for counsel to represent the petitioner. The record only contains a Form G-28 for counsel's representation of the beneficiary in the instant matter.

On the Form ETA 750B, signed on March 29, 2001, the beneficiary listed her prior work experience as: (1) Rottenberg Catering, Brooklyn, New York, September 1996 to present (March 29, 2001), cook – Russian/Ukrainian foods; (2) EKS0 Restaurant, Vinnica, Ukraine, from October 1992 to October 1994, cook; (3) Vinnicki Univermag Detskij Mir Cafeteria, Vinnica, Ukraine, October 1983 to October 1992, cook.

For the individual beneficiary to qualify for the certified labor certification position, the petitioner must demonstrate that the beneficiary's prior experience qualifies the individual for that position, and that the beneficiary obtained the experience by the time of the priority date. Evidence must be in accordance with 8 C.F.R. § 204.5(l)(3), which 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To document the beneficiary's experience, the petitioner initially submitted no evidence. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The director issued an RFE, but the petitioner did not submit any documentation in response, only a request for more time to obtain documentation from abroad. Further, Form ETA 750B provides that the beneficiary was also employed in the U.S. before the priority date. Counsel did not reference any attempts to obtain information from that employer to document the beneficiary's prior experience.

On appeal, counsel provides, "the beneficiary has two year experience as a cook for the "ECKO" Restaurant in Vinnitsa, Ukraine, between October 1992 and October 1994 (see copy of Work History Book)." Counsel further provides, "Unfortunately, the owner of the restaurant died and the restaurant went out of business. The beneficiary is unable to obtain any other official document. However, we will submit a supporting statement from a co-worker."<sup>4</sup>

The labor certification filed on the beneficiary's behalf was approved on April 3, 2003. The petitioner filed an I-140 Petition for the beneficiary on June 8, 2005, over two years later, four years after the initial labor certification filing. At the time of filing the Form I-140, the petitioner was required to provide evidence that the beneficiary met the requirements of the certified labor certification. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Despite the two-year time gap between the labor certification's approval and the I-140 filing,

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<sup>4</sup> On January 2, 2008, a fax was sent to the petitioner to indicate whether it had filed a brief as indicated on the appeal form. The petitioner did not provide any response. Counsel did not submit any additional documentation, from a former co-worker, or otherwise to verify the beneficiary's former work experience.

during which the beneficiary could have sought to obtain a letter to document her experience, the petitioner submitted no documentation at the time of filing to evidence that the beneficiary had the required experience.

The director then requested that the petitioner provide evidence to show that the beneficiary had the required skills. The petitioner further requested additional time in which to document the beneficiary's experience. No documentation was submitted. 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). 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.* Form ETA 750 listed that the beneficiary had also obtained experience in the U.S. Counsel made no reference to the availability or attempts at obtaining information from that prior employer. Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the "work record" will not be accepted on appeal.<sup>5</sup>

Further, although not raised in the director's denial, we find that the petitioner also failed to establish its ability to pay the beneficiary the proffered wage. 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).

First, in determining the petitioner's ability to pay the proffered wage during a given period CIS will 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 Form ETA 750B, signed by the beneficiary on April 29, 2001, the beneficiary did not list that she was employed with the petitioner. The petitioner did not claim to have employed the beneficiary. Therefore, the petitioner cannot establish its ability to pay the beneficiary the proffered wage through prior wage payment.

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. 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.*

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<sup>5</sup> Additionally, we note that even if the AAO accepted the work history book on appeal, the evidence would be insufficient to show that the beneficiary had the two years of prior experience in the job offered as a cook. The work history book provides that the beneficiary was employed as a "Confectioner," and not as a cook. The work history does not provide the name of the individual that issued the statement, fails to list her job duties, and does not list whether she was employed on a full-time or part-time basis. Accordingly, the work history book would be insufficient to show that the beneficiary had the required two years of prior experience. See 8 C.F.R. § 204.5(l)(3).

*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).

The petitioner did not submit tax returns for any year. Further, the petitioner did not submit any other regulatory prescribed evidence such as an annual report, or audited financial statement in any year. *See* 8 C.F.R. § 204.5(g)(2). The record contains no evidence of the petitioner's ability to pay the proffered wage.

Accordingly, 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.