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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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FILE: [Redacted]  
LIN 05 118 50440

Office: NEBRASKA SERVICE CENTER

Date: AUG 05 2009

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:



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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is before the AAO on a motion for reconsideration. The motion will be granted. The appeal will remain dismissed. The AAO's April 12, 2007 decision will be withdrawn in part and affirmed in part.

The petitioner is an insulation installation company. It seeks to employ the beneficiary permanently in the United States as a insulation worker. As required by statute, a Form ETA 750,<sup>1</sup> Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary met the minimum requirements of the approved Form ETA 750 at the time the request for certification was filed. The director denied the petition accordingly. The petitioner appealed this decision to the AAO and the AAO affirmed the director's decision denying the petition for the reasons stated in his decision as well as for the petitioner's failure to demonstrate an ability to pay the proffered wage. The petitioner filed a timely motion for reconsideration of this decision.

The regulation at 8 C.F.R. § 103.5(a)(3) requires motions to reconsider to "state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services policy." In support of the motion to reconsider, counsel argues that the documents submitted indicate that the beneficiary met the requirements of the amended Form ETA 750 in both the requirements included and the beneficiary's experience and that the petitioner was able to pay the prevailing wage for the 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 particulars of the position as contained in the Form ETA 750 as well as the background information regarding this type of immigrant visa and the role played by both the U.S. Department of Labor and U.S. Citizenship and Immigration Services (USCIS) were discussed in our previous decision and will not be recited in this decision.

The petitioner's argument concerning the special requirements of the Form ETA 750 is the same in the motion to reconsider as its argument on initial appeal. The petitioner argues that we misapplied law and thus the motion qualifies as a motion to reconsider. Counsel argues that our reference to a document that the petitioner submitted in support of its original appeal in this matter, namely a letter from the

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<sup>1</sup> After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

Colorado Department of Labor returning the petitioner's labor certification and requesting that amendments be made, was "erroneous." As stated in our original decision, neither that letter nor any other evidence in the record demonstrates that the requirements of the position changed as counsel claims as a result of the petitioner's request prior to DOL's certification of the labor certification. Without documentary evidence to support the claim that the Form ETA 750 was modified, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I. & N. Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I. & N. Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503, 506 (BIA 1980). 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, *Madany 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). As stated in our original decision, the documents supporting the Form ETA 750, including the advertisements and job postings, do not support counsel's argument that the terms of the labor certification were modified by DOL and are different than what is contained in the certified labor certification as contained in the record of proceedings. As such, we find no reason to amend or retract the finding in our original decision and affirm that the special requirements that appear on the Form ETA 750 would have to be met in order for the beneficiary to demonstrate eligibility for the position offered. As stated in the August 12, 2005 affidavit of [REDACTED], the beneficiary did not possess these qualifications at the time the I-140 petition was filed. Consequently, the beneficiary does not meet the terms of the labor certification and the petition is not approvable. Thus, this portion of the AAO's April 12, 2007 decision is affirmed.

In the motion to reconsider, counsel admits that no evidence was submitted to show that the beneficiary had the required two years of experience as specified on the labor certification as such information was never requested. A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(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.

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(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.

In support of his assertion that the beneficiary possessed the requisite two years of experience, counsel submits a May 11, 2007 affidavit from [REDACTED] stating that the beneficiary worked from

January 1998 to January 2000 as an installer and from January 2000 to March 2001 as crew foreman. Although such evidence would more properly be included with a motion to reopen as opposed to a motion to reconsider, this affidavit meets the applicable regulatory requirements and satisfies the petitioner's burden of proving that the beneficiary had the requisite two years of experience prior to the filing date for the petition. Thus, this portion of the AAO's April 12, 2007 decision is withdrawn.

The last issue raised in the motion to reconsideration was our finding that the petitioner failed to demonstrate its ability to pay the proffered wage to the beneficiary. 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 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$14.20 per hour (\$29,536 per year).<sup>2</sup>

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. With the motion for reconsideration, counsel submitted payroll records indicating that the beneficiary was paid between \$224.42 and \$623.13 per week from April 2001 to December 2001 (totaling \$17,196.85 for those nine months), between \$141.08 and \$841.50 per week during the calendar year 2002 (totaling \$21,910.18 for the year), between \$190.01 and \$903.32 per week in the calendar year 2003 (totaling \$23,348.39 for the year), between \$234.81 and \$950.79 per week in the calendar year 2004 (totaling \$28,228.33 for the year), between \$148.21 and \$998.20 per week in the calendar year 2005 (totaling \$28,675.27 for the year), and between \$359.24 and \$857.50 per week from January to March 2006 (totaling \$9,760.75 for the three months).<sup>3</sup>

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<sup>2</sup> We note that this wage is found on the labor certification and that the July 20, 2004 letter from the Colorado DOL states that the prevailing wage is \$27.18 per hour or \$56,534 per year.

<sup>3</sup> Even though the petitioner is not required to do so until after the approval of the I-485, we note that none of the years for which payroll records were provided demonstrate that the petitioner paid the

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 Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

Counsel also submitted federal income tax returns from 2001 to 2005. The motion for reconsideration was filed on May 15, 2007, however, the most recent federal tax return, that for 2006, was not provided. The petitioner's tax returns stated its net income as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated net income of \$138,148.00.<sup>4</sup>
- In 2002, the petitioner's Form 1065 stated net income of \$27,271.00.
- In 2003, the petitioner's Form 1065 stated net income of \$89,774.00.
- In 2004, the petitioner's Form 1065 stated net income of \$226,302.00.
- In 2005, the petitioner's Form 1065 stated net income of \$495,319.00

The net income demonstrated by these tax returns is sufficient to demonstrate that the petitioner has the ability to pay the proffered wage to the beneficiary alone or in combination with the wage

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beneficiary the proffered annual wage. In addition, the fluctuations in the beneficiary's pay indicate that the work he does for the petitioner may not be full time in nature. 20 C.F.R. § 656.3 defines "employment" as "permanent fulltime work by an employee for an employer other than oneself." Although fluctuations in the wages of hourly employees is to be expected, the wide variance of wages demonstrated through the payroll records raises the potential issue of whether or not a permanent full time offer of employment is being made in this case.

<sup>4</sup> Where a LLC's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on Line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065, U.S. Partnership Income, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 22." Where a LLC has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K (page 3 of Form 1065) is a summary schedule of all the partners' shares of the partnership's income, credits, deductions, etc. The net income is reported on Analysis of Net Income (Loss) line 1 Net income (loss). See Internal Revenue Service, Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>.

actually paid to the beneficiary. Thus, this portion of the AAO's April 12, 2007 decision is withdrawn.

Although we sustain two points raised by counsel in the motion to reconsider, the petitioner failed to demonstrate that the beneficiary met the special requirements appearing on the labor certification and thus this petition cannot be approved.

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 motion to reconsider is granted. The appeal remains dismissed. The AAO's April 12, 2007 decision is affirmed in part and withdrawn in part.