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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **MAY 22 2009**
SRC 07 230 50140

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, Texas Service Center (“director”), denied the employment-based immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is a TV network/production broadcasting business. The petitioner seeks to employ the beneficiary permanently in the United States as a multimedia designer. 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”). The director determined that evidence submitted by your organization, and elicited by the director, did not demonstrate that the beneficiary has the required experience as stated on the labor certification. The director found that the beneficiary was not qualified by his employment experience to perform the offered job of multimedia designer. Therefore the director denied the petition.

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).¹

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.

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 at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides:

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.

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).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

Here, the Form ETA 750 was accepted on March 27, 2005. The petitioner filed the Form I-140 on July 26, 2007, and the petitioner identified on that form is [REDACTED]. The proffered wage as stated on the Form ETA 750 is \$37,193.10 year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

According to Form ETA 750, Part B, the beneficiary stated that he was employed in multimedia design by Holos, Inc. (no address stated²) from June 2002 to present (i.e. March 22, 2005). The beneficiary's job duties with Holos, Inc. as listed on the Form ETA 750, Part B, were "Creation of multimedia databases using Macromedia Flash communication server. Web site development using Macromedia Flash. Video and Audio encoding. Audio post production."

Prior to that employment, the beneficiary stated he was employed with World Wide Web Institute (no address stated) in multimedia design from October 2000 to June 2002. The beneficiary's job with World Wide Web Institute's was as the "Head of Multimedia department." There is no description of the beneficiary's job duties with the World Wide Web Institute on the Form ETA 750, Part B.

According to the Form ETA 750 the beneficiary has a high school education. According to Form ETA, Block 14, evidence of the beneficiary's education, training, experience and abilities are "Exhibit A - Certificates of study and work experience." No such Exhibit A is found in the record of proceeding.

Relevant evidence submitted by the petitioner is an employment reference statement dated May 2, 2005, from Holos, Inc. located at [REDACTED] Ft. Lauderdale, Florida, by [REDACTED] (no title given) that the beneficiary was employed there from June 2002 to May 2005, as head of the

² Two job reference letters in the record, one given by Holos, Inc., dated May 2, 2005, and one given by WorldWide Web Institute.com, Inc., dated February 6, 2002, state that both companies are located at [REDACTED], Ft. Lauderdale, Florida, although the letters listed different suite numbers.

multimedia design department; and, an employment reference letter dated February 6, 2002, by [REDACTED] marketing director, from WorldWide Web Institute.com, Inc. located at [REDACTED], Ft. Lauderdale, Florida.

On March 13, 2008, the director issued a Request for Evidence (“RFE”) for the petitioner to provide: evidence according to the regulation at 8 C.F.R. § 204.5(g)(1). The regulation states in pertinent part:

General. Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required in individual cases. Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

Counsel responded by his letter transmittal dated April 10, 2008, in which he submitted employment reference letters from Holos, Inc., dated April 8, 2008, and from WorldWide Web Institute.com, Inc., dated April 7, 2008, and June 2, 2008.

On June 7, 2005, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. The director found that the petitioner did not establish that the beneficiary has the required experience as stated on the labor certification, and the director found that the beneficiary was not qualified by his employment experience to perform the offered job of multimedia designer.

Specifically, the director found that it was improbable that the beneficiary was actually employed by Holos, Inc., as a multimedia designer since information secured from the website <http://www.sunbiz.org> from the Florida Department of State, Division of Corporation, stated that the beneficiary was the president of Holos, Inc. from March 22, 2002, at least through February 15, 2008. The petitioner appealed to the AAO.

On appeal, counsel asserts that the beneficiary was appointed president of Holos, Inc. but his “operational” position was as a multimedia/web designer from June 2002 through May 2005. Therefore, counsel asserts the beneficiary was qualified by his employment experience to perform the offered job of multimedia designer.

In support of the appeal, counsel cites the case of *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and an unpublished decision of the AAO but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent

decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

According to counsel, the case of *Matter of Aphrodite Investments, Ltd., Id.* stands for the proposition that a corporation is a separate entity from its owner. Counsel is correct. A corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Further, counsel states that, according to the case of *Matter of Aphrodite Investments, Ltd., Id.*, involving non-immigrant H-1B visa classification, a petitioner's sole owner can be the same person as the sole beneficiary. It is unclear what counsel means by this statement since there is no evidence in the record that the beneficiary has an ownership interest in Holos, Inc., or that the beneficiary was the sole Holos' employee.

According to a letter May 2, 2005, by [REDACTED] of Holos, Inc. the beneficiary was employed by Holos, Inc., from June 2002 to May 2005, as head of the multimedia design department with no mention that the beneficiary was its president. However, there is evidence in the record that the beneficiary was president of Holos, Inc. at least to 2008. Therefore, the evidence concerning the beneficiary's employment duties with Holos, Inc. is inconsistent and contradictory.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, counsel asserts that the beneficiary can be the company president and carry-out job duties including "the creation of multimedia flash websites." Counsel fails to submit any additional evidence from Holos, Inc., the beneficiary's former employer, to set forth what percentage of the beneficiary's duties was managerial as opposed to multimedia designs. That is to say, as the petitioner failed to qualify the amount of time that the beneficiary worked as president of Holos, Inc. versus time spent as a multimedia designer, we cannot conclude that the petitioner has adequately documented that the beneficiary has two years of experience as a multimedia designer. Without documentary evidence to support the claim, 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 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Along with a legal brief, counsel submitted additional evidence on appeal which were two letters from WorldWide Web Institute.com, Inc. on its letterhead, by [REDACTED], identified as a chief operations officer, as dated April 7, 2008, and June 2, 2008.

According to the Florida Department of State, Division of Corporations information as accessed at the website <http://www.sunbiz.org> on April 29, 2009, WorldWide Web Institute.com, Inc. is an inactive corporation in the State of Florida having filed a document for administrative dissolution on September 21, 2001 (document number L76053). According to information from that site, the company's registered agent resigned as of January 22, 2002. Since WorldWide Web Institute.com, Inc., is an inactive company, dissolved eight years ago, it is reasonable to assume it is not doing business as a corporation and does not have a chief operations officer. There is no independent objective evidence in the record that WorldWide Web Institute.com, Inc. is authorized to conduct business in Florida or has a chief operations officer. The letter does not designate [REDACTED] as "the former chief operations" or contain any explanation. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

The letter dated April 7, 2008, from WorldWide Web Institute.com, Inc., on its company stationary by [REDACTED] as its chief operations officer, stated in pertinent part:

This letter is to certify that [the beneficiary] was employed in our company as a Multimedia Designer.

[The beneficiary] was sponsored by our organization ... from January 2000 until March 2002.

After only twelve months [the beneficiary] was promoted to head of our Multimedia Department.

His responsibilities included:

- Creation of Multimedia Databases using Macromedia Flash.
- Web site development using Macromedia Flash.
- Video and audio encoding.
- Audio and Music production.
- Actionscript programming.
- Website publishing, creation and maintenance.
- Art Direction.
- Project management.

Our company was dissolved in the year 2002.

The letter dated June 2, 2008, from WorldWide Web Institute.com, Inc., on its company stationary by [REDACTED] as its chief operations officer, stated in pertinent part:

Our April 7 letter clearly states that we started sponsorship for [the beneficiary] as of the date of submission of the H1B petition which is Jan 31 2000. It clearly stated that he was “sponsored” we have not said he started working for us on that date, he actually started working on Oct 1 of 2000 the initial validity period of the approved petition.

As the beneficiary only began working for WorldWide Web Institute.com, Inc. in October 2000 and was promoted to the head of the department twelve months later, or October 2001, and the company dissolved in early 2002, the letter would not document two years of experience as a multimedia designer. Further, it is unclear from the letter whether the beneficiary was responsible for multimedia design, or rather project management, after his promotion. The letter does not distinguish his job duties in each position.

As the petitioner has failed to submit any evidence clarifying the beneficiary’s role or the time spent as the president of Holos compared to time spent as a designer at Holos, and the WorldWide Web Institute.com, Inc. fails to document two years of experience, we cannot determine the exact amount of time that the beneficiary was employed as a multimedia designer. The petitioner did not allow for an applicant to qualify for the position based on experience in an alternate occupation such as president, or head of a multimedia department. Accordingly, the petitioner has failed to document that the beneficiary has the required two years of prior experience as a multimedia designer in accordance with 8 C.F.R. § 204.5(1)(3).

Based on the foregoing, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. 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.