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U.S. Citizenship and Immigration Services

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FILE: WAC 02 035 57701 Office: CALIFORNIA SERVICE CENTER

Date: NOV 16 2009

IN RE: Petitioner:
Beneficiary:



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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director, California Service Center, initially approved the preference visa petition. Subsequently, the director issued a Notice of Intent to Revoke (NOIR) the approval of the petition. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140 petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is in the jewelry manufacturing and sales business. It seeks to employ the beneficiary permanently in the United States as a stone setter. 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 demonstrated that the beneficiary met the requirements for the position as stated on the Form ETA 750, as certified by the DOL and submitted with the instant petition. The director therefore revoked the approval of the petition pursuant to Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155.

The record shows that the appeal is properly filed and timely. 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's Form ETA 750 was filed with DOL on March 1, 1996 and certified by DOL on July 22, 1999. The petitioner subsequently filed Form I-140 with the Immigration and Naturalization Service (INS) (now called U.S. Citizenship and Immigration Services (USCIS)) on November 6, 2001, which was approved on July 8, 2002. The beneficiary appeared for a final visa interview at the U.S. Embassy in Ankara, Turkey on December 15, 2003.

On June 16, 2005, the director sent a NOIR to the petitioner stating the following:

The beneficiary was approved as a stone setter. However, at the consular interview, the beneficiary stated he did not set stones himself but was actually a jewelry designer. The consulate attempted to contact the two former employers cited by the beneficiary, but was unable to locate them at the address given. No phone listing for the businesses was found. While it is uncertain that the beneficiary is a jewelry designer, as he claimed, his own statement that he does not set stones shows he is not qualified for the position offered, that of stone setter.

The petitioner responded to the NOIR on July 25, 2005. The response included a letter from counsel and a written declaration from the beneficiary. The director revoked the petition on August 11, 2005, finding that the petitioner had not established that the beneficiary was qualified for the classification sought.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General 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."

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 589. The burden of proving eligibility remains entirely with the petitioner until the immigrant visa is issued. Section 291 of the Act, 8 U.S.C. § 1361; *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, ... this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, 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. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

A NOIR "must include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence (*e.g.*, the investigative report)." *Matter of Estime*, 19 I&N Dec. 450; *see also Matter of Arias*, 19 I&N Dec. 568 (BIA 1988)(stating "where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained"). Here, the director's NOIR sufficiently detailed the evidence of the record, pointing out inconsistencies in the beneficiary's testimony before the consular officer and noting that the consulate was unable to verify the beneficiary's previous employment. The inconsistencies identified by the director would warrant a denial if unexplained and un rebutted, and thus the NOIR was properly issued for good and sufficient cause.

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 (2^d Cir. 1989).

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.

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien 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). 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).

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.

(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.

In the instant case, the Form ETA 750 states that the position requires four years of experience in the job offered. On the Form ETA 750B the beneficiary indicated that he had been employed as a stone setter/jeweler by [REDACTED] formerly [REDACTED] located at [REDACTED] [REDACTED] from May 1989 up to the date on which the Form ETA 750B was signed.

In addition, in response to a request for evidence issued by the director, the petitioner submitted a letter, dated March 14, 2002, from [REDACTED]. The letter states that the beneficiary had been employed by [REDACTED] as a stone setter and jeweler since May, 1989. The address provided for [REDACTED] appears to be the same as that provided on the Form ETA 750B – [REDACTED]

As noted above, the beneficiary appeared for a final visa interview at the U.S. Embassy in Ankara, Turkey on December 15, 2003. The information provided by the beneficiary at his final visa interview was inconsistent with the information provided on the Form ETA 750B and the letter from [REDACTED]. Specifically, the beneficiary stated that he worked as a jewelry designer and that he did not set stones himself, but came up with jewelry designs and other employees set the

stones. Further, it is noted that the U.S. Embassy in Ankara was unable to contact [REDACTED] or [REDACTED] at the address provided and was thus unable to verify the beneficiary's work experience.

In response to the NOIR issued by the director, the petitioner submitted a written declaration from the beneficiary in which the beneficiary states that he testified before the consular officer at his visa interview on December 15, 2003 that he had been a stone setter for more than 30 years. It is noted that the declaration submitted in response to the NOIR is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not persuasive evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). It is incumbent on 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. *Matter of Ho*, 19 I&N Dec. at 591-592. No such independent objective evidence was submitted in response to the NOIR, and none has been submitted on appeal, to establish that the beneficiary has at least four years of experience as a stone setter as required by the labor certification application.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position with four years of experience in the job offered. Thus, the director had good and sufficient cause to revoke the approval of the petition.

Further, although not noted by the director, the petitioner has failed to establish its ability to pay the proffered wage, and the appeal could not be sustained for this additional reason. 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*, 299 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 at 1002 n. 9. 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

As noted above, the Form ETA 750 was accepted on March 1, 1996. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$20,800.00 per year).

The record shows that the petitioner is structured as an S corporation. On the I-140 petition the petitioner claimed to have been established in 1985 and to have eight employees. On the Form ETA 750B, signed by the beneficiary on February 26, 1996, 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 a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, 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. 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 1996 or subsequently.

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 (1st 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 gross receipts and wage

expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner submitted a copy of its 2000 Form 1120S, U.S. Income Tax Return for an S Corporation. The tax return demonstrates that the petitioner's net income in 2000 was \$175,106.00.¹

¹ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If, as in this case, the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed October 20, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

The petitioner has established its ability to pay the proffered wage in 2000. However, the petitioner has not submitted tax returns or any other evidence to establish its ability to pay the proffered wage in any year other than 2000. As noted above, the petitioner must establish that it had the continuing ability to pay the proffered wage beginning on the priority date. As the petitioner has not submitted evidence of its ability to pay for any year other than 2000, it has failed to establish that it had the *continuing* ability to pay the proffered wage beginning on the priority date. The petition should not have been approved by the director for this additional reason.

In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition.

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. The approval of the employment-based immigrant visa petition is revoked.