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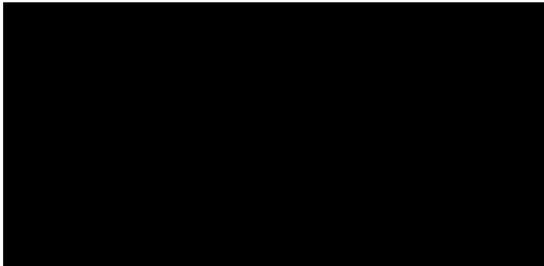
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
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Services**

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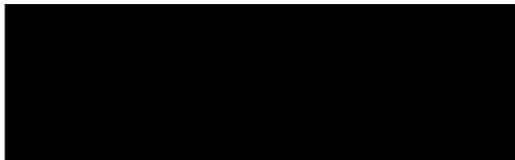
Petitioner:

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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gas station. It seeks to employ the beneficiary permanently in the United States as a night supervisor. 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 the beneficiary had the required education by the priority date of the visa petition. The director also questioned whether the offer was a bona fide job offer based on the employer-employee relationship. 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.

As set forth in the director's October 25, 2007 denial, the issues in this case are whether or not the beneficiary had the requisite level of education as of the time the labor certification was filed and whether the petitioner and beneficiary have a legitimate employer-employee relationship.<sup>1</sup>

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 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.<sup>2</sup>

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<sup>1</sup> The director also discussed whether the petitioner demonstrated the ability to pay the proffered wage of \$10.88 per hour (\$22,630 per year). We agree with the director's conclusion that the petitioner's net income from tax year 2005 and the net assets from tax years 2002-2004 demonstrate the petitioner's ability to pay the proffered wage from the time that the Form ETA 750 was accepted on December 17, 2002 onward.

<sup>2</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).

The beneficiary completed Schedule C ("Profit or Loss From Business") of the Form 1040 and listed that the beneficiary is the "proprietor" of the Shell Gas Station identified as the petitioner in this matter. Elsewhere on the Form 1040, the beneficiary states his occupation as "cashier." The beneficiary indicated that he did not "'materially participate' in the operation of th[e] business" during the course of the year. Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

On appeal, counsel states that the beneficiary's tax returns had "some errors" and that the beneficiary has no ownership interest in the petitioning entity. The petitioner's tax returns, on Schedule E, indicate that its common stock is owned by two individuals different than the beneficiary and that these two individuals owned the common stock of the petitioner for the entire time period for which the tax returns were provided. The beneficiary also filed a Schedule SE with his Form 1040 indicating that he is self-employed as a cashier; his expenses claimed include no usual business expenses, but instead reflect personal expenses such as laundry and cell phone usage. Although the manner that the beneficiary completed his personal tax returns raises questions about the beneficiary's ownership interest in the petitioner, as noted by the director, the petitioner's tax returns demonstrate that the beneficiary has no real ownership interest in the petitioner and therefore there is a *bona fide* employer-employee relationship in this case. This portion of the director's decision is withdrawn.<sup>3</sup>

Regarding the second issue of whether the petitioner documented that the beneficiary had the required education and experience, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

(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

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<sup>3</sup> We do, however, note conflicts in the evidence. Form ETA 750B states that the beneficiary has worked for the petitioner as a night supervisor since August 2002. The beneficiary's tax return states that he has been employed as a cashier, not a supervisor, during the same time period. "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. 582, 591-592 (BIA 1988). In addition, "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." *Id.* The petitioner must resolve this issue in any further filings.

(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.

The petitioner must 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). The regulations for the skilled worker classification contain a minimum requirement that the position require at least two years training or experience. The ETA Form 750 requires two years of experience as a supervisor as well as 12 years of high school education. The petitioner submitted a letter from [REDACTED], stating that the beneficiary worked as a cashier, salesperson, and supervisor for the company from February 15, 1997 to January 30, 2000. The letter does not state whether the beneficiary was employed in a full-time or part-time capacity nor does the letter state how much of the time spent was as a supervisor as opposed to a cashier or salesperson. See 8 C.F.R. § 204.5(l)(3)(ii)(B). Additionally, the beneficiary failed to list this experience on Form ETA 750B. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). As such, the letter submitted is insufficient to establish that the beneficiary had the requisite experience as of the date the labor certification was filed. 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 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

The petitioner submitted a diploma from Rochville University stating that the beneficiary received a high school diploma on June 15, 2003.<sup>4</sup> The accompanying transcripts reflect that the beneficiary attended three semesters of school before attaining the degree, but does not list any dates of attendance. The labor certification was accepted on December 17, 2002, which was before the diploma from Rochville University was issued. Despite being notified of the deficiency by the director in the request for evidence and the decision, no evidence of a prior high school diploma was submitted. On appeal, counsel represented that the beneficiary has a high school diploma from his home country and would be submitted when available, however, more than a year has passed since the petitioner filed the appeal and no additional documentation has been submitted. Additionally, the beneficiary stated on Form ETA 750 that he attended high school at "London College," with no location listed. The petitioner did not submit any documentation to demonstrate attendance at London College. As the beneficiary must hold all of the qualifications required before the priority

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<sup>4</sup> The beneficiary failed to list this education on Form ETA 750. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 9089, lessens the credibility of the evidence and facts asserted. Similarly, this would apply to the beneficiary's education as well.

date, the petitioner has not established that the beneficiary meets the requirements of the labor certification and the petition may not be approved.

The evidence submitted does not establish that the beneficiary held the requisite experience and education as of the date the labor certification was filed and therefore this petition may not 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 appeal is dismissed.