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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

B6



FILE:

SRC 07 196 51144

Office: TEXAS SERVICE CENTER

Date: JAN 21 2010

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

The petitioner is a restaurant.¹ It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL), not for the petitioner, but for another entity.² The director determined, *inter alia*: that the petitioner has not demonstrated the position offered meets the minimum requirements of this visa classification; that the petitioner has not demonstrated that the employer, [REDACTED] (hereinafter [REDACTED]³), stated on the labor certification is the petitioner or a predecessor-in-interest thereto; and, that the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience due to discrepancies in the dates of employment. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 denial, the issues in this case are whether or not the petitioner has demonstrated the position offered meets the minimum requirements of this visa classification; whether or not the petitioner has demonstrated that the employer stated on the labor certification is the petitioner; whether or not there is evidence in the record that the petitioner is a successor-in-interest to the LLC; and whether or not the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience.

Beyond the decision of the director, additional issues in this case are whether or not there is sufficient evidence submitted that the businesses that have employed the beneficiary are one and the same entity; and, whether or not the petitioner had established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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.

¹ The petitioner references several entities in the record: the petitioner, [REDACTED], EIN [REDACTED], EIN [REDACTED], W/E of [REDACTED], EIN [REDACTED], and, [REDACTED], EIN [REDACTED], W/E of [REDACTED].

³ Limited liability company.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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). Here, the labor certification application was accepted on September 17, 2001.

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.⁴

An issue in this case is whether or not the job position offered in the petition meets the minimum requirements of the visa classification. The labor certification filed by [REDACTED] states that 12 months of experience in the position offered is required, i.e. ETA Form 9089, Part H, 6-A. The minimum qualification for the skilled worker classification selected by the petitioner on the I-140 petition requires a minimum of two years of experience in the offered position. The job position offered in the labor certification does not meet the minimum requirements of the petition skilled worker classification. *See* 8 C.F.R. §§ 204.5(l)(4) and 204.5(l)(2).

Counsel contends on appeal that it is retroactively amending the I-140 petition to change the I-140 petition from one requesting a skilled worker classification requiring a minimum of two years of experience in the position offered, to the classification "other worker" that does not require experience in the position offered.

The petitioner's assertion is misplaced. The petition cannot be amended retroactively after the director's decision. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation. The evidence submitted does not establish that the petition requires at least two years of training and experience such that the beneficiary may be found qualified for classification as skilled worker.

⁴ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

An issue in this case is whether or not the employer LLC stated on the labor certification is the petitioner. The petitioner asserts that [REDACTED] was “closed”. The AAO has accessed the records of the Secretary of State of California at <<http://kepler.ss.ca.gov>> on December 18, 2009. According to that website, [REDACTED] “converted out.” According to the website <<http://sos.ca.gov>> accessed on December 18, 2009, the phrase “converted out” means that a business entity converted to another type of business entity or to the same type under a different jurisdiction. The petitioner has not provided information concerning the present status of the subject LLC. There is no evidence in the record that the employer LLC identified on the labor certification is the petitioner, [REDACTED]

Further, there is no evidence in the record that the petitioner is a successor-in-interest to the LLC. Successor-in-interest status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is or was affiliated with the limited liability company does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, no evidence was submitted to show the successorship status of the petitioner, or the ability of the LLC to pay the proffered wage.

Failure to provide required evidence is clear grounds for denial of the petition. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In visa petition proceedings, the burden of proof remains with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361.

An issue in this case is whether or not the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience.

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.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the 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). According to the plain terms of the labor certification, the applicant must have twelve months of experience in the job offered. As noted above, this job requirement alone disqualifies the beneficiary for the skilled worker category, and the appeal is being dismissed for this reason. However, the petitioner's failure to establish that the beneficiary meets even this insufficient level of work experience shall be an additional ground for dismissal.

Evidence submitted in this matter is a letter dated September 18, 2008, from [REDACTED] general manager of [REDACTED]; a job reference letter dated May 12, 2007, by [REDACTED] owner, [REDACTED]; an undated job reference letter from the general manager of [REDACTED]; and a permit dated August 22, 2008, issued to [REDACTED].

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has worked full time, e.g. 40 hours weekly, for the petitioner since 1990, and for [REDACTED] which is a separate restaurant business.

There are numerous inconsistent statements in the record concerning the beneficiary's work experience. The petitioner states on appeal the beneficiary only worked part time for it, e.g. 20 hours per week. However, a letter from The [REDACTED] restaurant dated June 5, 2007, stated that the beneficiary had been working for that restaurant full time, 40 hours weekly, from February 1, 1990, to the date of the letter. The petitioner also stated on appeal that the beneficiary has more than one year "past experience" working part time (20 hours each week) as a cook for "[REDACTED]" from November 1987 to February 1995. However, [REDACTED] of [REDACTED] stated in a letter dated May 12, 2007, the beneficiary worked as a cook full time in that restaurant from November 1987 to 1995. The beneficiary's pay records state that the beneficiary worked part time for the petitioner, and another employer, during that same time period. 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). Accordingly, due to inconsistencies and evidentiary errors, the record is not persuasive in establishing that the beneficiary has the requisite work experience in the job offered.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the petitioner has not demonstrated the position offered meets the minimum requirements of this visa classification; that the petitioner has not demonstrated that the employer stated on the labor certification is the petitioner; that the petitioner has not established that it is a successor-in-interest to the LLC; and, that the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience due to discrepancies in the dates of employment. The appeal will be dismissed for these reasons.

Beyond the decision of the director, additional issues in this case are whether or not there is sufficient evidence submitted that the businesses that have employed the beneficiary are one and the same entity; and whether or not the petitioner had established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Assuming for the sake of argument that the labor certification is relevant evidence in this case since it was certified for another entity, the ETA Form 9089 was accepted on September 17, 2001. The proffered wage as stated on the Form ETA 9089 is \$11.15 per hour (\$23,192.00 per year).

There is no evidence in the record of proceeding that establishes the petitioner's organizational structure. On the petition, the petitioner claimed to have been established in 2001 and to currently employ 170 workers. On the ETA Form 9089, signed by the beneficiary on May 7, 2007, the beneficiary did 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 an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition

later based on the ETA Form 9089, 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).

On appeal, counsel submits a letter dated June 7, 2007, from [REDACTED] as general manager of [REDACTED] California; the beneficiary's pay statements for the period ending December 15, 1989, February 15, 1992, and June 30, 1995, and from [REDACTED] restaurant; the beneficiary's W-2 Wage and Tax Statements from [REDACTED] for 1990, 1991, 1994, and 1995; the beneficiary's W-2 Wage and Tax Statements from [REDACTED] (EIN⁵ [REDACTED] for 1991, 1992, 1994, 1997, 1998, 1999, and 2000;⁶ and the beneficiary's W-2 Wage and Tax Statements from [REDACTED] (EIN [REDACTED] for 1995, 1996, 1998, 1999, and 2000.

Other evidence in the record includes a letter dated June 5, 2007, from [REDACTED] general manager of [REDACTED] California, and an additional letter dated June 7, 2007, from [REDACTED] California, that it employs 110 employees; earning statements from [REDACTED] California, issued to the beneficiary for the period beginning March 24, 2007, to May 11, 2007, stating a pay rate of \$7.50 per hour and year to date gross pay of \$16,345.46; the beneficiary's W-2 Wage and Tax Statements from The Whole [REDACTED] for 2001, 2002, 2003, 2004, 2005, and 2006; and the beneficiary's W-2 Wage and Tax Statements from [REDACTED] for 2002, 2003, 2004, 2005, and 2006.

As stated above, the petitioner stated that it currently employs 170 workers in the petition, and the general manager of one of three "[REDACTED]" restaurants stated in a letter dated June 7, 2007, that it employs over 110 workers. Despite these statements, the petitioner submitted no correlating evidence such as California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports, or employment rosters for each restaurant entity, or other information.

The evidence shows that the petitioner is a separate entity with its own EIN, i.e. [REDACTED] among other chain restaurants with separate EINs. The AAO finds that there is insufficient evidence submitted that businesses that have employed the beneficiary are one and the same entity.

⁵ The federal Employer Identification Number (EIN) stated on the I-140 petition for the petitioner is a nine-digit number assigned by the IRS. Each business entity must have a unique EIN. *See* <http://www.irs.gov/businesses/small/article/0,,id=169067,00.html> accessed November 19, 2009.

⁶ Pay records submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner's pay records generally.

The general manager of [REDACTED] California, submitted a letter dated June 7, 2007, to assert that it employs 110 employees. In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. Acceptance of such a letter is a discretionary judgment of the director based upon the facts of each case. Under the facts of this case, there is insufficient evidence in the record to show that the petitioner employs 170 workers, and the AAO does not accept the unsubstantiated statement of the general manager of [REDACTED] as sufficient proof that the petitioner employs 100 or more workers.

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 *full time* 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. There is no evidence submitted that the beneficiary was employed full time by the employer full time from the priority date. There is evidence that the beneficiary was employed part time by the petitioner and by [REDACTED] which is another entity.

In the instant case, the petitioner has not established that it employed the beneficiary full time and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

The AAO notes that the record of proceeding contains no evidence reflecting the petitioner's financial status beginning on the priority date, such as annual reports, prepared federal income tax returns, or audited financial statements. Evidence of the ability to pay the proffered wage as well as the bona fides of the job offer and verification that it is a U.S. employer are clearly required under the Act and applicable regulations. Failure to provide required evidence is clear grounds for denial of the petition. The petitioner's failure to submit these documents cannot be excused.

The petitioner has not demonstrates through sufficient evidence according to the regulation at 8 C.F.R. § 204.5(g)(2) that the petitioner could pay the proffered wage from the day the ETA Form 9089 Form was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss

Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, there is no evidence concerning the petitioner's gross receipts, officers compensation, longevity of business, reputation evidence in business, its market share, or total wages paid to all employees. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.⁷ In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, the petitioner has not been met that burden.

ORDER: The appeal is dismissed.

⁷ 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.