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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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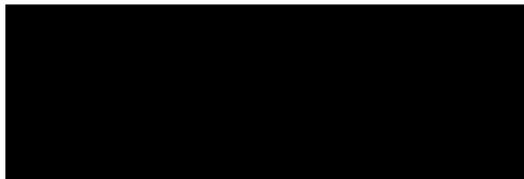
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FILE:  Office: NEBRASKA SERVICE CENTER Date: **OCT 05 2010**

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:

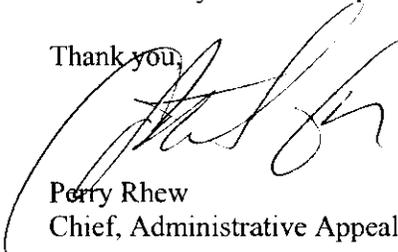


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a fast food cook. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker. The director further determined that the petitioner did not establish its ability to pay the proffered wage from the priority date onward, or that the beneficiary met the qualifications requirements set forth on the Form ETA 750. 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 March 14, 2008 denial, the issues in this case are as follows: whether or not the petitioner has established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker; whether the petitioner had the ability to pay the proffered wage from the priority date onward; and whether the beneficiary was qualified to perform the duties of the proffered position from the priority date onward.

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. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed on December 15, 2006. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief and copies of the beneficiary's

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

W-2 Forms for 2003 through 2007. Counsel asks that the Form I-140 petition be amended to state that it is seeking the services of “any other worker (requiring less than two years of experience)” and that the petition be adjudicated under Section 203(b)(3)(A)(iii) of the Act.

The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that the proffered position requires one year of experience as a fast food cook. However, the petitioner requested the skilled worker classification on the Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner’s request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition, select the proper category, submit the proper fee and required documentation.

The evidence submitted does not establish that the labor certification supporting the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

The director further determined that the petitioner had not established the ability to pay the proffered wage from the priority date onward.

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 Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the

newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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).

Here, the Form ETA 750 was accepted on December 2, 2003. The proffered wage as stated on the Form ETA 750 is \$12.33 per hour (\$22,440.60 per year based on a 35 hour work week as set forth on the Form ETA 750). The Form ETA 750 states that the position requires one year of experience in the proffered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

On the petition, the petitioner does not state when it was established or its gross annual or net annual income. The petitioner claims to have five employees. On the Form ETA 750B, signed by the beneficiary on September 8, 2003, 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 an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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, United States Citizenship and Immigration Services (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. The petitioner submitted W-2 Forms for years 2003 through 2007 which show wages paid by the petitioner to the beneficiary as follows:

- 2007 - \$40,536.44
- 2006 - \$37,572.50
- 2005 - \$38,307.14

² 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).

- 2004 - \$37,759.63
- 2003 - \$32,707.19

Thus, according to the W-2 Forms presented, the petitioner paid the applicant substantially more than the proffered wage (\$22,440.60) from 2003 through 2007. However, the wage information presented is contrary to the employment information stated on the Form ETA 750. In Section 15 of the Form ETA 750 signed by the beneficiary on September 8, 2003, the petitioner was asked to provide the beneficiary's work history for the past three years and to list any other jobs related to the position being sought. The petitioner listed employment with [REDACTED] from September of 1994 to June of 1997. The beneficiary did not claim to have worked for the petitioner when he signed the Form ETA 750 in 2003, yet the petitioner now submits copies of W-2 Forms indicating that the beneficiary had been employed from the priority date through 2007.³ Additionally, Form I-140 states that the petitioner's employer identification number (EIN) is 13-3972761. The W-2 statements show wages paid by an entity with the same name as the petitioner, but a different tax identification number, [REDACTED]. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." As such, the wages paid by a separate corporation cannot be used to establish the petitioner's ability to pay.

These inconsistencies have not been explained in the record and are material to the claim as they have a direct bearing on the petitioner establishing its ability to pay the proffered wage. 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. 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). Giving due consideration to the inconsistencies noted, it is determined that the petitioner has not established its ability to pay the proffered wage based on wages paid to the beneficiary during any relevant year. The record contains no additional information which would permit an evaluation of the petitioner's financial standing, determination of net income or net current assets, or other relevant information such as the petitioner's standing in the industry to determine that, under the totality of the circumstances, it would have the ability to pay the proffered wage from the priority date onward. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

Finally, the petitioner has not established that the beneficiary met the one year experience requirement of the Form ETA 750. The petitioner did not submit any letters to document the

³Although it predates the priority date, a W-2 Form was also submitted showing that the beneficiary was employed by the petitioner in 2001 and earned \$9,602.85.

beneficiary's prior experience with the initial filing or on appeal. The record contains, from a prior filing, an experience letter dated November 1, 1998 signed by [REDACTED] stating that the beneficiary had been employed by [REDACTED] "for approximately 5 years as a busboy." In a letter dated January 19, 2000 [REDACTED] submitted a second letter stating that the beneficiary had been employed by [REDACTED] "for approximately 5 years as a kitchen help." The experience letters do not establish that the beneficiary had one year of experience as a fast food cook as of the priority date and conflict with information on Form ETA 750 that states the beneficiary was employed with [REDACTED] as a fast food cook. Experience letters must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The letters submitted do not provide the title of the writer nor do they contain a specific description of the duties performed by the beneficiary. Further, the letters do not provide exact employment dates. Each letter states that the beneficiary has been employed by the company for approximately five years, yet one letter was written in November of 1998 and the second in January of 2000. The letters conflict with Form ETA 750 and the beneficiary's stated title. 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). The evidence is insufficient to establish that the beneficiary had one year of experience in the proffered position as of the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.