

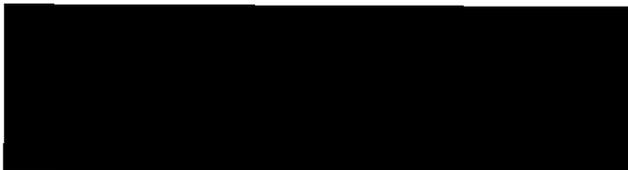
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



B6

DATE: Office: NEBRASKA SERVICE CENTER

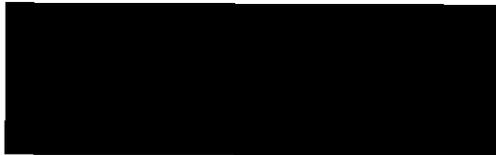
FILE: [REDACTED]  
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**APR 15 2011**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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.

Thank you,

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 The decision will be withdrawn, and the matter remanded to the director for further consideration and action.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Alien Employment Certification.<sup>1</sup> The director determined that the evidence submitted by the petitioner was insufficient to establish its ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (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.

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.<sup>2</sup>

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 labor certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the labor certification was accepted on January 29, 2001. The proffered wage as stated on the labor certification is \$21,964.80 per year.

The director determined that the Forms 1040 submitted by the petitioner as evidence in response to the director's request for evidence were not relevant to the petition and therefore, did not consider

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<sup>1</sup> It is noted that the petitioner has yet to provide the original Department of Labor (DOL) certification notification and the original page 1 and 2 of the ETA Form 9089, although this evidence has been requested by the director.

<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 at 8 C.F.R. § 103.2(a)(1).

this evidence. Upon review of the record, the AAO has determined that the petitioner properly responded to the request for evidence by submitting the Forms 1040 for the years 2001, 2002, and 2003, and the documentation should have been considered as evidence in this matter. The record of proceeding shows that the priority date in this matter is January 29, 2001, and that the petitioner may have incorporated its business entity in 2004 as an S corporation; therefore, for 2001, 2002, and 2003 the petitioner's Forms 1040 should have been considered by the director. It appears from the record that the petitioner's status during those years was that of a sole proprietor.<sup>3</sup> Further, the director erred in determining that the petitioner was a C corporation where it is evident from the IRS Forms 1120S submitted by the petitioner that it is an S corporation, which was not considered by the director. The record before the director closed on September 10, 2009, with the receipt by the director of evidence in response to the request for evidence. As of that date, the petitioner's 2009 federal income tax return was not yet due; however, evidence of the petitioner's ability to

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<sup>3</sup> It appears that the petitioner is claiming that [REDACTED] became a successor-in-interest to the sole proprietor who filed the labor certification application in 2001, thus entitling the corporation to use the labor certification. Considering *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986), and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. To ensure that the job opportunity *remains the same as originally certified*, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See id.* at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

It is noted that, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely or partly owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

pay the proffered wage since 2007 should be considered. Therefore, the AAO will remand the case to the director for further action.

Beyond the decision of the director, USCIS electronic records show that the petitioner filed multiple Form I-140 petitions which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2).

Beyond the decision of the director, the social security number (SSN) on the beneficiary's IRS Form W-2, Wage and Tax Statement for 2001 is [REDACTED]. The beneficiary's SSN on the letter from [REDACTED] dated September 3, 2009 is [REDACTED]. It is further noted that on the Form I-140 petition dated January 7, 2008, the petitioner does not indicate a SSN in the box designated for the beneficiary's social security number. Likewise, on the Form G-325A, Biographic Information, signed by the beneficiary and dated September 18, 2007, the beneficiary does not list any SSN in the box designated for his U.S. Social Security Number. On the Form I-485, Application to Register Permanent Residence or Adjust Status, there is no social security number listed for the beneficiary. These inconsistencies call into question the authenticity of the document submitted by the petitioner. 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. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. See *Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8<sup>th</sup> Cir. 2010).

Section 203(b)(3)(A)(i) of 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. As noted above, 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 petitioner stated on the Form I-140 at Part 2.g. that she was filing the petition for an unskilled worker (requiring less than two years of training or experience).

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 there is a two-year (24 month) experience requirement for the proffered position. However, the petitioner requested the unskilled worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to re-adjudicate 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 addition, the petitioner has failed to provide the original notice of certification issued by DOL and page 1 and 2 of the labor certification application.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position with 24 months (two years) of qualifying experience in the job offered. 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).

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, Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); and *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The beneficiary stated under penalty of perjury in the ETA Form 9089 that he was employed by [REDACTED] as a cook from September 1, 2000 to August 1, 2003. The letter of employment from 3 Amigos Market and Restaurant in Nevada indicates that the beneficiary was employed by the restaurant as a cook from January 2000 to August 2003. It is further noted that on the Form G-325A, Biographic Information, the beneficiary stated that he was employed by the petitioner since September 2001. There has been no explanation given for the inconsistencies. 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). Furthermore, the beneficiary must have completed the two years work experience before the January 29, 2001 priority date. Here, the conflicting evidence does not establish that he completed this work experience before the priority date. See *Matter of Wing's Tea House*.

In view of the foregoing, the director's decision will be withdrawn. The petition is remanded to the director. The director may request any additional evidence considered pertinent. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.