

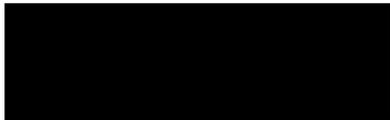
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date: FEB 17 2011

IN RE:

Petitioner:



Beneficiary:

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:

SELF REPRESENTED

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 \$630. 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 preference visa petition was denied by the Director, Nebraska Service Center, on October 21, 2008, and now the matter is before the Administrative Appeals Office (AAO). The petitioner appealed the decision to the AAO on November 24, 2008, which the AAO rejected on September 14, 2010, finding that the appeal was untimely filed.¹ The AAO notified the petitioner that it was sua sponte reopening the case on November 19, 2010, finding that the appeal was timely filed and offering the petitioner an opportunity to submit a new brief. The petitioner notified the AAO that he was declining to submit an additional brief on December 2, 2010. The appeal will be dismissed.

The petitioner is an individual. He seeks to employ the beneficiary permanently in the United States as a child care worker. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had indicated the wrong visa classification for the beneficiary on the petition and that the petitioner had failed to demonstrate its ability to pay the beneficiary the proffered wage from the priority date onwards. The director also found that the petitioner had failed to demonstrate that the beneficiary possessed the required five years of experience in the proffered position or six years of experience in the related occupation of child monitor. 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 denial dated October 21, 2008, the primary issue in this case involves the visa classification sought. On Part 2 of the Form I-140 petition, the petitioner checked box "g," indicating that it seeks to classify the beneficiary pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii) as an unskilled worker. The director determined that the petitioner incorrectly indicated that the position requires work from an alien capable of performing unskilled labor. The director also denied the petition because the petitioner had failed to demonstrate its ability to pay the beneficiary the proffered salary from the priority date onwards.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (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 July 31, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that he was filing the petition for an unskilled worker.

¹ The AAO notes that the petitioner filed a motion to reopen on October 12, 2010 regarding the AAO's September 14, 2010 decision. All evidence in the record of proceeding has been considered on appeal.

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 appeal, the petitioner asserts that he made a typographical error on Form I-140 and that he intended to check Part 2.e. indicating that he was filing the petition for a skilled worker. The petitioner also submits his personal tax returns for 2006 and 2007.

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 five years of experience in the proffered position or six years of experience in the related occupation of child monitor are required. However, the petitioner requested the unskilled 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 with the proper fee and required documentation.

The evidence submitted does not establish that the petition requires the experience required for classification as an unskilled worker.

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.

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,

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).

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 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 August 2, 2004. The proffered wage as stated on the Form ETA 750 is \$23,920.00 per year.

The evidence in the record of proceeding shows that the petitioner is an individual. On the Form ETA 750B, signed by the beneficiary on June 1, 2004, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that his 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 he 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 he employed and paid the beneficiary the full proffered wage from the priority date in 2004 onwards.

If the petitioner does not establish that he 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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).

The petitioner is an individual. Therefore the individual's adjusted gross income, assets and liabilities are also considered as part of the petitioner's ability to pay. Individuals report income and expenses on their IRS Form 1040 federal tax return each year. Individuals must show that they can cover their existing expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, individuals must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In the instant case, the petitioner supported a family of six in 2006 and a family of five in 2007 to 2009 in Chicago, Illinois. It is unclear what size family the petitioner supported in 2004 and 2005. The petitioner has also not submitted a list of his family's estimated yearly expenses for 2004 through 2009. The petitioner's tax returns (Form 1040, line 37) reflect the following information for the following years:

- 2004: The petitioner did not submit a tax return for this year.
- 2005: The petitioner did not submit a tax return for this year.
- 2006: \$144,812.00
- 2007: \$149,804.00
- 2008: \$192,300.00
- 2009: \$234,005.00

The petitioner has failed to establish his ability to pay the proffered wage in 2004 and 2005. The petitioner's adjusted gross income may have covered the proffered wage for 2006 to 2009 and his family's yearly expenses, but the petitioner failed to submit a list of his family's estimated yearly expenses for those years. Thus, the AAO cannot make a determination.

On appeal, the petitioner asserts that he will pay the beneficiary the proffered wage. The AAO notes, though, that he has not provided any additional evidence regarding his ability to pay the beneficiary other than his personal tax returns for 2006 to 2009.

USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of his adjusted gross income in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).³ USCIS may consider such factors as any

³ 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

uncharacteristic expenditures or losses incurred by the petitioner, whether the beneficiary is replacing a former household worker 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, the petitioner has provided the AAO with no other relevant evidence regarding his ability to pay the beneficiary the proffered salary from the priority date in 2004 onwards other than his personal tax returns from 2006 to 2009. He has merely given a written guarantee that he will pay the beneficiary's salary. The petitioner has not provided any further financial information such as bank statements, investment information, income from other businesses, etc. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that he had the continuing ability to pay the proffered wage from the priority date onwards.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is August 2, 2004. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (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.

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

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.

certification. 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). The petitioner has submitted a letter evidencing the beneficiary's prior work experience in the proffered position on appeal, which the AAO accepts. The AAO finds that the beneficiary possesses the requisite work experience for the proffered position. Notwithstanding, the AAO notes that the petitioner sought the wrong visa category for the position on the Form I-140 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.