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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
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: JAN 03 2011

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:

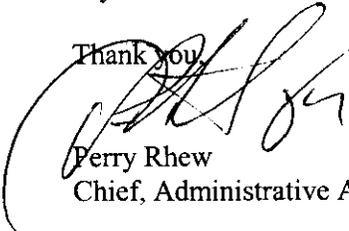


INSTRUCTIONS:

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 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 \$630. 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).

Thank you


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. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty chef. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. 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 February 25, 2008 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On appeal, we identified a second issue of whether the petitioner established that the beneficiary has the experience required on the labor certification.¹

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

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

¹ In a Request for Evidence (RFE) dated August 10, 2010, the AAO requested evidence concerning the beneficiary's relationship to the petitioner's owner as it indicated that a familial relationship existed on the ETA Form 9089. In response, the petitioner submitted evidence of an audit conducted by the DOL and stated (inconsistently and in error) that the petitioner's owner is both the uncle and the brother of the beneficiary ("Mr. [REDACTED] is the sole owner and shareholder . . . and he is the uncle of the alien beneficiary . . . There are currently three employees, [REDACTED] (owner and brother of the beneficiary) . . . and [REDACTED] (chef, brother of [REDACTED] and brother of the beneficiary)"). "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). As the petitioner submitted evidence that DOL audited the application and later certified the labor certification, the relationship is not in issue here.

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).

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 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 ETA Form 9089, Application for Permanent Employment 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 ETA Form 9089 was accepted on September 19, 2005. The proffered wage as stated on the ETA Form 9089 is \$2,081.75 per month (\$24,981 per year). The ETA Form 9089 states that the position requires study at an occupational trade school, field of study: Chinese Culinary Arts and Management, training in Chinese Culinary Arts and Management for three years, and eighteen months of experience as a Chinese specialty chef. In the alternative, an Associate's degree plus five years of experience would be accepted. The petitioner also required special skills in H.14:

Proficiency in using a Chinese cleaver to prepare raw ingredients for cooking and to carve edible hand-made flowers from fruits and vegetables as decoration to accompany the dishes. Proficiency using a Chinese wok to prepare Cantonese regional cuisine, including stir-frying, steaming, boiling, etc. Ability to organize a Chinese kitchen to serve banquets. Ability to supervise multiple kitchen workers.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 2004 and to currently employ two workers. On the ETA Form 9089, 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 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, 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. In the instant case, the petitioner submitted no evidence that it ever employed or paid any wages to the beneficiary.

If the petitioner does not establish that it 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

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.

Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In [redacted] at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

(gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in [redacted] noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even

1040 as a whole. [REDACTED] The sole proprietor did not submit any evidence of its personal expenses with the underlying filing. On appeal, in response to the AAO's request for evidence, the petitioner submitted a list of "personal and business statements" containing bills due in May, June, July, August, and September 2010 along with the corresponding bills issued. This statement includes bills for insurance, water, gas, electric, telephone, credit cards, and other miscellaneous items. The petitioner did not submit a statement with its overall average monthly charges for rent/mortgage, utilities, food costs, clothing costs, insurance, or other household expenses for expenses from the time of the priority date.³ Although the statement contained some line items for the costs of utilities and credit cards, the claimed expenses range from \$1,035 to \$2,948, annualized to \$12,420 to \$35,378, and each month does not include a consistent account of bills paid. For example, the expenses include a cell phone bill in July and September, but not a charge in June or August, and a second telephone company charge in July and August, but not June or September. The RFE specifically requested that the sole proprietor provide a statement "of his normal monthly or annual expenses of the household from the priority date onward." The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Even taking the lesser figure from the information submitted, the petitioner's AGI minus \$12,420 in household expenses (as noted above, this figure is deficient as it fails to include housing, food, and other major recurring expenses)⁴ is less than the proffered wage in 2009 and 2007 and would thus be insufficient to establish the petitioner's ability to pay the proffered wage in those years. As stated above, without a complete accounting of the sole proprietor's monthly expenses from the priority date onward, we cannot determine the petitioner's ability to pay for any year in question.

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. [REDACTED]

[REDACTED] The petitioning entity in [REDACTED] 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 [REDACTED]. 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 [REDACTED] was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in [REDACTED] 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

³ The director's decision clearly set forth items to be included in the sole proprietor's monthly expense estimate.

⁴ The sole proprietor's unaudited personal statements of assets and liabilities includes "real estate mortgage payable" in the amount of \$110,000 as a liability for 2006 and 2008.

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, the tax returns in the record indicate that the petitioner has paid minimal wages (\$9,000 in 2005, \$5,250 in 2006, \$0 in 2007, \$10,400 in 2008, and \$7,000 in 2009) that amount to a small fraction of the proffered wage and its net profit is only slightly more than the proffered wage. The petitioner submitted no evidence to liken its situation to the one in [REDACTED] including evidence of its reputation, unusual expenses, or one off year. 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.

In addition to the issue as to whether the petitioner has the ability to pay the proffered wage, the petitioner failed to adequately document that the beneficiary has the required experience for the position offered. 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. [REDACTED]

[REDACTED] (noting that the AAO conducts appellate review on a *de novo* basis). The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. [REDACTED]

[REDACTED] 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.

The regulations for the skilled worker classification contain a minimum requirement that the position require at least two years training or experience. 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. Relevant post-secondary education may be considered as training for purposes of this provision. The ETA Form 9089 requires three years of training in the field of Chinese Culinary Arts and Management and 18 months of experience as a Chinese specialty chef as well as a number of required specific skills in H.14. The beneficiary must have obtained the required skills, training, and experience by the September 19, 2005 priority date. The petitioner submitted the beneficiary's Diploma from [REDACTED] demonstrating that the

beneficiary completed his diploma in Culinary Arts and Management on July 1, 2003 based on a three-year program. This diploma is sufficient to establish that the beneficiary meets the training requirements of the labor certification. The training received by the beneficiary in pursuit of this diploma is separate from the 18 months of experience requirement.

Regarding the experience requirement, the petitioner submitted a letter from an unnamed person at the [REDACTED] Human Resources Department dated February 2, 2008 stating that the beneficiary worked from December 2003 to the present in "culinary arts work." The letter did not specify the beneficiary's position, that he specifically worked as a chef as required, nor did it state whether the beneficiary was employed in a full-time or part-time position, which is important here since the beneficiary would have been employed for only about 18 months from December 2003 to the priority date. In the RFE, the AAO requested further evidence of the beneficiary's qualifications for the position. In response to the RFE, the petitioner submitted two "Agreements for the Extension of the Labor Contract" between the beneficiary and White Swan Hotel stating that the contract would be extended from July 1, 2007 to June 30, 2009 and again from July 1, 2009 to June 30, 2012. These are periods of time after the priority date. The petitioner also provided a letter from the White Swan Hotel dated February 2, 2008 that states that the beneficiary is [REDACTED] employee, starting date of December 2003 working as a chief. [sic] This is proof." Similarly, this letter does not identify the author and whether the beneficiary is employed on a full-time or a part-time basis. As a result, it is insufficient to establish that the beneficiary had the required 18 months of experience as of the priority date.

The labor certification also contains specific skills required for the position in H.14:

Proficiency in using a Chinese cleaver to prepare raw ingredients for cooking and to carve edible hand-made flower from fruits and vegetables as decoration to accompany the dishes. Proficiency using a Chinese wok to prepare Cantonese regional cuisine, including stir-frying, steaming, boiling, etc. Ability to organize a Chinese kitchen to serve banquets. Ability to supervise multiple kitchen workers.

The letters submitted from the [REDACTED] do not state that the beneficiary has any such experience either with a Chinese cleaver, Chinese wok, with Cantonese regional cuisine, or that he has the ability to organize a kitchen to serve a banquet or supervise multiple kitchen workers. As a result, we are unable to conclude that the beneficiary had the requisite experience and special skills 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.