

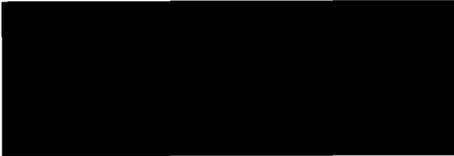
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

PUBLIC COPY



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Date: **MAY 31 2011** Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Other Worker Pursuant to § 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The director's decision will be affirmed in part and withdrawn in part.

The petitioner is a dairy farm. It seeks to employ the beneficiary permanently in the United States as a milker (farm worker, farm and ranch animals). As required by statute, ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not submitted initial evidence with the visa petition. Specifically, the director determined that the petitioner had not submitted documentation to establish its continuing ability to pay the proffered wage from the priority date or documentation to establish that the beneficiary met the experience requirements of the certified labor certification at the priority date. 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.

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 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 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 ETA Form 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 qualifications stated on its ETA Form 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 September 8, 2004. The proffered wage as stated on the Form ETA 750 is \$8.47 per hour (\$21,141.12 per year (48 hour week)). The Form ETA 750

states that the position requires six years of grade school and six months of experience in the job offered of milker (farm worker, farm and ranch animals).

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

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.² On the petition, the petitioner claimed to have been established in 1985 and to currently employ twenty six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on July 18, 2007, the beneficiary did not claim to have worked for the petitioner. However, the petitioner has submitted copies of the 2003 through 2010 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary showing wages paid to the beneficiary for those years. Therefore, the petitioner has established that it employed the beneficiary from 2003 through 2010.

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).

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

² A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

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 has submitted copies of the 2003 through 2010 Forms W-2, issued by the petitioner on behalf of the beneficiary, showing wages paid to the beneficiary of \$11,257.63, \$24,158.93, \$25,342.67, \$30,000.13, \$29,262.62, \$36,345.28, \$41,396.40, and \$45,136.34, respectively. As the 2003 Form W-2 is for the year prior to the priority date of September 8, 2004, the AAO will not consider the 2003 Form W-2 when determining the petitioner's continuing ability to pay the proffered wage of \$21,141.12 from the priority date. In the instant case, the petitioner has paid wages to the beneficiary in excess of the proffered wage of \$21,141.12 in all of the pertinent years. Therefore, the petitioner has established its continuing ability to pay the proffered wage from the priority date of September 8, 2004. The director's decision is withdrawn on this point.

The second issue in the instant case is whether or not the petitioner has established that the beneficiary met the experience requirements as certified by the ETA 750. With the initial petition, the petitioner failed to submit any evidence that demonstrated that the beneficiary is qualified to perform the duties of the proffered position as set forth in the Form ETA 750, Application for Alien Employment Certification. On appeal, the petitioner submitted a statement,³ dated February 12, 2008, from [REDACTED]. The AAO noted that the experience letter did not meet the requirements of 8 C.F.R. § 204.5(i)(3) as the duties listed on the experience letter did not show how they relate to or are the same duties required by the petitioner.⁴ In addition, the AAO noted that the dates of employment are not the

³ Please note that the statement that has been provided on motion is not an affidavit as it was not sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath. See *Black's Law Dictionary* 58 (West 1999). Statements made in support of a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

⁴ The job duties listed on the ETA Form 750A are:

Lead cows into stanchion & wash teats & udder of cow with disinfectant. Squeeze cow's teat to collect sample of milk in strainer cup & examine sample for curd & blood. Tend machine that milks dairy cows. Start milking machine & attach cups of machine to teats of cow. Remove cups when required amount of milk is obtained from cow. Dip cups of machine into disinfectant solution after each cow is milked. Pump milk from receptacles into storage tank, clean & sterilize equipment. Observe cows for possible health problems or problems in milking cows or with milking machine and notify manager immediately.

The job duties listed on the experience letter are:

Rendering his services in a cattle ranch of my property, being in charge of the administering of medication and vaccines for the breeding and raising of cattle, being always an honest person, punctual, hard working and greatly responsible in all the activities that were assigned to him.

same as that listed by the beneficiary on ETA Form 750B.⁵ Hence, the AAO issued a notice of derogatory information and notice of intent to dismiss (NDI/NOID) on February 17, 2011. The AAO requested that the petitioner submit evidence that established that the beneficiary had the six months of experience at the priority date of September 8, 2004. The petitioner was informed that evidence must meet the requirements of 8 C.F.R. § 204.5(l)(3).

In response to the AAO's RFE/NOID, counsel submitted another statement, dated March 3, 2011, from [REDACTED]. The second statement is in Spanish and untranslated. The regulations at 8 C.F.R. § 103.2(b)(3) state:

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

In response to the NDI/NOID, the petitioner states:

The alien, [the beneficiary], submitted a letter in Spanish from a prior employer, in which the translation done by [REDACTED] differs in the dates from the original to the translated version. In the Spanish version is noted, [REDACTED] [the beneficiary] [REDACTED] 1995 [REDACTED] 2003..." In the English translation is noted, "Make certain that [the beneficiary] worked for me from 1998 to February of 2003..." From 1998 is not correct. [The beneficiary] submitted a new letter, dated 03 March 2011 in Spanish reflecting the dates as of from February 1995 to February 2003. The prior employer telephone numbers are included.

The AAO does not agree with the petitioner. While the new letter in Spanish does state the dates as the month of February 1995 to the month of February 2003, the original letter, in Spanish, states the dates as the year 1998 to the month of February 2003. Therefore, the translation of the original letter was not incorrect, and no excusable explanation has been provided to overcome this discrepancy. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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).

In addition, no evidence was submitted in response to the NDI/NOID that show how the job duties listed by [REDACTED] relate to or are the same duties required by the petitioner.

⁵ The beneficiary listed his start date as 1995 while [REDACTED] listed the beneficiary's start date as 1998.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(3), which provides that:

(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.

In this case, the experience letter does not meet the requirements of 8 C.F.R. § 204.5(1)(3) as it does not give an adequate description of the beneficiary's duties that shows that those duties are the same or relates to the duties as certified by the ETA 750. In addition, the letter does not state whether the employment was full-time or part-time. Therefore, the petitioner has not established that the beneficiary met the six month experience requirement of the certified labor certification and the visa petition may not be approved.

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.