



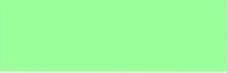
U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **APR 03 2012**

Office: NEBRASKA SERVICE CENTER

FILE: 

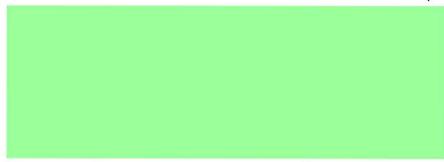
IN RE:

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 \$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

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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 private house. It seeks to employ the beneficiary permanently in the United States as a housekeeper. 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 denial notice also noted that the record lacked the 2006 and 2007 income tax returns. 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 January 22, 2009 denial, the primary issue in this case is 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.

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 April 2, 2007. 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 copies of the petitioner's 2006 Form 1120S and Form 7004, Application of Automatic Extension of Time To File Certain Business Income Tax, Information, and Other Returns. On appeal, counsel and the petitioner assert that the petitioner has demonstrated that the beneficiary has three months of experience as specified on the

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).

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labor certification and that the petitioner did not have to establish that the position requires two years of experience. Counsel and the petitioner further point out that the tax returns for 2006 and 2007 referenced in the director's denial were not requested in the director's Request for Evidence (RFE) dated November 11, 2008.

The regulation at 8 C.F.R. § 204.5(l) 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 only three months of experience is required for the proffered position. 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'r 1988).

The evidence submitted does not establish 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.

Beyond the decision of the director, the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. 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. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petitioner is a different entity from the employer listed on the labor certification. The labor certification lists [REDACTED] as the proposed employer, while the Form I-140 lists [REDACTED] Inc. as the petitioner. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). In addition, if the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job

opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document any transaction transferring ownership of the predecessor, it does not demonstrate that the job opportunity will be the same as originally offered, and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. In the instant case, counsel has provided no evidence to address the issue that the proposed employer on the labor certification is not the same entity as the petitioner who filed the Form I-140. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Although the director's decision notes that the petitioner's 2006 and 2007 tax returns were not submitted, it fails to provide further detail or analysis of the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.² If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the Form ETA 750 was accepted on March 3, 2004. The proffered wage as stated on the Form ETA 750 is \$13.17 per hour (\$27,393.60) per year. The petitioner did not employ the beneficiary, and its adjusted gross or net income and net current assets, when added to any wages paid to the beneficiary, were not demonstrated to be equal or greater to the proffered wage for the years beginning on the priority date and continuing to the date of the appeal: 2004, 2005, 2006, 2007, and 2008. The petitioner submitted Forms 1120S for [REDACTED] for 2003, 2004, 2005, and 2006. In each of those years, the petitioner demonstrated the ability to pay the proffered wage. However, as discussed above, [REDACTED] is not the proposed employer listed on the labor certification.

² *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

Moreover, no evidence of the petitioner's ability to pay the proffered wage in 2007 or 2008 was submitted.

The petitioner also submitted Forms 1040 for [REDACTED] the employer listed on the labor certification, for the years 2004 and 2005.

The employer on the labor certification, [REDACTED] is an individual. Therefore the individual's adjusted gross income, assets and liabilities are also considered as part of the 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, Mr. [REDACTED] supports a family of seven. Mr. [REDACTED]'s tax returns reflect the following information for the following years:

	<u>2004</u>	<u>2005</u>
Adjusted gross income (Form 1040, line 36)	\$190,048	\$136,402

However, as no listing of household expenses for [REDACTED] and his family were provided, it has not been demonstrated that he as an individual would be able to pay the proffered wage.

Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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'r 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); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires three months of

experience in the job. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a housekeeper with [REDACTED], an individual in [REDACTED] Mexico, from March of 1998 to the date in which the form was signed, which was January 24, 2004.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains one letter from [REDACTED] dated December 2, 2008, in which he states that he employed the beneficiary in the position of housekeeper from March 1998 to March 2000. However, the AAO notes that the letter did not include an address, phone number, or any other contact information. In addition, the dates of employment on the letter conflict with those on the labor certification. Part B of the Form ETA 750 states that the employment started in March of 1998 and continued to the present. Since the Form ETA 750 at Part B was signed by the beneficiary and dated January 24, 2004, the labor certification indicates that the employment lasted at least until January 24, 2004, which is almost four years later than the date stated in the letter.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.