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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:

AUG 08 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 petitioner is a retail sales company. It seeks to employ the beneficiary permanently in the United States as a sales associate. As required by statute, the Immigrant Petition for Alien Worker (Form I-140, petition) is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor 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, and that the beneficiary did not meet the experience requirements as established by the labor certification as of 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.

As set forth in the director's April 16, 2009, denial, the issues in this case are 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, and whether or not the beneficiary met the experience requirement as established by the labor certification as of the priority date.

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

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). Prior to the appeal, the record contained only the 2001 and 2006 tax returns for the petitioner. The director's request for evidence on February 17, 2009, sought missing, required financial information from the petitioner, as well as additional credible evidence verifying the beneficiary's experience. Counsel responded to the director's request on March 27, 2009, and requested an additional 30 days to respond. Counsel stated that the petitioner's corporate officer was unavailable, and therefore the petitioner could not provide the additional requested financial information. Counsel did not explain why the required years of tax returns were not submitted with the initial filing. Counsel did not provide any evidence relating to the petitioner or the beneficiary's requested W-2 statements, if any. The director's request for evidence clearly states that "[n]o extension of the period allowed to submit evidence will be granted." The director, in his decision, indicates that an extension of time to reply to a request for evidence is prohibited by regulation. 8 C.F.R. 103.2(b)(8)(iv) ("Additional time to respond to a request for evidence or notice of intent to deny may not be granted."). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a

Ability to Pay the Proffered Wage

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.

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 Form ETA 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 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$26,000 per year. The Form ETA 750 states that the position requires four (4) years of high school education, and two (2) years of experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1994. The petition is incomplete, and fails to document the current number of employees of the corporation, its gross annual income, or its net annual income. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner.

petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO need not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Under the circumstances, as the petitioner asserts that the returns were unavailable based on the corporate officer being outside the country, the AAO will consider the evidence now submitted on appeal.

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'l Comm'r 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'l Comm'r 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 has not established that it employed and paid the beneficiary the full proffered wage, or any wages, during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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. *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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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). 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 *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* 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 though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on March 30, 2009, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2009 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2008 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2001 to 2008, as shown in the table below.

- In 2001, the Form 1120S stated net income² of \$47,021.
- In 2002, the Form 1120S stated net income of \$92,302.
- In 2003, the Form 1120S stated net income of \$73,289.

² Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 25, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, deductions, and other adjustments shown on its Schedule K for 2001 to 2008, the petitioner’s net income is found on Schedule K of its tax returns. The director stated the petitioner’s net income for 2001 from page 1 of the petitioner’s tax return.

- In 2004, the Form 1120S stated net income of \$80,759.
- In 2005, the Form 1120S stated net income of \$46,940.
- In 2006, the Form 1120S stated net income of \$41,909.
- In 2007, the Form 1120S stated net income of \$35,029.
- In 2008, the Form 1120S stated net income of \$31,474.

Therefore, for the years 2001 to 2008, the petitioner did have sufficient net income to pay the proffered wage. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of the petitioner's net income. The portion of the director's decision finding that the petitioner did not have the ability to pay the beneficiary the proffered wage from the priority date onward is withdrawn.

Qualifications for the Job Offered

The director also found that the beneficiary did not meet the experience requirement as established by the labor certification as of the priority date. The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Wing's Tea House*, 16 I&N Dec. at 159; *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating 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); *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 has the following minimum requirements:

EDUCATION

Grade School: None Required

High School: 4 years

College: None Required

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered.

OTHER SPECIAL REQUIREMENTS: None Required.

The beneficiary states his experience on Form ETA 750B as [REDACTED] located in New York, NY, from January 1997 until March 2001. The beneficiary also states his experience as a sales associate with [REDACTED] located in New York, NY, from August 1991 until December 1996. The beneficiary also states his experience as a sales associate with [REDACTED]

██████████³ located in New York, NY, from October 1989 until August 1991. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) states:

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.

The record contains a photocopy of an experience letter from ██████████, no title given, ██████████ letterhead stating that the company employed the beneficiary as a *Sales Associate* (emphasis in original) from January 1997 until March 2001. However, the letter is undated; it does not provide the title of the signatory; and it does not state whether the beneficiary was employed full-time. The duties provided include a succinct list of five (5) tasks mirroring the order, style, and grammar of the duties listed by the beneficiary on the labor certification. The letter is not credible evidence of the beneficiary's experience, as it is undated, lacks the title of the writer, and does not provide a specific description of the duties performed by the beneficiary. The director, in his request for evidence, indicated that USCIS questions the validity of the letter provided, and required the submission of additional evidence of the beneficiary's claimed experience, including W-2 statements and documentation confirming the type of business ██████████. Counsel did not provide any evidence in response.⁴

On appeal, counsel now submits the beneficiary's affidavit regarding his attempt to obtain documents confirming his employment with ██████████. The beneficiary states that ██████████ "no longer exists and the company was terminated in November of 2008. Now the company is called ██████████." Aff. Beneficiary ¶ 32 (May 13, 2009). The database of corporations maintained by the New York Department of State, Division of Corporations, indicates that there is only one (1) company registered with the name ██████████, and that said corporation was registered to do business in Chautauqua County, New York, which is in upstate New York, not New York city, on September 22, 1983, and dissolved on December 29, 1999.⁵ The address provided for this corporation is in a different city, county, and zip code than the location provided on the labor certification and on the letter from ██████████. Further, the beneficiary indicates that the original owners of ██████████, now operate another business, ██████████. The New York

³ Counsel notes on appeal that the company's name is incorrectly listed on the labor certification, and that the correct corporate name is ██████████

⁴ As noted above, counsel did not provide any information documenting the beneficiary's experience with ██████████ nor did counsel indicate that information was forthcoming, in his response to the director's request for evidence.

⁵ Search of New York Department of State, Division of Corporations, Corporation and Business Entity Database, http://www.dos.ny.gov/corps/bus_entity_search.html (accessed July 25, 2012).

Department of State, Division of Corporations database indicates that this business is an active business, formed in 1991, operating at the same location where the beneficiary states that [REDACTED] operated prior to its dissolution. However, the beneficiary indicates in his affidavit that the company "has changed locations." None of the beneficiary's sworn statements are borne out by the evidence.⁶ The address provided by the beneficiary does not match to that of the corporation at which he claimed to have gained experience. That corporation was dissolved and ceased operation in December 1999, yet the beneficiary claims to have worked for the corporation through March 2001. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (stating that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). The director requested independent, objective evidence such as W-2 statements to confirm the beneficiary's stated experience with [REDACTED]. The beneficiary indicates that he was not given W-2 statements from [REDACTED] will not provide such statements now, as he "took the job knowing that [REDACTED] would not provide me with anything but a weekly salary in cash." Aff. Beneficiary ¶ 8 (May 13, 2009). The beneficiary confirms that he did not receive or file 1099 statements as well. *Id.* ¶ 9. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The inconsistencies in the beneficiary's affidavit, in combination with the questionable veracity of the original experience letter, fail to provide credible, objective evidence of the beneficiary's stated experience.

Counsel provides two W-2 statements for 1990 and 1991 issued to the beneficiary from [REDACTED], and a photocopy of the front of a handwritten "payroll" check from [REDACTED], issued to the beneficiary. This evidence is insufficient to document the beneficiary's experience with said company. It is not accompanied by an experience letter as required by regulation, and fails to document the beneficiary's title, duties, or full-time employment. 8 C.F.R. § 204.5(1)(3)(ii)(A). Additionally, based on the amounts paid (\$9,360 both years), it is unclear whether this experience represents full-time or part-time experience. No credible evidence corroborating the beneficiary's claimed experience exists in the record, therefore the beneficiary does not meet the experience requirement as set by the petitioner and established by the labor certification.

Additionally, the record does not demonstrate that the beneficiary has the education required for the position offered. Information shows that the beneficiary was born in 1954. He states on Form ETA 750B that he attended school in India until January 1970. However, as he would only be 16 at the

⁶ On the labor certification, the beneficiary claims to have worked for three corporations as a sales associate. For each listing of experience, the beneficiary provides the same duties, without variance. The third company, [REDACTED], does not exist at the location listed nor was such a corporation incorporated in New York during the time period the beneficiary claims to have worked there. *Supra.* n. 5 (search on [REDACTED] results in 48 entities, none of which were in existence during the time period stated by the beneficiary, or at the location stated by the beneficiary).

time of stated completion, it is not clear that the beneficiary would have completed four years of high school as required by the labor certification. The petitioner should submit evidence in any further filings to demonstrate that the beneficiary had the required education by the time of the priority date.

Conclusion

Based on the foregoing, the petitioner can establish its ability to pay the beneficiary the proffered wage from the priority date onward. However, the AAO affirms the director's decision insofar that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.