

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

[REDACTED]

B6

DATE: **DEC 18 2012** OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a retail coffee and donuts business.¹ It seeks to permanently employ the beneficiary in the United States as a manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).²

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 30, 2001. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum two years of experience in the job offered required to perform the offered position by the priority date.

The record shows that the appeal is properly filed 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.

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.³

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 *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katighak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

¹ It is noted that the Form ETA 750 describes the business as retail of donuts, ice cream and pastry.

² Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: Six (6) years.

High School: Four (4) years.

College: N/A.

College Degree Required: N/A.

Major Field of Study: N/A.

TRAINING: N/A.

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

OTHER SPECIAL REQUIREMENTS: N/A.

The labor certification states that the beneficiary qualifies for the offered position based on experience as a manager with Asif II, Inc. d/b/a Dunkin Donuts (Asif) in Illinois from August 1995 until December 1998. The labor certification also states that the beneficiary was employed with the petitioner from June 1999 to July 2000. No other experience is listed. The beneficiary signed the labor certification on October 13, 2006 under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(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 an experience letter dated December 6, 2003 from ██████████ General Manager, on Asif letterhead stating that the company employed the beneficiary as a manager from August 1995 to December 1998.

The director issued a request for evidence (RFE) on April 10, 2009 to clarify information about the beneficiary's qualifying experience and the beneficiary's past employment with the petitioner. In response, counsel stated that the beneficiary had been working for the petitioner since 2004 and submitted two affidavits regarding the beneficiary's prior experience. An affidavit from the beneficiary, dated May 20, 2009, stated that the beneficiary was employed with Asif as a manager from August 1995 to December 1998. 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)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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 second affidavit submitted was from ██████████, dated May 21, 2009, which stated that although he was not the general manager at the time, he had knowledge that the beneficiary had worked at Asif from August 1995 to December 1998. This information conflicts with that provided in the original employment experience letter, which ██████████ wrote in his capacity as the general manager of Asif and which did not mention the fact that ██████████ did not work for Asif during the time period in question.

The director issued a second RFE on April 23, 2010 in order to clarify ██████████ position with Asif and to notify the petitioner that a check of the Illinois Secretary of State website showed that Asif was established in January 1999 and was involuntarily dissolved in June 2003. The dates of the beneficiary's employment with Asif as stated in the employment letter, in the affidavit from ██████████ and in the affidavit from the beneficiary are well before Asif existed as a company. Furthermore, the original experience letter submitted with the I-140 petition was written on Asif letterhead six months after the company was dissolved. The director asked the petitioner to resolve the contradictory information about the beneficiary's prior employment, specifically, how the beneficiary could have been working at Asif from August 1995 to December 1998, when the company did not exist until January 1999. 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. at 582.

In a response dated May 26, 2010, counsel did not dispute the dates of Asif's existence as a company, but rather asserted that the beneficiary had been employed by Asif from February 1999 to March 2001 and that ██████████ had been mistaken about the beneficiary's prior employment dates. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner also submitted a new affidavit from [REDACTED] dated May 12, 2010, stating that the beneficiary was actually employed at Asif from February 1999 to March 2001. The record does not contain any explanation as to why [REDACTED] would have submitted an employment letter and prior affidavit with the incorrect dates of prior employment, nor does it describe what led [REDACTED] to now know that the beneficiary has worked with Asif from February 1999 to March 2001 instead of from August 1995 to December 1998, as he previously stated. The inconsistency in [REDACTED] statements raises doubt as to his credibility. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. at 591. As such, the statements from [REDACTED] are not sufficient to establish that the beneficiary had the required two years of experience in the job offered.

Furthermore, the claim that the beneficiary worked for Asif from February 1999 to March 2001 directly contradicts information contained in the ETA Form 750B, which states that beneficiary worked for the petitioner from June 1999 to July 2000. This claim also contradicts information submitted by the beneficiary as part of her Form I-485 Application to Adjust to Permanent Resident. The beneficiary reported on Form G-325A, signed August 12, 2007, that she was employed with the petitioner from June 1999 to at least the date of signature. The beneficiary also submitted IRS Form W-2 for 1999 showing that she was working for the petitioner during that year.⁴ The discrepancies and contradictions in the record call into question the veracity of the documents submitted. As noted above, it is incumbent upon the petitioner to resolve the inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. at 582. Therefore, the evidence submitted is not sufficient to determine that the beneficiary had the required two years of experience at the priority date.

Counsel also states that the beneficiary had other related work experience, namely with Union Foods in 1995 and with Shaili Donuts in 1997, and submits IRS Form W-2 issued to the beneficiary from these companies for the years named. The Form W-2s are not evidence that the beneficiary possessed the required two years of experience in the job offered. They simply show that at some point during the reporting year the beneficiary worked for a company for an unknown period of time in an unknown occupation. Additionally, neither of these former employers was listed on the ETA Form 750B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. As such, the beneficiary's prior employment with Union Foods and Shaili Donuts will not be considered in this case.

On appeal, counsel states that the director denied the petition "merely" because the beneficiary could not get an updated letter of experience from Asif. Counsel states that because Asif was dissolved in

⁴ While it may have been possible for the beneficiary to work for both Asif and the petitioner simultaneously, neither counsel nor the petitioner have claimed that this was the case or provided any verifiable information on the beneficiary's true employment history.

2003. the director should accept other evidence of the beneficiary's prior employment, the other evidence being the second affidavit from [REDACTED] dated May 12, 2010.

Counsel has misstated the director's position. The director did not deny the petition because the petitioner did not submit a new employment letter from Asif. The director rightly denied the petition because of the inconsistencies and direct contradictions in the record concerning the dates and places of the beneficiary's prior employment. Neither counsel nor the petitioner have sufficiently resolved or explained the contradictory information or provided independent objective evidence of the beneficiary's prior experience.

The AAO affirms the director's decision 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.

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).

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.⁵ 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 petitioner did not pay the beneficiary the full proffered wage each year, and its net income and net current assets, when added to the wages paid to the beneficiary, were not equal or greater to the proffered wage for the years in question. Further, the petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

⁵ *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).

Furthermore, according to USCIS records, the petitioner has filed nine I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary. The absence of this evidence precludes the AAO from making a positive determination on the petitioner's ability to pay. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

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.