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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



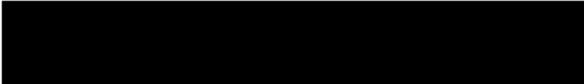
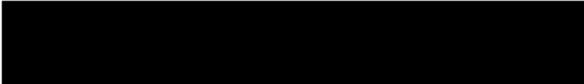
**U.S. Citizenship
and Immigration
Services**



B6

Date: **FEB 02 2012**

Office: TEXAS 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)



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, the petition is accompanied by 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, 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)(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.

As set forth in the director's September 24, 2008, denial, the issue raised in the denial of 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.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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'l Comm'r 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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).

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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on May 25, 2007. The proffered wage as stated on the ETA Form 9089 is \$12.44 per hour (\$25,875.20 per year). The ETA Form 9089 states that the position requires twenty-four months experience in the offered position, as a painter.

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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1994, and to currently employ 10 workers.² According to the tax returns in the record, the petitioner's fiscal year is the calendar year. On the ETA Form 9089, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since May 2002.

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 the burden of establishing the continued ability to pay the proffered wage, starting from the priority date (which is May 25, 2007 in this case), until the beneficiary adjusts status.

The record closed on November 11, 2008, with the petitioner's submissions on appeal. The record includes a Form W-2 from 2007, the year containing the priority date. In 2007, the petitioner paid

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 The petitioner did not list its gross or net annual income on the petition.

the beneficiary \$58,160, as documented on the Form W-2 for that year. Wages actually paid to the beneficiary in 2007 were more than double the proffered wage.

The director, in his decision, mentions receipt of the 2007 Form W-2, but did not analyze the amount the petitioner paid the beneficiary. As noted above, evidence that petitioner paid the proffered wage is *prima facie* proof of its ability to pay the proffered wage.

While the petitioner has overcome the director's basis for denial, the petition is not approvable. We will remand the petition for the director's consideration of the following issue: whether the beneficiary is qualified for the offered position.

As stated previously, the AAO conducts review on a de novo basis. Upon review by the AAO, the petitioner has not submitted sufficient evidence to establish that the beneficiary has the required skills or other requirements as stated on the labor certification. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary meets the experience requirements.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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). In this case, the ETA Form 9089, Part H-6 requires twenty-four months of experience in the offered job.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 Part K, the beneficiary listed the following employers and dates of employment:

February 1, 1998 to December 31, 1998
May 1, 1999 to November 1, 2000
November 1, 2000 to January 31, 2002
February 1, 2002 to April 30, 2002
May 1, 2002 to Present



In support of the experience claimed on the ETA Form 9089, the beneficiary provided a certified English language translation of an experience letter written by [REDACTED] which asserts the beneficiary was employed there from February 1, 1998

to February 15, 1999.³ A second letter from [REDACTED] asserted that the beneficiary was employed with that employer from March 2000 to January 2001.⁴ Even if these letters were accepted, these two letters combined assert that the beneficiary has roughly 22 months experience.⁵

The final evidence submitted to substantiate the beneficiary's experience is a letter from the petitioner, stating it has employed the beneficiary since 2002.

Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the

³ We have noted the experience claimed by the beneficiary on the ETA Form 9089, and we note that there are substantial discrepancies between that form, the experience letters submitted in support of that form, and the Form G-325A, Biographic Information Sheet, also included in the record.

The beneficiary states on the Form G-325A that he was employed by [REDACTED] from February 1998 to April 2000. Yet on the ETA Form 9089, he claims to have worked there from February 1998 to December 1998. The letter purportedly from that employer claims he was employed from February 1998 to February 1999. Thus, the beneficiary only claimed eight months of experience from this employer, but provided a letter claiming twelve months.

Additionally, *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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.

⁴ The beneficiary states on the Form G-325A that he was employed [REDACTED], from April 2000 to the "present time," which at the time the form was signed on July 31, 2002. However, the letter in the record from [REDACTED] alleges the beneficiary was employed there from March 2000 to January 2001. The beneficiary asserts on the ETA Form 9089 that he was employed there from February 2002 to April 2002. Thus, the beneficiary claimed three months of experience on the ETA Form 9089 for this employer, but provided a letter alleging nearly ten months.

⁵ Additionally, on the ETA Form 9089 beneficiary asserts that he was employed by [REDACTED] from November 2000 to January 2002. This employer does not appear on the Form G-325A, but during this same time on that form, the beneficiary alleges to have been employed [REDACTED]. Finally, the Form 1099s issued by [REDACTED] to the beneficiary indicate the beneficiary was self-employed.

certified position.⁶ Specifically, the petitioner indicates that questions J.19 and J.20, which ask about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did

⁶ 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

.....
(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 24 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable⁷ and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a painter, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

Thus, the record as currently constituted does not appear to substantiate a claim that the beneficiary has twenty-four months of experience. The inconsistencies discussed herein must be addressed in any future filings.

(5) For purposes of this paragraph (i):

- (i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
- (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

⁷ A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

- ...
- (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.