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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

Date: JUN 22 2012 Office: TEXAS 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 with the field office or service center that originally decided your case by filing a 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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. On September 3, 2008, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner describes itself as a landscaping company. It seeks to permanently employ the beneficiary in the United States as a landscape gardener. 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).¹

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 NOR concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date and that the documentation submitted to show that the beneficiary qualified for the position was internally inconsistent. On appeal, the AAO identifies an additional issue and finds that the record does not establish that the petitioner has the ability to pay the proffered wage.

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.

¹ 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.

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.²

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 Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 30, 2001. The name of the job title which the petitioner seeks to hire is “Landscape Gardener.” Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, “Execute all types of landscaping projects, including preparation of ornamental gardens, pool areas, grading, seeding, sodding, cultivating, maintaining, etc. Construct small walls and lay elementary walks; maintain and overhaul equipment, prune, transplant, etc.”

Under item numbers 14 and 15 of the Form ETA 750, part A, the petitioner set forth the minimum education, training, and experience that an applicant must have for the position of a landscape

² 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).

gardener. The petitioner indicated on item number 14 that an applicant must have, at a minimum, two years of experience in the job offered.

The beneficiary set forth his credentials on part B of the Form ETA 750 labor certification and signed his name on December 26, 2000, under a declaration that the contents of the form are true and correct under the penalty of perjury. On item number 15, eliciting information of the beneficiary's work experience, the beneficiary represented that he worked as a landscape gardener for [REDACTED] in Sobralia Brazil, from January 1985 to March 1988.

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.

Along with the petition and the approved Form ETA 750 labor certification, the petitioner submitted a letter of employment dated December 27, 2000 from [REDACTED] stating that the beneficiary worked as a landscape gardener from January 1985 to March 1988. In the Notice of Intent to Revoke (NOIR) dated September 3, 2008, the director noted that according to the Brazilian corporate database (CNPJ),³ the Brazilian company [REDACTED] did not open until [REDACTED]. Based on this information, the director concluded that the beneficiary could not have worked there from January 1985 to March 1988.

In response to the director's Notice of Intent to Revoke (NOIR), the petitioner submitted the following evidence to demonstrate that the beneficiary worked at [REDACTED] between 1985 and 1988:

- A sworn statement from the beneficiary stating that he worked for [REDACTED] CNPJ number [REDACTED] from January 1985 to March 1988 (when he moved to a different city) as a gardener;
- A sworn statement from [REDACTED] stating that she owned [REDACTED] and that the beneficiary worked for her company as a gardener from January 1985 to March 1988;

³ CNPJ (Cadastro Nacional da Pessoa Juridica) is similar to the federal tax ID or employer ID number in the United States. The Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

⁴ The CNPJ number shown on the letter is [REDACTED]

- Impresario Application stating that [REDACTED] formed a company on February 15, 1985 and closed the company on January 10, 1995 with a CNPJ number of [REDACTED]

In the NOR, the director found that the CNPJ number originally supplied for the company with which the beneficiary gained his experience, [REDACTED] was not found on the Impresario application for dissolution. Instead, the number on the application for dissolution was [REDACTED]. Because of this discrepancy, the director was unable to determine that the business being dissolved by the Impresario application is the same as the business that then opened and employed the beneficiary.

On appeal to the AAO, counsel submits the following evidence to show that the beneficiary had the requisite work experience in the job offered or in a related occupation:

- A sworn statement from [REDACTED] an accountant, stating that the beneficiary worked for [REDACTED] from 1985 to 1988;
- Registration declaration stating that the company [REDACTED], owner [REDACTED] began operation on October 10, 1991;
- Cancellation of registry by [REDACTED] of the company with CNPJ [REDACTED] on June 27, 2003;
- Business establishment documentation dated February 5, 1985 for a business buying and selling clothes and stationary by [REDACTED];
- 1996 tax and social security assessments for [REDACTED] business;
- 1993, 1994 tax assessments for the business operated by [REDACTED];
- 1993 business license and registry for [REDACTED] to operate [REDACTED];
- Bank withdrawal dated July 24, 1990 for [REDACTED];
- Debt collection notice from the [REDACTED] dated December 10, 1995; and
- Employment records from 1995 for [REDACTED]

The AAO notes that the original letter of employment dated December 27, 2000 from [REDACTED] contains a CNPJ number different from other CNPJ numbers in the record and that it is unclear from the evidence submitted when that business was formed. On appeal, counsel states that the inclusion of the CNPJ no. [REDACTED] was in error and that the owner of [REDACTED] is married to the owner of the company whose CNPJ number was provided. The petitioner submitted a letter signed by Francisco Borges de Souza and Maria Sonia Ferreira Borges stating that the beneficiary worked for Carisma Confecoes Commerce and Clothing Retail from January 1985 to March 1988 as a gardener and that this company had a CNPJ number of 20.778.220/0001-37. In addition, [REDACTED] stated that he mistakenly sent documentation from his company, CNPJ number 25.689.050/0001-59 even though the beneficiary worked only for Ms. Borges's company. The petitioner also submitted establishment documents and dissolution documents for a company run by Maria Sonia Ferreira Borges. The documents submitted do not establish the longevity of the company nor its profitability. It remains unclear why the CNPJ number for a different company would have been included.

Based on the facts stated above, [REDACTED] CNPJ no. [REDACTED] is a different company from the company, CNPJ [REDACTED], for which [REDACTED] submitted the registration cancellation in 2003. "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner did not submit independent, objective evidence such as paystubs, employment records, social security records, or other such evidence to demonstrate the beneficiary's previous work experience.

In addition, the letter of employment dated December 27, 2000 from [REDACTED] is not reliable evidence of continuous, full-time employment for two years as a landscape gardener since [REDACTED] is not in the landscaping or gardening business. The petitioner submitted no evidence to demonstrate that any employment was in a full-time as opposed to part-time capacity or why a company whose stated purpose was as a store for retail clothing and other items would need a full time landscape gardener. As stated above, "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." *Matter of Ho*, 19 I&N Dec. at 591-592. Also, we note that the beneficiary failed to include his employment abroad on the Form G-325 (Biographic Information).⁵

Because of the discrepancies in the record concerning the beneficiary's claimed employer, the full-time as opposed to part-time nature of the position, and discrepancies within the documents, the record does not establish that the beneficiary has the experience claimed.

The AAO affirms the director's NOR 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.⁶ If the petitioner's net income or net current assets is

⁵ The beneficiary submitted the Form G-325 in connection with his Application to Register Permanent Residence or Adjust Status (Form I-485).

⁶ See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp.*

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).

As noted earlier, the record shows that the Form ETA 750 was received by the DOL for processing on April 30, 2001. The rate of pay or the proffered wage set by the DOL on the Form ETA 750 is \$11.40 per hour or \$20,748 per year (based on a 35-hour work per week).

The record contains a copy of the 2001 and 2004 Forms W-2 issued from the petitioner to the beneficiary, October 10, 2005 paystub, and 2001 Form 1120. A review of these Forms W-2 shows that the petitioner paid in excess of the proffered wage in 2001 and 2004, however, the petitioner must establish its ability to pay the proffered wage in every year beginning at the priority date.⁷ The petitioner did not submit evidence establishing its ability to pay in any other year.

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.

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.

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

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).

⁷ The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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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.