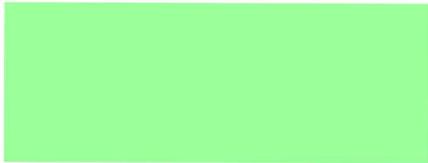




U.S. Citizenship
and Immigration
Services

(b)(6)

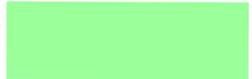


Date:

JUN 28 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

(b)(6)

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not submitted all the required initial evidence. 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 February 9, 2009 denial, the issues in this case are: 1) whether or not the petitioner had the continuing ability to pay the proffered wage beginning on the priority date; and 2) whether or not the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. The director noted that the required initial evidence regarding these issues was not submitted with the petition.

If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, U.S. Citizenship and Immigration Services (USCIS), in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii)(rule effective for all petitions filed on or after June 18, 2007). The petitioner filed its petition with USCIS on July 17, 2007, and is thus subject to this provision. Therefore, the director was not obligated to issue a Request for Evidence (RFE) seeking the missing initial evidence of the petitioner's eligibility. A labor certification certified by the Department of Labor was filed with the petition.

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'1 Comm'r 1977).

Here, the Form ETA 750 was accepted on January 6, 2003. The proffered wage as stated on the Form ETA 750 is \$11.33 per hour (\$23,566.40 per year). The Form ETA 750 states that the position requires two years of experience in the job offered or in the related occupations of "bookkeeping or accounting."

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 does not show how the petitioner is structured. On the petition, the petitioner claims to have been established in 1968 and to currently employ ten workers. On the Form ETA 750B, signed by the beneficiary on December 9, 2002, the beneficiary did not claim to have worked for the petitioner, [REDACTED]

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'1 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 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 Sonegawa*, 12 I&N Dec. 612 (Reg'1 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

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).

that it employed and paid the beneficiary the full proffered wage from the priority date, January 6, 2003.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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).

In the instant case, the petitioner has failed to provide copies of its annual reports, federal tax returns, or audited financial statements. The petitioner’s failure to provide such required initial evidence for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner’s ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Accordingly, the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

On appeal, counsel asserts that the director erred in not stating a reason for the denial of the petition and that the petitioner submitted proof of its ability to pay the proffered wage as well as evidence of the beneficiary’s qualifications. However, as previously stated, the director’s denial cited the petitioner’s failure to submit all required initial evidence with the petition. Further, counsel fails to cite which evidence she is referring to in claiming that evidence addressing the petitioner’s ability to pay the proffered wage and the beneficiary’s qualifications has already been submitted. The AAO notes that the only evidence submitted in support of the petition was an original copy of the labor certification and a statement signed by [REDACTED] for the petitioner stating that recruitment was done at the current prevailing wage of \$11.33 per hour.

Counsel also asserts that the petitioner has been in business over 40 years and had annual income in 2006 of over \$750,000. However, none of the regulatory prescribed evidence at 8 C.F.R. § 204.5(g)(2) was submitted to support these assertions. On appeal, counsel submitted a copy of a California State Wage Withholding Report for the quarter ended December 31, 2001, for [REDACTED] reflecting the quarterly wages of 29 employees, none of whom are the beneficiary.

The AAO notes that neither [REDACTED] are listed as the proposed employer on the approved labor certification. In addition, as the priority date is January 6, 2003, payments made in 2001 to other employees prior to the priority date are not necessarily dispositive about whether or not the petitioner had the ability to pay the proffered wage on the priority date and continuing until the beneficiary obtains permanent residence. Furthermore, neither corporation is listed as an active corporation on the California Secretary of State’s website available at <http://kepler.sos.ca.gov/cbs.aspx> (accessed May 26, 2012).

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).

In addition, 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)).

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income, or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's gross receipts, net gains or losses, wages paid, and officer compensation are not in the record as the petitioner has failed to provide them. Additionally, there are no other factors present in the record such as reputation, uncharacteristic expenditures or losses, replacement of employees or intent to forego officer's compensation, which would indicate that the financial condition of the petitioner should be given less weight. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

(b)(6)

The petitioner must also demonstrate whether or not the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. No evidence regarding this issue was submitted with the initial filing of the Form I-140.

As stated previously, section 203(b)(3)(A)(i) of 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 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). As stated above, the labor certification application was accepted on January 6, 2003.

On appeal, counsel submits a copy of an experience letter from [REDACTED] human resources operations manager for [REDACTED] dated July 22, 2002. The letter states that the beneficiary worked for [REDACTED] Limited as a temporary clerk beginning June 7, 1961; a permanent clerk beginning January 6, 1962; an assistant store-keeper beginning January 1, 1970; and a re-designated clerk on January 9, 1978, until retirement on April 7, 1989. No specific duties are listed, and the record does not contain any other evidence relevant to the beneficiary's qualifications.

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

Block 13. of the Form ETA 750, Part A. Offer of Employment states that the applicant will be required to do the following:

Keep records of financial transactions using calculator and computer. Verify, allocate, & post details of business transactions to subsidiary accounts in journals or computer files from documents, such as sales slips, invoices, receipts, check stubs, & computer printouts. Summarize details in separate ledgers or computer files & transfer data to general ledger using calculator or computer. Reconcile bank accounts. Compile reports to show statistics, e.g. cash receipts & expenditures, accounts payable & receivable, profit & loss, & other items pertinent to the operation of the business. Calculate

employee wages & prepare checks. Overtime & evenings required as needed by employer.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has 27 years of experience with [REDACTED] from January 1962 to January 1998 working 40 hours per week. On the section describing the duties performed, he describes his duties and states that he:

Analyzed invoices of all [REDACTED] products sold; balanced accounts; maintained files for each product; maintained record of petty cash using computer; computed payments to staff of 130 employees e.g. daily wages, overtime, medical bills, van repairs, temporary laborers, supervised the loading and unloading of imported [REDACTED] products into/out of warehouse to numerous dealers throughout the country and kept track of same; monitored accuracy of stockbook maintained by stockbook clerk and related responsibilities.

The letter of experience from [REDACTED], human resources operations manager for [REDACTED] failed to corroborate these duties. The AAO notes that: 1) the letter of experience states that the beneficiary's experience was as a clerk and as a store-keeper, but that it failed to state that the beneficiary ever gained any experience as a bookkeeper or accountant as required by the labor certification; 2) the letter fails to state whether the employment was full-time; and 3) the letter states that the beneficiary's employment ended on April 7, 1989, while the labor certification states that the employment ended January 1989. Thus, the claimed dates of employment on the labor certification do not match those provided on the letter. Therefore, the letter does not demonstrate that the beneficiary had the necessary experience.

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 regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General*. 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.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or

(b)(6)

experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO also notes that 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*, 299 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 AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered 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.