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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

**PUBLIC COPY**

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Date: **JAN 03 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)

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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, Texas Service Center, and is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner is a pump and valve company. It seeks to employ the beneficiary permanently in the United States as a machine operator. 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 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.

As set forth in the director’s April 18, 2008 denial, the single issue in 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.

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 \$9.00 per hour (\$18,720 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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.<sup>1</sup>

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 1950 and to currently employ 30 workers. 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 24, 2001, the beneficiary claimed to have worked for the petitioner.

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 Sonegawa*, 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 established that it employed and paid the beneficiary the full proffered wage during the relevant timeframe from the priority date in 2001 until the present day:

- In 2001, the petitioner paid the beneficiary \$20,065.50
- In 2002, the petitioner paid the beneficiary \$23,987.25
- In 2003, the petitioner paid the beneficiary \$23,209.15
- In 2004, the petitioner paid the beneficiary \$25,093.00

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<sup>1</sup> 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).

- In 2005, the petitioner paid the beneficiary \$27,321.50
- In 2006, the petitioner paid the beneficiary \$32,988.21
- In 2007, the petitioner paid the beneficiary \$33,793.81
- In 2008, the petitioner paid the beneficiary \$26,709.14
- In 2009, the petitioner paid the beneficiary \$23,606.32
- In 2010, the petitioner paid the beneficiary \$26,848.24

Since the petitioner established that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the petitioner established that it had the continuing ability to pay the proffered wage beginning on the priority date. Thus, the director's decision will be withdrawn.

However, the petition may not be approved as the beneficiary is not qualified to perform the services of the proffered position. On October 7, 2011, the AAO specifically requested that the petitioner submit documentation to resolve inconsistencies in the record concerning the beneficiary's past work experience. The petitioner failed to submit the documentation requested by the AAO.

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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> 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).

In the Form I-140, the petitioner requested that the beneficiary be classified as a skilled worker. Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), 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, 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). Here, the labor certification application was accepted on April 30, 2001.

As stated above, 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. The relevant evidence in the record includes the beneficiary's employment letter. The record does not contain any other evidence relevant to the beneficiary's qualifications.

Counsel argues that the Department of Labor's approval of the labor certification application is determinative of the beneficiary's qualifications and that USCIS may not question the beneficiary's credentials. At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the

regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to USCIS to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>2</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).<sup>3</sup> Thus, the AAO has the authority and the responsibility to review the beneficiary's qualifications submitted into the record and to determine whether these qualifications meet the requirements of the approved labor certification.

<sup>2</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

<sup>3</sup> The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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. at 406 (Comm. 1986). *See also, Mandany 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).

The required education, training, experience and special requirements for the offered position are set forth at Part A, Items 14 and 15, of Form ETA 750. In the instant case, the labor certification states that the position has the following minimum requirements:

Block 14:

Education: N/A

Experience: 2 years in the job offered.

Block 15: None

The beneficiary states that he has the requisite two years of experience in the job offered or related occupation as required on the Form ETA 750 by the petitioner. On the ETA 750B, the beneficiary lists one position in which he obtained the requisite experience:

1) Name and Address of Employer: [REDACTED]

Name of Job: Machine Operator

Date Started – Date Left: 08/90 – Present

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The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984).

Kind of Business: [REDACTED]

No. of Hours Per Week: 40

Describe in Detail the Duties Performed: Operates machine used in the manufacture of pumps and valves.

On January 19, 2007, the petitioner amended the Form ETA 750B to include the following position:

2) Name and Address of Employer: [REDACTED]

Name of Job: Machine Operator

Date Started – Date Left: August 1986 – July 1990

Kind of Business: [REDACTED]

No. of Hours Per Week: 40

Describe in Detail the Duties Performed: Observe machine operation to detect workpiece defects. Position, adjust and secure stock material or workpieces against stops, on arbors, or in shucks, fixtures or automatic feeding mechanisms, manually or using hoists. Select, install, and adjust alignment of drills, cutters, dies, guides, and holding devices using templates, measuring instruments, and hand tools. Start machines, and turn handwheels or valves to engage feeding, cooling, and lubricating mechanisms.

The regulation at 8 C.F.R. § 204.5(1)(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 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.

In the present case, the petitioner submitted a job letter from [REDACTED] on behalf of the beneficiary. The AAO noted that the beneficiary started to work at this position when he was 14 years old. Further, the beneficiary failed to initially list this employment on the Form ETA 750B that he signed under penalty of perjury on April 24, 2001. In order to confirm that the beneficiary had the proper qualifications, the AAO issued a Request for Evidence (“RFE”) on October 7, 2011. The AAO requested an explanation as to why the beneficiary failed to list this employment on the

Form ETA 750B when he signed the form in 2001. The regulation at 8 C.F.R. § 204.5(g)(2) states that the AAO may request additional evidence in appropriate cases.

In response to the AAO RFE, counsel explained that due to the April 30, 2001 deadline to file a labor certification application to benefit from a provision of law allowing certain filers to adjust status to permanent residence in the United States, the beneficiary thought he "would have additional time later in order to supplement his application with additional and more detailed information." 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). Counsel failed to explain that the beneficiary could have listed his work experience with [REDACTED] on the Form ETA 750B without submitting the supporting documentation.<sup>4</sup> The beneficiary's failure to initially list this experience on the Form ETA 750B lessens the credibility of his later assertions of work experience with [REDACTED]. *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.

The petitioner did not submit independent objective evidence in response to the AAO RFE to resolve the inconsistency of the beneficiary's failure to initially list the work experience with [REDACTED] when he signed the Form ETA 750B in April 2001. Although specifically and clearly requested by the AAO, the petitioner declined to provide copies of pay stubs, payroll records, tax documents, or other evidence to show employment of the beneficiary by [REDACTED] between April, 1986 and July, 1990. In response, the petitioner resubmitted the employment letter by [REDACTED] dated March 18, 2008, which was in the record prior to the issuance of the RFE. The AAO asked for more precise proof of the beneficiary's past employment in order to resolve the inconsistency and to confirm the beneficiary's qualifications for the stated position. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

In view of the above, the petitioner has not established the qualifications of the beneficiary as of the priority date.

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.

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<sup>4</sup> The DOL did not require the submission of experience letters with the filing of the Form ETA 750B.