

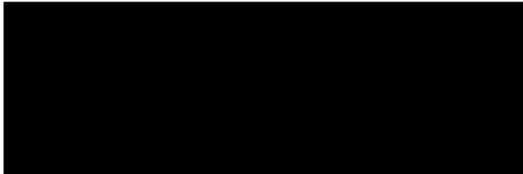
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



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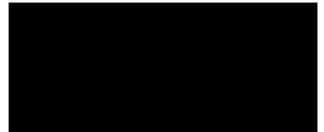


Date:

MAR 14 2012

Office: NEBRASKA SERVICE CENTER

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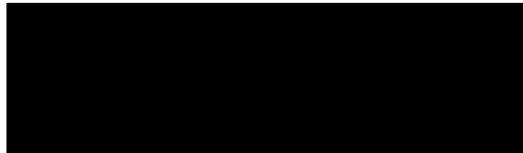
Petitioner:

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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 computer consultant firm. It seeks to employ the beneficiary permanently in the United States as a network administrator. 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 or that the petitioner submitted evidence to document that the beneficiary possessed the requisite two years of experience as of the priority date. 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 24, 2008 denial, the issues in this case are 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 and whether the beneficiary possessed the requisite experience as of the priority date.

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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 9, 2004. The proffered wage as stated on the Form ETA 750 is \$46,000 per year. The Form ETA 750 states that the position requires two years of experience in the position offered as a network administrator.

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. The petition states that the company was established in 1998 and currently employs five workers. According to the tax returns in the record, the petitioner's fiscal year is the same as the calendar year. On the Form ETA 750B, signed by the beneficiary on May 12, 2004, the beneficiary stated that he began working for the petitioner in December 2002.

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. Comm. 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 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. The petitioner submitted the following Forms W-2 and 1099-MISC for the beneficiary:

- In 2004, the petitioner paid the beneficiary \$18,491.06 as reflected on the Form 1099 and \$33,000 as reflected on the Form W-2 for a total of \$51,491.06.²

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).

- In 2005, the petitioner paid the beneficiary \$23,451 as reflected on the Form 1099 and \$28,295 as reflected on the Form W-2 for a total of \$51,746.
- In 2006, the petitioner paid the beneficiary \$24,946 as reflected on the Form 1099 and \$28,000 as reflected on the Form W-2 for a total of \$52,946.
- In 2007, the petitioner paid the beneficiary \$10,472 as reflected on the Form 1099 and \$42,000 as reflected on the Form W-2 for a total of \$52,472.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner established its continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary. As a result, we withdraw that portion of the director's decision denying the petition because of the petitioner's inability to pay the proffered wage.

Additionally, the director denied the petition as the petitioner failed to document that the beneficiary has the required experience for the position offered. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The Form ETA 750 requires two years of experience in the job offered. The Form ETA 750B, signed and certified under penalty of perjury by the beneficiary on May 12, 2004, states that the beneficiary worked for Foster Wheeler in [REDACTED] from January 2000 through February 2002. In response to a September 29, 2010 RFE issued by the AAO, the petitioner submitted a letter from [REDACTED] Foster Wheeler (Philippines) Corporation, stating that the beneficiary worked from January 2000 to February 2002 on a full-time basis as a network administrator. The letter from [REDACTED] is from Foster Wheeler (*Philippines*) (emphasis added) and bears a Filipino address in Batangas City. In response to the AAO's May 4, 2011 Notice of Intent to Deny (NOID), counsel stated that "the letter was issued by the [beneficiary's] boss whom was stationed at the Philippines offices at the time." Counsel further explains that [REDACTED] is "a multinational conglomerate with more than 100 offices in at least 34 countries . . . [and] The Shinfield Park Reading UK address was the corporations global headquarters."

The evidence about the beneficiary's experience is conflicting. On the Form ETA 750B, the beneficiary stated that he worked for [REDACTED] from January 2000 to February 2002. On the Form G-325A, he stated that he worked during that time period for [REDACTED], Philippines branch. On appeal, the petitioner submitted a letter from [REDACTED] (Philippines) Corp. with a Philippines address stating that the beneficiary worked for the company, without indicating where. The beneficiary did not submit a statement indicating why he wrote on the Form ETA 750B that he worked in the UK and not in the

² From the record, it is unclear why the petitioner paid the beneficiary on Form 1099 as "nonemployee compensation." The I-140 petition requires that the petitioner pay the employee the full proffered wage at the time of adjustment and that the petitioner will be the employee's actual employer. In any further filings, the petitioner must establish that it will be the beneficiary's actual employer.

Philippines. He did not state, as suggested by counsel, that he simply wrote the corporate address of Foster Wheeler in the UK, but worked in the Philippines. 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).

Moreover, the website to which counsel directed the AAO does not state that the company's headquarters is in the UK, but is instead located in Switzerland. 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 website lists the [REDACTED] address as a location of the company, but is not the corporate headquarters. Further, the website does not list an office in Batangas City in the Philippines; the only Filipino location is located in [REDACTED]. See the Foster Wheeler website at [REDACTED] (accessed March 8, 2012). No evidence was submitted to show that the beneficiary's supervisor was located in the Philippines and supervised the beneficiary in the Philippines, whether [REDACTED] was located in the UK and supervised the beneficiary in the UK, or conversely, that the beneficiary worked at the UK office, but was supervised by [REDACTED] in the Philippines. Because of these unresolved discrepancies, the AAO finds that the experience letter is not credible, and that the beneficiary was not qualified as a network administrator as of the priority date.

Lastly, the AAO's May 4, 2011 NOID noted that the petitioner currently employs the beneficiary pursuant to an H-1B I-129 petition in the position of Computer Support Specialist. In the Form I-129 application, filed by the petitioner sponsoring the beneficiary for an H-1B visa, the job title was stated as "Computer Support Specialist." The certified Labor Condition Application stated the certified wage is \$52,000 per year. The Form I-129 H-1B Data Collection Supplement states the required education is a Bachelor's degree in Computer Engineering.³ The Form I-140 petition filed stated the job title as "Network Administrator" with the certified proffered wage on the labor certification of \$46,000 per year and stated no degree requirement on the labor certification. The Form I-129 petition requires a bachelor's degree, and the labor certification submitted with the Form I-140 petition requires no education. These discrepancies call into doubt the veracity of the position requirements, the required minimum education, and the bona fides of the position.

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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.

³ A prior I-129 petition valid from July 30, 2002 to June 30, 2005 stated the same wage of \$52,000 and a degree requirement in Computer Engineering.

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

The NDI requested that the petitioner explain why the beneficiary was employed in a position that paid more and required a higher level of education than the position presented in the instant petition. In response, counsel stated both that it offered a different position to the beneficiary and that it crafted its labor certification to “cast a larger net for available U.S. worker [sic] at the time of recruitment in the Labor Certification process.” Again, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). No evidence of the petitioner’s intent was submitted with the response nor was any evidence submitted to demonstrate why the beneficiary would accept a lower paying position than the one he currently occupies or why the petitioner desired the beneficiary to work at a lower skilled job than the one he currently occupies. Due to the discrepancies in the positions and the failure of the petitioner to submit evidence demonstrating its business needs for a change in the beneficiary’s employment, we are unable to conclude that the job offer represents the actual requirements for the position. This issue must be addressed in any further proceedings.

The petitioner has not established that the beneficiary is qualified to perform the services of the occupation as stated on the labor certification 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.