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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: OCT 10 2012

OFFICE: TEXAS SERVICE CENTER

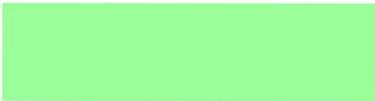
FILE:



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:

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.

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

DISCUSSION: The employment-based immigrant 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 describes itself as a landscaping company. On July 16, 2007, the petitioner filed a petition seeking to permanently employ the beneficiary as a landscape laborer supervisor. 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), approved by the U.S. Department of Labor (DOL). The priority date of the petition is February 14, 2003.²

On June 30, 2008, the director issued a notice of intent to deny the petition (NOID), instructing the petitioner to submit evidence of its ability to pay the proffered wage starting from the February 14, 2003 priority date, to include one of the following for each of the years 2003 through 2007:

- The petitioner's annual federal corporate tax return, including copies of all schedules,
- An audited or reviewed financial statement,
- An annual report, or
- A statement from the financial officer if the petitioner employs 100 or more workers.

In response, counsel did not request additional time to file a response, but instead stated that the director should have issued a request for evidence (RFE) allowing the petitioner 45 days to respond, instead of a NOID, which only allowed the petitioner only 30 days to respond.

The director denied the petition on September 30, 2008, over 90 days after issuing the NOID. The decision stated that the evidence submitted by the petitioner failed to establish its ability to pay the proffered wage.

Counsel filed the instant appeal on October 30, 2008. On Part 3 of Form I-290B, Notice of Appeal or Motion, counsel states the following as the basis for the appeal:

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), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

- 1) The Service failed to give petitioner adequate time to respond to the request for additional information, in violation of Service regulations and procedural guidelines. Specifically, the adjudications Officer sent the petitioner, through Counsel, a Notice of Intent to Deny (NOID) the I-140 petition instead of a Request for Evidence (RFE). The effect of this Service error was an inordinately short period within which the petitioner was required to submit the requested documentation, to wit, 30 days were allowed, whereas 45 days should have been. The Petitioner was unfairly prejudiced by this error, as [REDACTED] was not able to prepare and submit the requested evidence in the time allowed allotted for NOID responses.
- 2) The Service determined that [REDACTED] did not have the ability to pay [REDACTED] wage from the original date of submittal to the date of I-140 adjudication. This determination is in error, as established by the documentation submitted with this appeal.

The relevant evidence submitted by counsel on appeal was, copies of the petitioner's 2003 through 2007 federal tax returns that were originally requested in the NOID; a copy of a 2004 compiled financial statement; a copy of the beneficiary's pay stub from pay period ending October 12, 2008; copies of W-2 Forms issued to the beneficiary for 2005, 2006, and 2007; copies of the petitioner's operating account bank statements from for January 31, 2008 through September 30, 2008; and copies of the petitioner's operating account bank statements for statement period December 1 to December 31 for 2003 through 2007.

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.

The regulation at 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part:

Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the

missing initial evidence be submitted within a specified period of time as determined by USCIS.

In the instant case, the petitioner failed to submit initial evidence of its continuing ability to pay the proffered wage with the petition, and therefore, the director was not obligated to issue a RFE seeking the missing initial evidence of the petitioner's eligibility.

The purpose of a NOID is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's NOID. *Id.*

The director did not issue the denial in the instant case until two months after the petitioner responded to the NOID. Therefore, the petitioner had sufficient time in which it could have submitted the requested evidence. Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Therefore, the appeal is dismissed.

Even if the AAO considered the evidence submitted on appeal, the appeal would have been dismissed. 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.³ If the petitioner's net income or net current assets is 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).

In the instant case, the petitioner did not pay the beneficiary the full proffered wage each year, and its net income and net current assets, when added to the wages paid to the beneficiary, were not equal or greater to the proffered wage for 2004. 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

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

to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

The petitioner also failed to establish that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In the instant case, the labor certification states that the offered position requires two years of experience in the offered position or as a landscape worker. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The only employment letter submitted in the instant case is from the petitioner. The beneficiary's experience with the petitioner can only be considered for meeting the requirements of the labor certification in limited circumstances, and such circumstances are not asserted by the petitioner in the instant case. *See e.g., Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA). Therefore, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

Finally, the beneficiary is only employed by the petitioner nine months each year. Therefore, it does not appear that the petitioner has a full-time permanent position to offer the beneficiary.

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. The petitioner has not met this burden.

ORDER: The appeal is dismissed.