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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



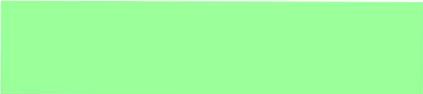
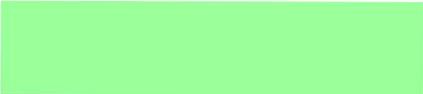
U.S. Citizenship
and Immigration
Services



DATE: **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:

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

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 describes itself as a masonry construction company. It seeks to employ the beneficiary permanently in the United States as a brick layer/stone mason. 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 an ETA Form 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is January 3, 2002.² The proffered wage is \$23.39 per hour, or \$48,651.20 per year based on the 40-hour work week specified on the labor certification.

The director's decision denying the petition concluded that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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.

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.³

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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). Therefore, the petitioner must 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). Evidence of ability to

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).

³ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, 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).

pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.* If the petitioner does not submit tax returns, annual reports or audited financial statements covering the period from the priority date, the petition must be denied. The failure to provide complete annual reports, federal tax returns, or audited financial statements 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. *See id.*

In determining the petitioner’s ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If, as in the instant case, 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.⁴ 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).

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.⁵ On the petition, the petitioner claimed to have been established in 1985 and to currently employ one worker. According to the tax returns in the record, the petitioner’s fiscal year is based on a calendar year.

During the adjudication of the petition, the director issued a request for evidence (RFE) on November 7, 2008, instructing the petitioner to submit its 2002 through 2007 federal tax returns, and evidence of any wages paid to the beneficiary by the petitioner for that period. In its response, the

⁴ *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).

⁵ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

petitioner failed to submit its 2007 federal tax return and the beneficiary's 2007 W-2 Form. These forms would have been available at the time of the RFE. The petitioner did not explain why they were not submitted.

Further, after the filing of the instant appeal, the AAO issued a Notice of Intent to Dismiss and Derogatory Information and Request for Evidence (hereinafter "Notice") on May 30, 2012. The Notice instructed the petitioner to submit its complete federal tax returns (including all attachments and schedules), annual reports or audited financial statements for 2003 through 2006, and 2008 through 2011. In its response, the petitioner failed to submit its complete federal tax return for 2004.

The purpose of the RFE 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 request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the petitioner's 2007 federal tax return or the beneficiary's 2007 W-2 Form submitted on appeal. Further, the AAO is unable to conclude that the petitioner possessed the ability to pay the proffered wage in 2004 because the petitioner failed to submit a complete tax return with all schedules and attachments for that year.

In addition, all of the petitioner's federal tax returns for 2007 through 2011 appear to have been prepared on July 2, 2012 in response to the AAO's Notice. Counsel submitted no explanation for this, and the record does not contain evidence that these returns were in fact filed with the IRS. Additionally, the tax returns submitted with the original filing appear to have been prepared on dates that do not correlate with the required filing dates for such forms. The record contains no evidence of the petitioner's request for an extension, or of amended tax returns being filed by the petitioner. This inconsistency raises questions regarding the validity of the tax returns as evidence of the petitioner's ability to pay the proffered wage. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Due to the unexplained irregularities in the tax returns, the AAO also does not accept the petitioner's 2007, 2008, 2009, 2010, and 2011 tax returns as evidence of its ability to pay the proffered wage.

Therefore, it is concluded that the petitioner failed to establish its ability to pay the beneficiary the proffered wage for each year from the priority date until the beneficiary obtains lawful permanent residence as required by 8 C.F.R. § 204.5(g)(2).

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position.⁶ 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 as a bricklayer/stone mason. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a mason for the petitioner from March 1994 to the present; and as a stonemason for [REDACTED] from April 1986 to October 1991.

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 record contains a letter [REDACTED] architect, on [REDACTED] letterhead stating that the company employed the beneficiary as a "constructor" from April 1986 until 1991. However, this letter does not describe the duties performed by the beneficiary in detail (including any duties of a bricklayer/stone mason), or state if the job was full-time.

The AAO's Notice instructed the petitioner to submit an experience letter that satisfied the regulatory requirements. In response, counsel stated the beneficiary was unable to locate his previous employer, and submitted an affidavit from the beneficiary describing his duties for [REDACTED]. The petitioner also submitted a statement from the Ecuadorian Police Department.

The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. In addition, the police department statement merely mentions states that the beneficiary was known as a stone mason and director of construction. This letter is not sufficient to conclude that the beneficiary possessed two years of experience as a bricklayer/stone mason as of the priority date.

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)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). 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. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

⁶ 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 (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).

Also beyond the decision of the director, the petitioner has not established that it has a permanent, full-time position for the beneficiary. The record contains a letter dated September 26, 2008, signed by [REDACTED] stating the beneficiary has been working for [REDACTED] since 2007, and his work and earnings "depend the days that he works, due to weather otherwise is season work." 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 other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Accordingly, the AAO requested that the petitioner submit evidence to establish that the job offered is a permanent full-time position, and not temporary or seasonal in nature. In response, the petitioner submitted another statement from [REDACTED] which states that the petitioner's business "depends on weather conditions, we can't work in the rain, snow or if is too cold." The petitioner submitted no evidence to establish the beneficiary's position is permanent and full-time. Therefore, the AAO cannot conclude that the offered position qualifies as a permanent, full-time position as required by section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).

Finally, on appeal, the petitioner claims that it changed its name from [REDACTED] in 2002, and it continued to file under the same Employer Identification Number (EIN). The AAO Notice instructed the petitioner to submit evidence of the claimed name change. In its response, the petitioner submitted a letter from [REDACTED] CPA, LLC stating the company was the petitioner's accountant and prepared the partnership tax returns. [REDACTED] requested the AAO take note that as of 2002 the partnership went through a name change from [REDACTED] to the current filing name of C [REDACTED] and they continued to file under the same EIN.

However, no documentary evidence was submitted in support of this name change. 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)). A letter from a CPA does not constitute sufficient evidence of a name change or the use of a fictitious name granted by the applicable state corporate agency.

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.