

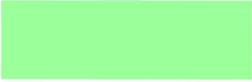
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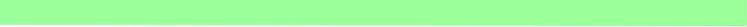
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



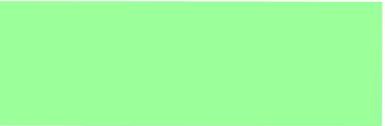
U.S. Citizenship  
and Immigration  
Services



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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. 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).<sup>1</sup> The petition is accompanied by labor certification, certified by the U.S. Department of Labor (DOL).

As set forth in the director's denial, at issue in this case is whether 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 meets the minimum requirements of the offered position as set forth in the labor certification.

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 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). The regulation 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.

The petitioner must also 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),

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<sup>1</sup> 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.

(12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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. 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 (1<sup>st</sup> Cir. 1981).

On April 30, 2009, the director issued a notice of intent to deny the petitioner (NOID) advising the petitioner the evidence did not establish the petitioner's ability to pay the proffered wage because the tax returns in the record were for a different company than the petitioner. The director also advised the petitioner that the evidence in the record to support the beneficiary's experience was inconsistent with the experience listed by the beneficiary on the labor certification.

The director requested the petitioner submit the following:

- Copies of the petitioner's annual reports, federal tax returns, and audited financial statements for fiscal years 2004 through 2008;
- Copies of personnel records, cancelled checks, W-2 Forms, etc. from the beneficiary's former employer to establish his claimed two years of experience as a cook;
- The beneficiary's W-2 Forms from his current employer for 2006, 2007, and 2008, and pay statements for 2009; and
- A list of receipt numbers of all petitions filed by the petitioner for 2007 and 2008.

In the petitioner's response to the director's NOID, it submitted copies of the beneficiary's personal tax returns for 2004 through 2008, along with copies of W-2 Forms issued to the beneficiary by the petitioner and what appears to be its predecessor, and current pay stubs. The petitioner also submitted another letter from the beneficiary's asserted former employer.

However, the petitioner failed to submit:

- Copies of the petitioner's annual reports, federal tax returns, and audited financial statements for fiscal years 2004 through 2008;
- Copies of personnel records, cancelled checks, W-2 Forms, etc. to establish the a beneficiary's claimed experience with his former employer, [REDACTED]
- A list of all receipts numbers of all petitions filed by the petitioner for 2007 and 2008.

The purpose of the request for evidence 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 evidence submitted on appeal.

Consequently, the AAO concurs with the director's conclusion that the petitioner failed to establish its ability to pay the proffered wage and that the beneficiary possessed the required experience set forth on the labor certification.

Even if the AAO considered the evidence submitted for the first time on appeal, the appeal would still have been dismissed. On appeal, the petitioner submitted federal tax returns for a company named [REDACTED] for tax years 2006 and 2007; the petitioner's tax returns for 2008 [REDACTED] W-2 Forms issued to the beneficiary for 2004, 2005, and 2006 by a company named [REDACTED] and by the petitioner for 2006, 2007, and 2008; current paystubs issued by the petitioner; documents to establish what appears to be a possible successor-in-interest between the petitioner and [REDACTED] and, a duplicate letter from the beneficiary's asserted former employer, T [REDACTED]. Therefore, even on the appeal, the petitioner failed to submit its federal tax returns for 2004 and 2005, and any objective documentary evidence to establish the beneficiary's purported employment with the [REDACTED] from March 1997 to June 1999.

Further, a public search shows the [REDACTED] did not open for business until October 1997. It is unclear how the beneficiary could have been employed by the [REDACTED] beginning in March 1997. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043; *see also Soltane v. DOJ*, 381 F.3d at 145.

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.