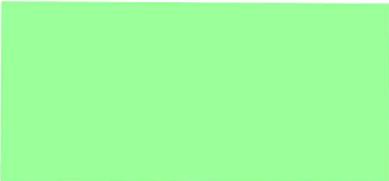


(b)(6)

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



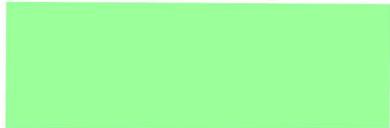
DATE: **OCT 19 2012** OFFICE: TEXAS SERVICE CENTER

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 Director, Texas Service Center denied the employment-based immigrant petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a Korean food catering business. It seeks to employ the beneficiary permanently in the United States as a Korean specialty cook pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3). The petitioner is accompanied by a labor certification approved by the U.S. Department of Labor.

The director's decision denying the petition concluded that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage; and that the beneficiary met the educational requirements stated on 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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), (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,

¹ 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).

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 (1st Cir. 1981).

On July 18, 2012, the AAO issued a notice of intent to dismiss the appeal (NOID). The NOID informed the petitioner that, according to the the New Jersey Division of Revenue, there was no record of a business named [REDACTED]. The NOID also stated that the federal tax returns submitted to establish the petitioner's ability to pay the proffered wage were for a company named [REDACTED], and, according to the New Jersey Division of Revenue, this organization was inactive.

This office also notified the petitioner that if it is currently dissolved, this is material to whether the job offer, as outlined on the immigrant petition filed by this organization, is a *bona fide* job offer. Moreover, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(stating that doubt cast on any aspect of the petitioner's proof 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. *See Id.*

Finally, NOID informed the petitioner that in order for the submitted W-2 Forms and federal tax returns to be considered, it must submit evidence to establish the relationship between [REDACTED]

Counsels' response to the NOID stated that "the petitioner has used the business names including [REDACTED]. The New Jersey Department of Treasury website states the following with regard to alternate business names:

A business entity may also legally conduct business in the state under a name other than the formation name by registering an alternate name. This is done after the business entity has been established or receives authorization to do business in New Jersey.

(Emphasis added).

The record contains no evidence that [REDACTED] registered the alternate name of [REDACTED] with the New Jersey Department of Treasury.

Counsel also stated that on January 27, 2011, the petitioning company reorganized, changing its name to [REDACTED] and changed its location to [REDACTED]. Counsel also states the new entity has an EIN of [REDACTED]. Counsel states the new entity operates the same type of business as the original employer and assumed all of its rights and duties.

The petitioner submitted a copy of the original Business Name Certificate filed with the State of New Jersey in 1999 establishing the petitioner's name as [REDACTED] listing the sole interested person or member of the business as [REDACTED]. Also submitted was a copy of the Certificate of Formation filed with the New Jersey Department of the Treasury establishing the formation of the new entity [REDACTED] on January 27, 2011, and verification from the Internal Revenue Service establishing the new entity's EIN of [REDACTED]. The Notes to the Financial Statement for [REDACTED] shows the new entity has two partners, [REDACTED].

The petitioner failed to submit a certificate of good standing or other proof that the petitioner remains in operation as a viable business or was in operation from the priority date onwards. The evidence submitted clearly establishes the petitioner no longer remains in operation. The petitioner also failed to establish that [REDACTED] is a successor-in-interest to the entity that filed the labor certification, petition and appeal. A labor certification is only valid for the particular job opportunity stated on the application form. Not only is the job opportunity no longer at the address listed on the labor certification, but according to 20 C.F.R. § 656.30(c), if [REDACTED] is a different entity than the petitioner/labor certification employer and appellant, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not describe or document the transaction transferring ownership of [REDACTED]. Additionally, it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor both possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because [REDACTED] has failed to establish that [REDACTED] is a successor-in-interest to the petitioner/labor certification employer and appellant.

In addition, the submitted financial statement submitted for [REDACTED] is not audited. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2)

² The petitioner's address listed on the I-140 and labor certification was [REDACTED].

makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Further, since the W-2 Forms issued by [REDACTED] to the beneficiary show a different social security number for the beneficiary than what is listed for him on the Form I-140, and since the petitioner did not establish its relationship to [REDACTED] these W-2 Forms cannot be used to establish wages paid to the beneficiary.

Therefore, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Finally, the petitioner failed to establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. The labor certification states that the applicant must possess two years of experience as a Korean specialty cook.

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a Korean specialty cook for [REDACTED]

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 Certificate of Career from [REDACTED] a representative for Y [REDACTED] stating that the company employed the beneficiary as a cook in the division of Korean-style foods, from January 11, 1995 to March 30, 1998. The letter does not list the specific duties performed by the beneficiary, or give the position of Min Iiwa-ok within the company. The submitted experience letter does not meet the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), and therefore the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.

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.