



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **FEB 21 2013**

Office: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

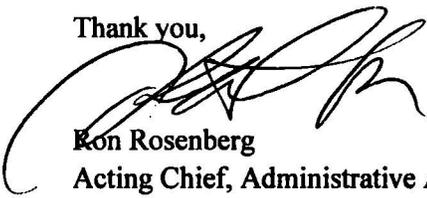
[REDACTED]

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,


Ron Rosenberg
Acting 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 is a retail and wholesale auto firm. It seeks to employ the beneficiary permanently in the United States as an automotive service technician. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to provide the requested documentation relevant to the beneficiary's qualifying experience and the petitioner's continuing ability to pay the proffered wage as of the visa priority date, and denied the petition accordingly.

On appeal, current counsel submits additional evidence and maintains that the petitioner has demonstrated that the petition merits approval.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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(1)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate that a beneficiary has the necessary education and experience

specified on the labor certification as of the priority date. The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on September 19, 2006, which establishes the priority date.

The ETA Form 9089 underlying this Immigrant Petition for Alien Worker (Form I-140) is a duplicate of the original which was submitted in support of the first Form I-140 filed by the petitioner on November 14, 2006.¹

The Form I-140 in this proceeding was filed on June 7, 2007. On Part 5 of the petition, the petitioner claims to have been established on April 14, 1989, to have eight workers, to report a gross annual income of \$4,230,938 and a net annual income of \$170,514. Part 6 indicates that the position is a new one.

The ETA Form 9089 requires that the beneficiary have no training or formal education but requires 2 years of work experience in the job offered as automotive service technician. The proffered wage is stated to be \$14.20 per hour, which amounts to \$29,536 per year. It is noted that on appeal counsel represents the calculation of the full-time wage at 35 hours per week instead of 40 hours per week. As counsel has submitted no documentary evidence that the petitioner actually recruited the job based on a 35-hour per week wage, the AAO considers the proffered wage calculation to be based on 40 hours per week.

It is noted that both the alien and the petitioner's representative appeared to have signed the original ETA Form 9089 under penalty of perjury on October 29, 2006. The instructions on Part K tell the beneficiary to list all jobs held for the past three (3) years. It also instructs the beneficiary to list any other experience related to the occupation for which the employer is seeking certification. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See 8 C.F.R. § 103.2(b)(1), (12). See also *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

¹ That petition was denied on March 20, 2007, based on abandonment. The petitioner was represented by [REDACTED] on this application. It is noted that [REDACTED], a former Employment and Training Administration (ETA) contractor, pled guilty on July 10, 2009, to accepting a bribe as a public official. He conspired with an individual from "the Law Offices of [REDACTED] (co-conspirator) to manipulate priority dates and other information on ETA applications." *Semiannual Report to Congress*, Volume 62 (Office of Inspector General for U.S. Dept. of Labor, April 1-September 30, 2009).

The only job listed on the ETA Form 9089 is for an employer identified as "[REDACTED]" at [REDACTED] Mexico, where the beneficiary claims that he worked from June 20, 1991 to December 22, 1996. No other jobs are listed. In support of the beneficiary's qualifying employment, the petitioner initially provided a copy of a letter in English indicating that it was a translation from a document in Spanish from [REDACTED] the company "[REDACTED]". This letter appears to be dated August 14, 2006 and states that Mr. [REDACTED] is the owner of [REDACTED] and that "[REDACTED]" worked there during 1991, 1992, 1993, 1994, 1995 and 1996. This letter was unaccompanied by the original document in Spanish, failed to specify the alien's job and failed to describe his duties. See 8 C.F.R. § 204.5(l)(3)(ii)(A).

In response to the director's February 13, 2008, Notice of Intent to Deny, the petitioner submitted an undated copy of an employment verification letter in English from [REDACTED]. There is no indication that the letter is a translation from another document. It purports to state that "[REDACTED]" worked for the company of [REDACTED] from 1991 through 1996 as a full-time mechanic. The letter lists the beneficiary's duties and also enumerates his qualities of character. Although in English, the letter ends with "Atentamente," "[REDACTED]" suggesting the letter was a misrepresentation because of the inconsistency of the body of the letter appearing in English contrasted with the use of a closing phrase in Spanish. Mr. [REDACTED] also does not identify his position in this letter. Neither of these letters can be considered credible. The first lacked the deficiencies as noted above and lacked the original Spanish document, as specifically requested by the director in his Notice of Intent to Deny issued on February 13, 2008. The director also requested that the claim of prior experience be accompanied by such evidence as payroll records, pay receipts or similar documentation that confirms the beneficiary's employment with the previous employer. The petitioner has never provided such evidence to verify the second letter. Nothing was submitted on appeal to address this deficiency.

Another discrepancy is discussed in the director's decision issued on April 20, 2010 and as indicated by the underlying record. As noted above, the employment letters that were submitted identified the beneficiary as "[REDACTED]". The petitioner's employment records submitted to the record, however, indicate that it has employed two different individuals with extremely similar names. One is "[REDACTED]" listed as an employee in 2006 and 2007, and one is "[REDACTED]" who is identified on the Form I-140 as the beneficiary. In the last quarter of 2007, the petitioner's state quarterly wage reports indicate that the petitioner employed both these individuals.²

It is noted that on appeal, counsel asserts that [REDACTED] and [REDACTED] are the same person and that in Mexico he is known as [REDACTED] using his maternal last name. This is not supported by the record, because as indicated above, both persons were

² The petitioner's state quarterly wage reports also indicate the employment of "[REDACTED]"

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employed by the petitioner with each using a different social security number.³ Counsel's assertions are not persuasive in this regard and do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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. 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, 591-592 (BIA 1988).

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, United States Citizenship and Immigration Services (USCIS) is bound to follow the pertinent regulatory guidelines pursuant to 203(b)(3)(A)(i) of the Act. USCIS jurisdiction includes the authority to examine an alien's qualifications for preference status and to investigate the petition under section 204(b) of the Act, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *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 v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). 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 Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

As indicated above, neither letter submitted in support of the beneficiary's experience in the job offered in this proceeding credibly establishes that the beneficiary is the subject of the letter or that he acquired two years of experience in the job offered. As such, the petitioner failed to comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). This office concurs with the director's assessment that the petitioner has not established that the beneficiary possessed the requisite work experience as of the priority date of September 19, 2006.

With respect to the ability to pay the proffered wage,⁴ it is noted that the petitioner has submitted copies of its Form 1120S, U.S. Income Tax Return for an Corporation claimed to have been filed

³ It is noted that the beneficiary claimed no social security number on Part 3 of the first Form I-140 filed on November 14, 2006 and similarly claimed no social security number on the second Form I-140 filed on June 7, 2007.

⁴ The petitioner has also failed to 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). 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,

with the Internal Revenue Service (IRS), along with copies of what appear to be IRS transcripts of its employer's quarterly returns (Form 941). It is further noted that the director requested in the NOID that the petitioner submit a certified IRS tax return transcript for 2006 in an unopened envelope. The petitioner never provided this documentation and has subsequently provided only a 2008 income tax transcript from the IRS. Because of this and due to the questions that have emerged relevant to the employment verification documentation, the AAO declines to consider the petitioner's copies of federal income tax returns without corroboration such as requested by the director. The ability to pay has not been established. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the foregoing, the petitioner has not established that the beneficiary possesses the required qualifying work experience and has not demonstrated its continuing ability to pay the proffered wage.

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.

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. *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). In some circumstances, 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. Comm'r 1967). As stated above, the AAO declines to employ these methods to determine the petitioner's ability to pay as sufficient corroboration of the petitioner's financial status is lacking.