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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: **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 Director, Texas Service Center, denied the immigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook and to classify him as a skilled worker pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it possessed the continuing ability to pay the proffered wage to the beneficiary since the priority date. The director denied the petition accordingly. Counsel filed a timely appeal on the petitioner's behalf.

On appeal, counsel asserts that the petitioner has the continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel submits documentation in support of the appeal.

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.

The petitioner must 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). In the instant case, the ETA Form 9089 was accepted on December 13, 2006. The proffered wage as stated on the ETA Form 9089 is \$13.14 per hour or \$27,331.20 annually. The ETA Form 9089 states that the position requires no education, no training, and 24 months of experience in the offered job of specialty cook.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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); *see also* 8 C.F.R. § 204.5(g)(2).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Consequently, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered when evaluating the

petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The AAO issued a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) to counsel and the petitioner on November 26, 2012, acknowledging that the petitioner was a sole proprietor who had submitted copies of his Forms 1040, U.S. Individual Income Tax Return, for 2006, 2007, and 2008 in support of the claim that he possessed the continuing ability to pay the proffered wage from the priority date of December 13, 2006. To supplement the record the AAO requested that the petitioner submit his complete federal income tax returns for 2009, 2010, and 2011, as well as any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner to the beneficiary in 2006, 2007, 2008, 2009, 2010, and 2011.

In addition, the AAO asked that the sole proprietor petitioner provide statements of his family's recurring monthly expenses including a breakdown detailing payments for mortgage, auto, installment loans, credit cards, household expenses, utility expenses, tuition expenses, childcare expenses, and corresponding documentation reflecting such expenses for 2006, 2007, 2008, 2009, 2010, and 2011.

Finally, beyond the decision of the director, the evidence in the record does not establish that the beneficiary possesses the required experience for the offered position. 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*, 299 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 (3^d Cir. 2004) (AAO's *de novo* authority is well recognized by the federal courts).

The petitioner must demonstrate that the beneficiary possessed all of the requirements stated 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, U.S. Citizenship and Immigration Services (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 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).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states that any experience requirements for professionals and skilled workers must be supported by letters from employers giving the name, address, and title of the trainer or employer, and a description of the experience of the alien.

The labor certification states that the offered position requires 24 months of experience in the offered job. At part K of the ETA Form 9089, the beneficiary claimed that he had been employed as a cook at [REDACTED] from June 15, 2004 to July 2, 2006. In the NOID/RFE, the AAO noted that the record did contain an experience letter from the owner of this enterprise, but that this individual did not list the exact dates of the beneficiary's employment at [REDACTED]. Therefore, the AAO requested that the petitioner provide a letter from this employer listing the beneficiary's exact dates of employment at this establishment.

The petitioner and counsel were given 45 days to respond to the NOID/RFE. The AAO specifically alerted the petitioner and counsel that failure to respond to the NOID/RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. 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).

While the record reflects that the NOID/RFE mailed to petitioner at its business address was returned by the United States Postal Service as undeliverable, the NOID/RFE mailed to counsel was not returned. More than 45 days have passed since the NOID/RFE was issued, and the AAO has received no response from either the petitioner or counsel. Therefore, the appeal will be dismissed on this basis, as well as those issues specifically raised by the AAO in the NOID/RFE. *See* 8 C.F.R. § 103.2(b)(13).

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.