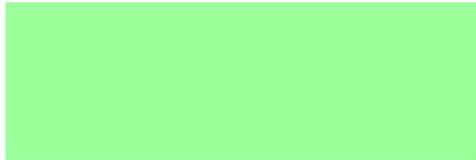




U.S. Citizenship
and Immigration
Services

(b)(6)

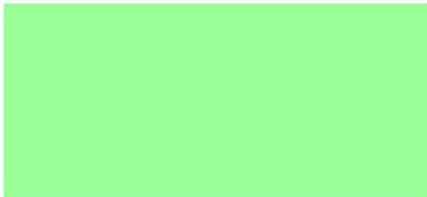


DATE: JUN 06 2013 OFFICE: TEXAS SERVICE CENTER FILE: 

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be rejected.

The petitioner describes itself as a construction business. It seeks to permanently employ the beneficiary in the United States as a brick 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).

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is December 18, 2003. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to establish that it had the ability to pay the proffered wage in 2004, 2005 and 2006.

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 labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.30(b)(2) provides: "An approved permanent labor certification *granted before July 16, 2007 expires* if not filed in support of a Form I-140 petition with the Department of Homeland Security *within 180 calendar days of July 16, 2007.*" (Emphasis added).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petition was filed on May 19, 2009 with a labor certification approved by the Department of Labor (DOL) on June 13, 2007. 673 days passed after July 16, 2007 and prior to the filing of the petition with United States Citizenship and Immigration Services (USCIS). As the filing of the instant case was after 180 days of July 16, 2007, the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

As the labor certification is expired, the petition is not accompanied by a valid labor certification, and this office lacks jurisdiction to consider an appeal from the director's decision. Therefore, the appeal will be rejected.

If the appeal were not rejected, the appeal would be dismissed. The AAO notes that the petitioner failed to overcome the grounds for denial in the director's August 5, 2010 decision. The director found that the petitioner did not establish that it had the ability to pay the proffered wage of \$34,216 from the December 18, 2003 priority date onward and failed to establish its ability to pay the beneficiary the proffered wage in 2004, 2005 and 2006.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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 Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

The AAO notes that on March 1, 2010, the director issued a Request for Evidence (RFE) in which he requested annual reports, U.S. federal tax returns or audited financial statements for 2004 through 2009, and additional evidence such as profit/loss statements, bank account records or personnel records. The petitioner responded on April 1, 2010 with tax returns for 2007 and 2008; a letter related to the 2009 tax return; reviewed financial statements for 2005 and 2006; and Form W-3s for 2004 through 2009. On appeal, the petitioner has submitted audited financial statements for 2004, 2005 and 2006. The AAO notes that the Form I-140 states that the petitioner has 10 employees. However, the salary and wages for the 2004, 2005 and 2006 income statements are listed as \$28,200, \$28,200 and \$50,141 respectively. In addition, the data on the 2004 audited financial statement (fiscal year 2003) is not consistent with the 2003 tax return which lists payroll as \$52,200 and net income of \$163,162. There is no analysis, comments or notes from the Certified Public Accountant (CPA) in 2004, 2005 or 2006, only the letter confirming that the audit was performed. This casts doubt on whether audits were performed in each of the years indicated. These discrepancies cast doubt on the audited financial statements. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states, "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." The AAO notes that the CPA who prepared the audited financial statements is not the same CPA who prepared the petitioner's 2003 and 2008 tax returns.²

² The AAO notes that the individual signing the tax returns, identified as the petitioner's president, bears the same last name as the beneficiary's spouse. The 2003 tax return was signed on September 10, 2004. This person is different from the individual who signed the labor certification as the petitioner's president on December 18, 2003 and who also signed the Form I-140 on May 15, 2009. It is unclear who is the petitioner's president, and if this individual is related to the beneficiary. *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405. In this case, there is doubt cast on whether a *bona fide* job offer exists. The petitioner must resolve this issue in any further filings with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988).

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be

In addition, according to USCIS records the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record of proceedings does not contain evidence of the priority date, the proffered wage or any wages paid to the other worker. The petitioner must address this issue in all relevant years before the petitioner's ability to pay the proffered wage can be established in any year. Therefore, even if the petition were accompanied by a valid labor certification, the AAO would find that the petitioner has not established that it had the ability to pay the proffered wage in 2004, 2005 and 2006, or any other year, as the petitioner must establish that it can pay the respective proffered wages of both sponsored workers.

The labor certification requires two years of experience in the position offered. 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. 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 (1st Cir. 1981). 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).

The AAO also notes that the experience letter submitted from [REDACTED], dated December 15, 2003, does not state the beneficiary's job duties. The letter states that the beneficiary worked from July 1997 to July 2003, however, the New York State Department of State says the only corporation with a similar name was incorporated in June 2003. *See* http://www.dos.ny.gov/corps/bus_entity_search.html (accessed May 15, 2013). The letter does not state whether the experience was full-time or part-time. The listed president of this company has the same first and last name, but not the same middle name, as the beneficiary which casts doubt on its authenticity. The experience letter must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and

financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

(I)(3)(ii)(A). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The letter, based on the deficiencies noted, would fail to establish that the beneficiary had the required experience for the position offered, and in any further filings, must be supported by independent objective evidence, such as W-2 statements to verify the claimed experience.

As noted above, as the labor certification is expired, the petition is not accompanied by a valid labor certification, and this office lacks jurisdiction to consider an appeal from the director's decision. However, even if considered valid, which the labor certification is not, the petitioner would fail to overcome the basis for the director's decision and establish the petitioner's continuing ability to pay the beneficiary, and a second worker that the petitioner has sponsored, the respective proffered wages. Additionally, the experience letter submitted is deficient as set forth above and would fail to establish that the beneficiary had the experience required for the position offered. The appeal would be dismissed on these bases.

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 rejected.