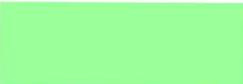


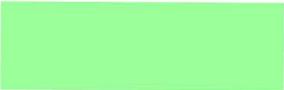


U.S. Citizenship
and Immigration
Services

(b)(6)

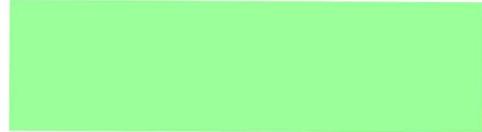


DATE: JUN 18 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: 

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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The petitioner then filed a motion to reopen and reconsider. The motion will be granted. The previous decision of the AAO will be affirmed. The petition remains denied.

The petitioner is a Korean food restaurant. It seeks to employ the beneficiary permanently in the United States as a cook.¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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).²

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 September, 27 2001. *See* 8 C.F.R. § 204.5(d).

The AAO's decision denying the appeal concludes that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Further, the AAO noted that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

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.

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.

¹ This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

² 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), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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).

Here, the Form ETA 750 was accepted on September 27, 2001. The proffered wage as stated on the Form ETA 750 is \$13.52 per hour (\$28,121.60 per year based on forty hours per week). The Form ETA 750 states that the position requires three years of experience as a Korean food cook.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The AAO's decision dated June 8, 2012 indicated that the petitioner did not have sufficient net income to pay the proffered wage for the years 2001, 2002, 2003, 2004, and 2007. Further, the AAO noted that the petitioner did not have sufficient net current assets to pay the proffered wage for the years 2003 and 2004.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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.

The AAO's decision stated the following with regard to counsel's assertions regarding the petitioner's officers' pay:

On appeal, counsel states that the petitioner paid two officers a total compensation of \$72,200 to \$82,098 each year. Counsel asserts that this officer compensation is discretionary and could have been used to pay the proffered wage. The petitioner's IRS Forms 2001 to 2007 show that the petitioner paid officer compensation of \$79,200 from 2001 to 2005, \$75,000 in 2006, and \$82,098 in 2007. The amount of officer compensation paid to the officers does not vary from 2001 to 2005. The petitioner failed to submit evidence to show that officer compensation payments were not fixed by contract or otherwise. Without such evidence, the AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the officers have not expressed their willingness to reduce their compensation to pay the beneficiary's wage.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.³

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. All evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

On motion, counsel asserts that the officers' salaries are discretionary and submits an affidavit signed by the petitioner's owners stating that there is no contract between the officers and the petitioner regarding their compensation. Counsel also submitted financial information for the officers indicating that they are both high net worth individuals. The AAO notes that the affidavit and financial evidence submitted is not new evidence and could have been provided previously.

On motion, counsel asserts that the AAO failed to properly evaluate and comprehend the petitioner's tax returns and its financial situation and that the AAO failed to consider evidence of the totality of the circumstances. The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3)

³The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

Counsel states that in 2003, the officers took a \$27,023 distribution in order to reduce the amount of cash on hand. Counsel states that the distribution was a discretionary decision based on the advice of their accountant. Counsel submitted a letter on [REDACTED] letterhead dated July 5, 2012, signed by [REDACTED]. However, [REDACTED] states that her company has been handling the petitioner's tax related matters since 2004 and does not discuss the 2003 distribution in her letter or mention that the petitioner acted on her advice. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel states that in 2004, the petitioner's combined net income and net current assets was \$40,090, an amount greater than the proffered wage of \$28,121.60. Counsel advocates combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

Counsel also asserts that the AAO failed to consider the totality of the circumstances in determining that the petitioner did not establish its ability to pay the proffered wage from the priority date onward.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had

been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In fact, the AAO reviewed the totality of the circumstances and discussed its analysis in its June 8, 2012 dismissal of the appeal. The record contains evidence that the petitioner was able to pay the proffered wage in all but two years, 2003 and 2004. With this motion, the petitioner asserts for the first time that it had uncharacteristic business expenditures in those years. In her letter, [REDACTED], the petitioner's accountant, stated that the petitioner opened a second restaurant on October 25, 2004 and its net income was negatively impacted due to startup expenses and losses related to the first few months of operation. [REDACTED] adds that the petitioner's revenues and net income increased significantly in 2005. Finally, the record contains evidence of the petitioner's officers' willingness and financial ability to reduce their salaries in order to pay the proffered wage. Nothing in the record demonstrates that this information was previously unavailable and could not have been presented on appeal. Therefore, this evidence cannot be considered new and will not now be considered by the AAO.

Evidence of the business expansion and the officers' compensation could have been presented previously and therefore does not meet the regulations at 8 C.F.R. § 103.5(a)(2) as noted above. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

On motion, counsel argues that the AAO erroneously concluded that the petitioner did not establish that the beneficiary possessed the minimum experience required to perform the offered position because the petitioner was not given an opportunity to respond before the AAO issued its decision. 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 beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: n/a

High School: n/a

College: n/a

College Degree Required: n/a

Major Field of Study: n/a

TRAINING: n/a

EXPERIENCE: Three (3) years in the job offered

OTHER SPECIAL REQUIREMENTS: None

The labor certification also states that the beneficiary qualifies for the offered position based on experience as an assistant cook with [REDACTED] from March 1998 until March 2002. The labor certification lists no address for this employer. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

The AAO's previous decision states the following regarding the evidence of the beneficiary's work experience:

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). Although the record contains a letter from [REDACTED] president of [REDACTED] [REDACTED] stating that the beneficiary worked as a full-time cook, the Form ETA 750 lists the beneficiary's position as "assistant cook." 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. 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, 591-92 (BIA 1988).

On motion, counsel submits a new employment letter. The record contains an experience letter dated July 2012 from [REDACTED] President stating that [REDACTED] employed the beneficiary as a full-time cook from March 10, 1998 until March 30, 1998. The letter states that the beneficiary's duties were "preparing vegetables, meats, soups, and sauces for Korean food dishes" and supervising a "cook helper."

[REDACTED] previous letter dated April 2006 stated that the beneficiary worked 30 hours per week and did not provide the beneficiary's duties. In his letter, [REDACTED] does not provide an explanation for why he previously described the beneficiary's position as that of an "assistant cook" or why he now describes her employment as full-time. [REDACTED] letters are inconsistent with each other and the labor certification, and the record contains no independent, objective evidence such as pay stubs or tax returns resolving the inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On motion, the petitioner also submits a declaration from [REDACTED] stating that he worked at [REDACTED] as a cook from May 1, 1997 to December 31, 2004. [REDACTED] states that the beneficiary worked with him as a full-time cook from March 10, 1998 to March 30, 2002. Although [REDACTED] states that he worked with the beneficiary he does not state what type of food the beneficiary prepared or how he remembers the dates of the beneficiary's employment at the restaurant. While [REDACTED] letter is some evidence that the beneficiary worked at [REDACTED] [REDACTED] his letter is not objective, independent evidence of her employment as a Korean food cook for at least three years as required by the labor certification.

Counsel also states that the petitioner's previous attorney listed the beneficiary's title as "assistant cook" by mistake. In their affidavit, the petitioner's owners state that they relied on their attorney and had limited English language skills when the Form ETA 750 was signed. As noted above and the AAO's decision, the record contains a letter dated 2012 from the beneficiary's previous employer describing her employment as a full-time cook. However, the AAO notes that the previous employer's letter dated 2006 also states that the beneficiary worked as an "assistant cook."

Although the petitioner claims that its counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

The AAO affirms its previous decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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 motion is granted. The previous decision of the AAO is affirmed. The petition remains denied.