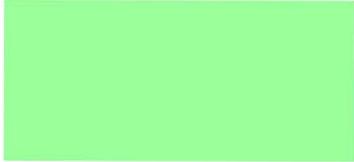




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: OFFICE: NEBRASKA SERVICE CENTER

FILE:

JUN 21 2013

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:

SELF REPRESENTED

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, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a car wash and auto spa. It seeks to employ the beneficiary permanently in the United States as a car wash manager. 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 director's decision denying the petition concludes that the petitioner failed to submit the required initial evidence with the petition according to 8 C.F.R. § 103.2(b)(8). Specifically, the director found that the petitioner failed to establish its ability to pay the proffered wage and that the beneficiary possessed the education and experience required on the labor certification.

On July 19, 2012, the AAO issued a Notice of Intent to Deny/Notice of Derogatory Information (NOID/NDI) to the petitioner, indicating that, according to the website maintained by the California Secretary of State as well as public records accessed through [REDACTED] the petitioning entity was suspended on September 4, 2007. This information was obtained through a search of the fictitious name used by the petitioning entity, the Federal Employer Identification Number (FEIN) listed on the Form I-140, the name of the individual who signed Form I-140, and the name of the individual who signed Form I-290B.

On August 9, 2012, the AAO received a response to its July 19, 2012 NOID/NDI, signed by [REDACTED] in which she stated that the petitioning entity remained operational and in good standing. According to [REDACTED] the petitioner is a Limited Liability Company, operating as [REDACTED] and [REDACTED] is the fictitious name.

The website maintained by the California Secretary of State as well as public records accessed through [REDACTED] do show that [REDACTED] is an active business entity in the state of California and that the registered agent/principal is [REDACTED]. Further, according to the same public records, [REDACTED] has only one manager, that manager being [REDACTED]. None of the records, which identify [REDACTED] as a business in good standing in the state of California, however, contain the name of [REDACTED] (the individual who filed the instant appeal on behalf of the petitioner) as being associated with this business.

On February 5, 2013, the AAO issued a NOID/Request for Evidence (RFE) to the petitioner, noting that [REDACTED] signed the Form I-140 as a representative of [REDACTED] and identified herself on Form ETA 750 as the owner of the petitioning entity. However, [REDACTED] signed and filed the Form I-290B, identifying himself, in a letter accompanying the appeal, as the owner of [REDACTED].

Since the records which indicate that the petitioner, [REDACTED] is an active business show only one manager, [REDACTED] who also claims to be the owner of the

entity, and do not identify [REDACTED] as being associated with the petitioner, the AAO notified the petitioner on February 5, 2013 that it would have to reject the instant appeal unless the petitioner was able to demonstrate that [REDACTED] is an authorized representative of [REDACTED]

On March 7, 2013, [REDACTED] responded to the AAO's February 5, 2013 NOID/RFE. She stated that, when she signed the labor certification and the Form I-140, she was the original owner of [REDACTED] but that she sold the lease to [REDACTED] around March of 2008. [REDACTED] stated that [REDACTED] signed the Form I-290B as a representative of [REDACTED]. [REDACTED] indicated that [REDACTED] could not keep up financially with the business and signed the lease back over to her around February 24, 2010. [REDACTED] admitted that she could not demonstrate that [REDACTED] is an authorized representative of [REDACTED] but that he was the owner of [REDACTED] at the time that he signed the Form I-290B.

[REDACTED] submitted a copy of the agreement to transfer [REDACTED] back from [REDACTED] to [REDACTED] on February 24, 2010. The AAO notes that this arrangement dated back to December 22, 2008, not to around March 2008 as [REDACTED] had indicated. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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.

The transfer agreement indicates that [REDACTED] was the chief executive officer and secretary of [REDACTED]

As noted by the director in his March 30, 2009 decision, the petitioner failed to submit any evidence of its ability to pay the proffered wage. The AAO finds that the petitioner has failed to establish its ability to pay the beneficiary the proffered wage of \$50,544.00 (\$18.00 per hour, 54 hours per week) from the priority date of April 30, 2001 onwards. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The petitioner submitted copies of Internal Revenue Service (IRS) Forms W-2 issued by [REDACTED] in 2007 and by [REDACTED] in 2008 to the beneficiary in the respective amounts of \$33,150.00 and \$25,640.00.

The AAO notes that the FEIN listed on the Form I-140 for [REDACTED] is [REDACTED] but the FEIN listed on the 2008 W-2 is [REDACTED]. Although the FEIN on the 2007 Form W-2 matched the Form I-140, this Form W-2 was issued by [REDACTED]. Nothing in the record establishes a relationship between the petitioner and [REDACTED]

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.

See *Matter of Ho*, 19 I&N Dec. at 591-592.

Further, the beneficiary's Social Security Number (SSN) listed on both Forms W-2 is different than the beneficiary's SSN listed on the beneficiary's 2007 and 2008 personal income tax statements that the petitioner submitted.¹ Accordingly, the AAO will not consider the Forms W-2 as evidence of wages paid by the petitioner to the beneficiary.

¹ Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding SSN fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with SSN fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

The petitioner failed to submit its annual reports, federal tax returns, or audited financial statements for 2001 onwards. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Also noted by the director, the petitioner failed to submit any evidence of the beneficiary's qualifications for the offered position. The AAO finds that the petitioner has still not established that the beneficiary is qualified for the offered position. 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'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 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 *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).

According to the plain terms of the labor certification, the applicant must have six years of grade school, six years of high school, and two years of experience in the job offered as a car wash manager as of the April 30, 2001 priority date. The Form ETA 750 does not allow for experience in any related occupation.

The regulation at 8 C.F.R. § 204.5(l)(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 beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he worked for [REDACTED] in La Habra, California as an auto detailer from October 1998 through March 1999, for [REDACTED] in La Palma, California as an assisting manager from March 1999 through February 2004, and for the petitioner in Cypress, California as a car wash manager from May 2004 to the present.

The record contains a signed letter dated May 21, 2009 from [REDACTED] the former manager of [REDACTED]. The letter is not on [REDACTED] letterhead and was not issued directly from that employer. The letter also does not state whether the beneficiary's employment there was full-time.² The AAO highlights that the letter states that the beneficiary worked for that entity as an assisting manager from March 1999 through February 2004, not as a car wash manager as required by the terms of the labor certification.

The record indicates that the beneficiary worked for the petitioner as a car wash manager since May 2004. The AAO notes that this experience was gained after April 30, 2001 and therefore does not qualify as experience gained before the priority date as required by the terms of the labor certification.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

ORDER: The appeal is dismissed.

² The petitioner submitted pay stubs issued to the beneficiary by [REDACTED] and its claimed predecessor, [REDACTED] to substantiate the beneficiary's claimed experience. The AAO notes that the pay stub dated February 17, 2000 covering the period January 31, 2000 to February 13, 2000 lists only 68 hours worked by the beneficiary in a two-week period, indicating that the beneficiary's employment may have been less than full-time.