



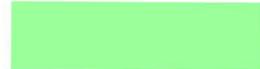
U.S. Citizenship
and Immigration
Services

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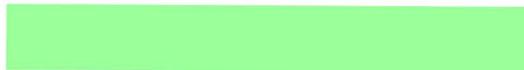


DATE: JUN 24 2013 OFFICE: TEXAS SERVICE CENTER

FILE:

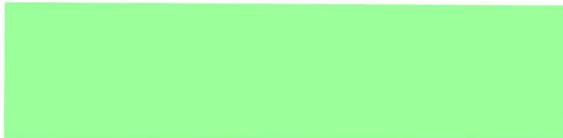


IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act (the 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 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 dismissed.

The petitioner describes itself as a retail store. It seeks to permanently employ the beneficiary in the United States as a manager. The petitioner requests classification of the beneficiary as a 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).¹ The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is October 1, 2004. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to demonstrate that it has the continuing ability to pay the proffered wage as of the priority date onward and that the beneficiary meets the minimum requirements set forth on the labor certification. The director also concluded that the petitioner and the beneficiary made willful misrepresentations on the labor certification and submitted a fraudulent document in support of the beneficiary's asserted experience, and invalidated the labor certification.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. 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.

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.² The AAO notes that counsel indicated on the Form I-290B, Notice of Appeal or Motion, that brief and additional evidence would be submitted to the AAO within 30 days of the filing of the appeal. As of the date of this decision, no brief or additional evidence is received by the AAO; and therefore, the record is considered complete.

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). Since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel asserts that the director erred in concluding that the petitioner could not have employed the beneficiary prior to its formal registration. Counsel further asserts that the director also erred in determining that the beneficiary does not have a true intent to work for the petitioner because the beneficiary owns his own dry cleaning business.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on October 1, 2004, the priority date, which is the date the Form ETA 750 was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d). The proffered wage as stated on the Form ETA 750 is \$40,857 per year.

With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

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 record before the director closed on January 18, 2012 with the receipt by the director of the petitioner's response to his notice of intent to dismiss. The petitioner's 2011 tax return was not yet due; therefore, the petitioner's 2010 tax return is the latest return available. On the petition, the petitioner claimed to have been established in 1999, to employ four employees, to have \$2.2 million in gross annual income, and \$19,007 in net annual income.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The record does not demonstrate that the beneficiary has ever been employed by the petitioner.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos*

Restaurant Corp. v. Sava, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. 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).

The evidence in the record shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1999 and to employ four workers. In support of its ability to pay the proffered wage, the petitioner submits its corporate tax returns for 2004-2005 and 2008-2010. The AAO notes that the petitioner has not submitted its 2006 and 2007 tax returns. The following income figures are shown on the tax returns:

Year	Net Income ³
2004	\$38,944
2005	\$19,007
2006	Data not provided
2007	Data not provided
2008	\$46,468
2009	\$-19,184
2010	\$-79,740

Thus, with the exception of 2008, the petitioner did not have sufficient net income to pay the proffered wage of \$40,857.⁴

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are

³ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on May 13, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

⁴ Because the petitioner failed to submit evidence establishing its ability to pay the proffered wage in 2006 and 2007, the AAO concludes that the petitioner did not have the net income to pay the proffered wage in 2006 and 2007.

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets"

shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

Year	Year-end Current Assets	Year-end Current Liabilities	Net Current Assets
2004	\$28,482	\$4,480	\$24,002
2005	\$55,935	\$13,784	\$42,151
2006	Data not provided		
2007	Data not provided		
2009	\$60,229	\$3,018	\$57,211
2010	\$20,632	\$2,645	\$17,987

The petitioner did not have sufficient net current assets to pay the proffered wage of \$40,857 in 2004, 2006, 2007, and 2010.

However, USCIS may also 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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,

consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.

Furthermore, the sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on tax returns. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

Unlike *Sonegawa*, the petitioner in the instant case has failed to demonstrate its ability to pay the proffered wage for several years. Furthermore, the evidence in the record does not demonstrate the petitioner's historical growth since its inception, nor does it demonstrate its reputation in the industry. In addition, the record is silent regarding whether the sole shareholder would forego his officer compensation in order to pay the proffered wage. Moreover, the AAO notes that on appeal, petitioner makes no assertions regarding its ability to pay the proffered wage. Considering the totality of the circumstances, the petitioner fails to demonstrate that it had the continuing ability to pay the beneficiary from the priority date onward.

The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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). 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).

The Form ETA 750, items 14 and 15, set forth the minimum education, training, and experience that a beneficiary must have for the position of a manager. Specifically, in the instant case, the petitioner indicated that the proffered position requires a minimum of two years of experience in the job offered. Item 13 of the Form ETA 750 lists the following duties: "Oversee retail operations. Provide customer service. Hire and train employees. Prepare deposit and cash reconciliation. Formulate pricing policies. Maintain inventory and equipment."

The petitioner indicated on the labor certification that the beneficiary qualifies for the offered position based on his experience as a manager at [REDACTED] from June 1993 to August 1995. The beneficiary signed the labor certification on July 12, 2007, under penalty of perjury, declaring that the contents are true and correct.

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).

The record contains an experience letter from [REDACTED] former director at [REDACTED] indicating that the beneficiary was employed as a manager from July 2002 to September 2004. The AAO notes that the petitioner did not list [REDACTED] on the labor certification as one of the beneficiary's employers. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's ETA Form 750B, lessens the credibility of the evidence and facts asserted. The AAO further notes that according to the labor certification, [REDACTED] the beneficiary's brother and the original beneficiary of the labor certification, was employed by [REDACTED] from July 2002 at least until the day [REDACTED] signed the labor certification on September 21, 2004.

The petitioner submits no experience letter from [REDACTED], the employer that is listed on the labor certification. Furthermore, the petitioner makes no assertions and submits no evidence on appeal regarding the beneficiary's qualifications. Therefore, the AAO finds that the petitioner has failed to demonstrate that the beneficiary meets the minimum requirements as set forth on the labor certification.

With regards to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of DHS has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho* at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of DHS that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an

alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.

It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud or a material misrepresentation finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

Section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. at 447. Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the

misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Furthermore, a finding of willful misrepresentation may lead to invalidation of the Form ETA 750. See 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

In examining the evidence of record, we find that the petitioner and the beneficiary willfully misrepresented the beneficiary's experience on the Form ETA 750 because the beneficiary's purported former employer [REDACTED] was not in existence as a company during the beneficiary's claimed employment dates. On appeal, counsel asserts that the fact that the company was not registered does not mean the company was not operating and employing the beneficiary. However, the petitioner submits no evidence in support of counsel's assertions. Without documentary evidence, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

We also find that the experience letter submitted in support of the labor certification, more likely than not, is fraudulently manufactured. The AAO notes that the fraudulent nature of the experience letter has not been disputed by the petitioner on appeal, nor has any evidence been submitted to establish its authenticity. By misrepresenting the beneficiary's experience to qualify for the offered position, both the petitioner and the beneficiary would seek to procure a benefit provided under the Act through fraud or willful misrepresentation of a material fact. Any finding of fraud or willful misrepresentation as a result shall be considered in any future proceeding where admissibility is an issue. Based on the finding of fraud or willful misrepresentation of the beneficiary's experience, the AAO affirms the director's invalidation of the labor certification.

In summary, the AAO concludes that the petitioner has failed to demonstrate that the beneficiary qualifies for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act. The petitioner also has failed to demonstrate that it has the ability to pay the beneficiary the proffered wage from the priority date onward. The AAO also finds that the petitioner and the beneficiary have made willful misrepresentation on the labor certification and have submitted, more likely

than not, a fraudulent document in support of the beneficiary's experience; therefore, the labor certification is invalidated.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition remains denied and the labor certification remains invalidated.