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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

[Redacted]

DATE: **MAY 03 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,

*Rachel DiToro*  
for

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The visa petition was denied by the Director, Texas Service Center (director) and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is again before the AAO as a motion to reopen and a motion to reconsider. The motion to reopen will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner indicates that it is a cheese factory. It seeks to employ the beneficiary permanently in the United States as a cheese maker. The director determined that the petitioner had not submitted any initial evidence required by regulation or by the instructions on the form and denied the petition on this basis. On appeal, the AAO found that the petitioner had failed to establish its ability to pay the proffered wage pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), also concluding that the record did not establish that the beneficiary was qualified for the offered position.

On motion, counsel for the petitioner submits documentation of the wages the petitioner has paid the beneficiary since 2005; its bank statements for the period 2001 through 2011; evidence of immigration fraud on the part of [REDACTED] the business that assisted the petitioner in filing the Form I-140, Immigrant Petition for Alien Worker; and statements from the petitioner and beneficiary.

The requirements for motions to reopen and reconsider are found at 8 C.F.R. §§ 103.5(a)(2) and (3):

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence . . . .

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The record reflects that the motion to reopen and the motion to reconsider are properly filed and timely. Although the petitioner has not met the requirements for a motion to reconsider, it has satisfied those for a motion to reopen, submitting new facts with supporting documentation not previously provided. Therefore, the motion is granted and the AAO will reopen the matter.

The first issue before us is whether the petitioner has established its continuing ability to pay the offered wage.

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 . . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

As fully discussed on appeal, United States Citizenship and Immigration Services (USCIS) in determining a petitioner's ability to pay first examines whether the petitioner has employed and paid the beneficiary during the required period. In such cases, if the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during this period, that evidence is considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS examines the net income figure reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6<sup>th</sup> Cir. Filed Nov. 10, 2011).<sup>1</sup> If the petitioner's net income during the period time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where an employer's net income or net current assets do not establish a consistent ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of a petitioner's business activities. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

On appeal, the AAO determined that the record did not establish that the petitioner had the continuing ability to pay the proffered wage of \$20,147.40 per year as of April 30, 2001, the date on which the ETA Form 750, Application for Alien Employment Certification, had been accepted for processing by the Department of Labor (DOL), through 2007, the latest tax return available on the date the record before the director closed. The petitioner was found to have submitted no evidence that it had employed the beneficiary at a wage equal to or in excess of \$20,147.40 per year and its submission of its federal tax returns and banking statements did not establish that its net income or net current assets had exceeded the proffered wage for the period 2001 through 2007. The AAO also

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<sup>1</sup> 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983).

concluded that the petitioner had failed, pursuant to *Matter of Sonogawa*, to submit sufficient evidence to establish that the totality of its circumstances demonstrated its ability to pay the proffered wage.

On motion, the petitioner submits additional financial evidence to establish its ability to pay the proffered wage, including copies of Form 1099-MISCs, Miscellaneous Income, for the beneficiary for the years 2005-2006 and 2008-2011, and its bank statements for the period 2001 through 2011. Counsel for the petitioner states that it is his understanding that the petitioner is not currently in possession of any income tax records for years prior to 2005 as it has operated under the understanding that it is necessary to retain income tax records for no more than seven years. He contends, however, that the submitted bank statements demonstrate that, since 2001, the petitioner has had adequate cash flow to employ the beneficiary in the offered position.

The AAO now turns to a consideration of whether, when added to the financial evidence previously submitted by the petitioner, the documentation provided in support of the motion establishes the petitioner's ability to pay the proffered wage.

The Form 1099s submitted on motion establish that the petitioner employed the beneficiary in 2005-2006 and 2008-2011 and paid him as follows:

- 2005: \$19,752.00
- 2006: \$19,584.00
- 2008: \$15,000.00
- 2009: \$20,060.00
- 2010: \$20,000.00
- 2011: \$20,400.00

However, to establish its ability to pay the proffered wage based on its employment of the beneficiary, the petitioner must establish that it has paid the beneficiary equal to or in excess of the proffered wage beginning as of April 30, 2001, the date on which the Form ETA 750 was filed with DOL. Here, the petitioner has submitted no evidence to establish its employment of the beneficiary prior to 2005 or during 2007. Moreover, the submitted Form 1099s indicate that 2011 is the only year in which the petitioner paid the beneficiary at or in excess of the proffered wage. Accordingly, the petitioner has not established its ability to pay the proffered wage based on its employment of the beneficiary.<sup>2</sup>

On motion, the petitioner has submitted copies of its bank statements from 2001 through 2011 in lieu

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<sup>2</sup> At the time of the appeal, the AAO noted that the petitioner had filed a Form I-140 for another individual that was approved in April 2005. The AAO indicated that the petitioner was also required to establish that it had the ability to pay the proffered wage for this individual as of the priority date of the petition benefiting him until such time as he had adjusted status. As a review of USCIS data bases indicates that the Form I-140 beneficiary approved in 2005 became a lawful permanent resident on May 31, 2006, the petitioner is no longer subject to this requirement.

of tax records, which counsel indicates it does not possess for the period 2001 through 2004. However, as indicated on appeal, a petitioner may not rely on bank statements to establish its ability to pay the proffered wage. Such statements are not among the three types of documentation required by 8 C.F.R. § 204.5(g)(2) to establish ability to pay, i.e., copies of annual reports, federal tax returns, or audited financial statements. Although the regulation allows additional material to be submitted in "appropriate cases," it may not be substituted for the evidence required by regulation. Moreover, bank statements reflect the amount in an account on a given date and, therefore, are not proof of a sustainable ability to pay the proffered wage. Further, no evidence has been provided to demonstrate that the funds reported on the petitioner's bank statements reflect additional available funds that would not be indicated on its tax returns. Accordingly, the AAO does not find the petitioner's submission of its bank statements from 2001 through 2011 to overcome our determination on appeal that the financial documentation submitted for the record does not establish that the petitioner had the net income or net current assets to pay the proffered wage during the required period.<sup>3</sup>

For these same reasons, the petitioner's bank statements do not support a finding, pursuant to *Sonegawa*, that the totality of the petitioner's circumstances establish its ability to pay the proffered wage. In the absence of financial records that establish the petitioner's financial history since its opening in 1999, i.e., annual reports, federal tax records or audited financial statements, the petitioner cannot demonstrate that the totality of its circumstances demonstrate its ability to pay the proffered wage.

Based on the record before us, the AAO finds that the petitioner on motion has not established its ability to pay the proffered wage as of the April 30, 2001 priority date of the Form ETA 750.

The petitioner also submits evidence to overcome the AAO's determination that the petitioner has failed to demonstrate that the beneficiary is qualified for the offered position of cheese maker.

On appeal, the AAO noted that the Form ETA 750 requires the beneficiary to have two years of experience in the job of cheese maker and that it indicates that the beneficiary acquired this experience while employed by [REDACTED] from November 1994 to May 1996 and his employment with the petitioner, which began in January 2001. However, the record was also found to include a May 15, 2003 letter from [REDACTED] the owner of [REDACTED] who states that the beneficiary was employed by his company from January 1994 until May 1996. Based on this inconsistency between the Form ETA 750 and the May 15, 2003 letter from Mr. [REDACTED] which was not explained by the petitioner, the AAO found that, pursuant to *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988), the record did not establish that the beneficiary possessed the experience required by the Form ETA 750.

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<sup>3</sup> Although not acknowledged in our March 27, 2012 decision, the record contains evidence that the Form I-140 filed by the petitioner on December 24, 2003 was supported by federal tax returns for 2001 and 2002. The petitioner's 2001 tax return indicated net income of (\$15,940) and net current assets of (\$27,842); its 2002 return reported net income of (\$3,717) and net current assets of (\$13,780), further supporting the AAO's conclusion on appeal that the record did not establish the petitioner's ability to pay the proffered wage.

On motion, counsel states that the petitioner and beneficiary are the victims of ineffective assistance of counsel, as they relied on [REDACTED] a New York business that fraudulently claimed to be authorized to practice immigration law. Counsel asserts that the beneficiary was not aware of the May 15, 2003 letter until he, counsel, presented it to him and that the beneficiary believes that it was produced by [REDACTED]. Counsel also states that the beneficiary has informed him that he never claimed to have worked for [REDACTED] for two years. Counsel further notes that the Form G-325A, Biographic Information, for the beneficiary also reflects the same dates of employment with [REDACTED] as the Form ETA 750 and, further, indicates that the beneficiary was born on February 20, 1969 rather than February 20, 1976, which is his correct date of birth.

In support of his assertions, counsel has provided a printout of an online article entitled, [REDACTED] [REDACTED] which indicates that, as of August 17, 2010, [REDACTED] and a [REDACTED] its owner, have been permanently barred from operating any immigration services business. Also included in the record is a July 21, 2010 Assurance of Discontinuance order for [REDACTED] [REDACTED] which indicates that [REDACTED] provided unauthorized legal assistance in immigration-related matters and that [REDACTED] engaged in the unauthorized practice of law. Counsel also submits a copy of the decision in *Lopez v. INS*, 184 F.3d 1097 (9<sup>th</sup> Cir. 1999) in which the U.S. Court of Appeals for the Ninth Circuit (9<sup>th</sup> Cir.) considered a case involving a petitioner who had failed to file a timely motion to reopen in removal proceedings because of the ineffective assistance he received from a notary who had posed as an attorney.

The AAO acknowledges the actions taken against [REDACTED] by the State of New York, the involvement of [REDACTED] in the applicant's various filings and the signature of a [REDACTED] on the Form I-140 filed on November 19, 2007 that indicates she prepared the form. However, the AAO also observes that when the Form ETA 750 was filed on April 30, 2001 and when the May 15, 2003 letter was submitted in support of the first Form I-140 filed by the petitioner, the beneficiary was represented by [REDACTED] who, although affiliated with [REDACTED] was then and is now an attorney licensed to practice law in New York.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

*Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff d*, 857 F.2d 10 (1st Cir. 1988).

Here, although counsel indicates that the petitioner and beneficiary have been the victims of ineffective assistance of counsel, the AAO finds no evidence that the requirements of *Matter of Lozada* have been met with regard to [REDACTED] the beneficiary's attorney of record at the time the Form ETA 750 was filed with the DOL and the May 15, 2003 letter submitted to USCIS. Accordingly, the petitioner has not established a claim based upon ineffective assistance of counsel.

The AAO also notes that, while the beneficiary disavows any knowledge of the claim made regarding his employment by [REDACTED] he signed both the ETA Form 750 and the G-325A on which this employment is reflected.<sup>4</sup> Although in an April 23, 2012 affidavit, the beneficiary states that his lack of knowledge and education led him to sign blank documents and documents with the wrong information, his failure to inform himself of the contents of the paperwork or the information being submitted does not absolve him of responsibility for the content of the Form ETA 750 or the materials submitted in support of the Form I-140. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents).

In evaluating a beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. It 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 Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). To be eligible for approval, a beneficiary must have 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 (Act. Reg. Com. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The minimum required education, training, experience and special requirements for the offered position are set forth in Part , sections 14 and 15 of ETA Form 750.

Here Part A, section 14 of the Form ETA 750, which was accepted for processing by DOL on April 30, 2001, indicates that the position requires two years of experience in the job offered, i.e., as a cheese maker. On motion, counsel for the petitioner now indicates that the employment experience reflected in Part A, section 15 of the ETA Form 750 relating to [REDACTED] was fabricated by [REDACTED] and that the beneficiary's two years of experience were, instead, gained while learning to make cheese under the supervision of his friend [REDACTED] beginning in January 1999, and, later, under the tutelage of cheese maker experts [REDACTED] the petitioner's owner. A letter from [REDACTED] dated April 23 2012, indicates that he met the beneficiary in June 1999 and began training him to make cheese.

<sup>4</sup> The ETA Form 750 reflects two signatures from the beneficiary, including one in Part A , section 15.c, the block describing his employment experience with [REDACTED]

The Form I-140 filed by the petitioner reflects that it is seeking to employ the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 203(b)(3)(A)(i), which requires the beneficiary to have at least two years of training or experience.

To document that training or experience, the regulation at 8 C.F.R. § 204.5(I)(3) states the following requirements:

(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.

Although counsel indicates that the beneficiary has the required two years of experience based on the work he performed with his friend [REDACTED] prior to January 2001, the AAO does not find the record to support this claim.

The beneficiary's April 23, 2012 affidavit indicates that in January 1999, he began to learn about the process of cheese making from his friend [REDACTED] and that he received on-the-job training from the petitioner beginning in June 1999. The April 23, 2012 letter written by the petitioner's owner, [REDACTED] also states that as of June 1999, he began to train the beneficiary in cheese making. Mr. [REDACTED] does not indicate that the beneficiary's training had been completed when he hired the beneficiary in January 2001. Based on these statements, it appears that beginning in January 1999 and continuing through June 1999, the beneficiary was being trained to become a cheese maker, rather than performing in that capacity as counsel asserts. Accordingly, the record does not demonstrate that the beneficiary had two years of experience as a cheese maker as of April 30, 2001, the date on which the Form ETA 750 was accepted for processing by the DOL.

While USCIS regulation allows a beneficiary to qualify for a skilled worker position based on at least of two years of training or experience, the Form ETA 750 in the present case requires the beneficiary to have two years of experience as a cheese maker. It does not allow the beneficiary to qualify for the position on the basis of training and, as previously indicated, USCIS may not ignore

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the terms of a labor certification.<sup>5</sup> Therefore, as the record does not establish that the beneficiary had two years of experience as a cheese maker as of the April 30, 2001 priority date, the petitioner has not demonstrated that he is qualified to perform the duties of the offered position.

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 sustained that burden. Accordingly, the prior decision of the AAO will be affirmed.

**ORDER:** The motion to reopen is granted and the decision of the AAO dated March 27, 2012 is affirmed. The petition remains denied.

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<sup>5</sup> Even if the Form ETA 750 did indicate that two years of training were sufficient to qualify the beneficiary for the offered position, the record would not demonstrate that the beneficiary had the two years of training as it does not contain letters from the three individuals who provided his training, giving their names, addresses, titles and a description of the training he received by the beneficiary, as required by 8 C.F.R. ^ 204.5(l)(3)(ii).