

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

(b)(6)

DATE: **MAY 17 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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,

Rachel Nitro

for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), revoked the approval of the employment-based immigrant visa petition. The petitioner has appealed the director's decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a Japanese restaurant. It seeks to permanently employ the beneficiary in the United States as a Japanese cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date DOL accepted the labor certification for processing, is March 3, 2003. *See* 8 C.F.R. § 204.5(d).

This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by DOL. However, on May 17, 2007, 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 date of the instant petition, July 13, 2007, predates the effective date of the final rule, the requested substitution will be permitted.

In his decision revoking the approval of the Form I-140, Immigrant Petition for Alien Worker, the director found that the substituted beneficiary had not possessed the minimum two years of experience required to perform the offered position as of the priority date. On appeal, counsel asserts that United States Citizenship and Immigration Services (USCIS) based its revocation of the Form I-140 on collateral matters that do not establish the beneficiary lacks the necessary experience.

The record shows that the appeal is properly filed 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.¹

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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

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 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 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). 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 requirements for an offered position are set forth in Part A.14. and Part A.15. of the Form ETA 750.

In the instant case, Part A.14. and Part A.15. of the Form ETA 750 reflect the following minimum requirements:

EDUCATION

Grade School: Not required.

High School: Not required.

College: Not required.

College Degree Required: Not required

Major Field of Study: N/A

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered.

OTHER SPECIAL REQUIREMENTS: None.

Part B of the Form ETA 750, Statement of Qualifications of Alien, indicates that the beneficiary qualifies for the offered position based on his experience as a Japanese cook with the [REDACTED] Taiwan from January 3, 2002 until February 15, 2004. 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 record contains a translated August 20, 2004 statement from [REDACTED] Director of the [REDACTED] [REDACTED] stating that the restaurant employed the beneficiary as “a cook for lunch and Japanese food” from January 3, 2002 until February 15, 2004. While the AAO notes that the statement indicates that the beneficiary was employed as a Japanese cook for two years, it also reflects that only 13 months of this experience was acquired prior to the March 3, 2003 priority date of the Form ETA 750.

In his June 1, 2010 revocation of the Form I-140, the director indicated that at the time of his consular visa interview, the beneficiary’s claimed employment as a cook for [REDACTED] could not be verified as it appeared the restaurant no longer existed. The director also noted that the beneficiary had claimed employment experience from June 1, 2007 to January 31, 2009 with the [REDACTED], but that it had been determined that the [REDACTED] was not a legally-registered restaurant and that an interview with the owner of the [REDACTED] [REDACTED] revealed that he had paid the beneficiary in cash and could not provide any “official evidence” of the beneficiary’s employment. The director further indicated that the beneficiary’s official labor insurance record showed that he had been employed with security companies from October 7, 2002 to March 3, 2004. He also stated that the beneficiary’s claim to have engaged in practical training as a chef at the [REDACTED] for two or three days a week from January 2002 to February 2004 was not supported by the record. The director revoked the approval of the Form I-140 based on what he found to be a lack of credible or verifiable evidence of the beneficiary’s work experience as a cook and his determination that the work experience claimed by the beneficiary had not been completed by the March 3, 2003 priority date of the labor certification.

On appeal, counsel asserts that the beneficiary should not be punished because the two restaurants at which he worked no longer exist and cannot confirm his employment or because the [REDACTED] [REDACTED] was not legally registered. He also contends that the beneficiary’s employment with a security company did not preclude him from having other employment and that the beneficiary has explained that he worked at the [REDACTED] two to three times per week over the course of two years.² The AAO finds, however, that even if counsel’s claims were persuasive or the record reliably documented the employment and training claimed by the beneficiary, the beneficiary would not be eligible for the offered position.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the date it is filed with DOL, which in the present case was March 3, 2003. 8 C.F.R. § 103.2(b)(1), (12). The substitution of a beneficiary, as in this case, does not result in the adjustment of the priority date to a date on which the new beneficiary is able to meet the requirements of the labor certification. Therefore, as the two years of work experience the

² On January 31, 2013, the AAO issued a Notice of Intent to Dismiss and Request for Evidence to the petitioner, providing it with an opportunity to submit additional evidence of the beneficiary’s qualifying experience for the offered position. The petitioner’s March 19, 2013 response did not provide any additional evidence regarding the beneficiary’s prior employment.

beneficiary claims in Part B of the Form ETA 750 did not occur prior to the March 3, 2003 filing of the Form ETA 750, he is not qualified for the offered position and would not be qualified even if this work experience were reliably documented in the record. For the same reason, the beneficiary's claim of employment with the [REDACTED] from June 1, 2007 to January 31, 2009 is not relevant to his eligibility for the offered position. Although AAO notes the director's findings regarding the restaurant's legal status and the absence of any documentation of the beneficiary's experience, it is not necessary to address these issues here as the beneficiary's claimed employment with the [REDACTED] occurred after the March 3, 2003 priority date.

Therefore, the AAO affirms the director's decision that the petitioner has failed to establish that the beneficiary met the minimum requirements of the offered position set forth in the Form ETA 750 as of the March 3, 2003 priority date. Based on the record, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Beyond the decision of the director,³ the petitioner has also failed to establish its continuing ability to pay the proffered wage pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), which 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.

In its January 31, 2013 Notice of Intent to Dismiss and Request for Evidence, the AAO asked the petitioner to submit its federal tax returns, audited financial statements or annual reports for the years 2005 through 2011 to establish its ability to pay the beneficiary the proffered annual wage of \$22,500.00 as of the March 3, 2003 priority date. On March 19, 2013, the petitioner responded, submitting its tax returns for the years 2007 through 2011.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL and whether it continues to do so. If the petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence is

³ 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).

considered *prima facie* proof of the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). 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 then 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 (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).⁴ If the petitioner's net income during the required 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 a petitioner's net income or net current assets do not establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its business activities. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances, USCIS may look at such factors as the number of years it 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.

In the present case, the petitioner has not employed the beneficiary and, therefore, cannot establish its ability to pay the proffered wage based on the beneficiary's actual wages. It has also failed to submit tax returns or any of the other financial documentation identified by the regulation at 8 C.F.R. § 204.5(g)(2) for the years 2005 and 2006, preventing the AAO from determining whether its annual net income and net current assets for the period 2003 through 2011 demonstrate its ability to pay the proffered wage. The record also lacks the evidence necessary to establish that the totality of the petitioner's circumstances demonstrate its ability to pay. Accordingly, the petitioner has failed to prove by a preponderance of evidence its ability to pay the proffered wage as of March 3, 2003, the date on which the Form ETA 750 was filed with DOL.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

⁴ 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).