

(b)(6)

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 23 2013** Office: **TEXAS SERVICE CENTER**

FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker 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.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center (“the director”), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a church. It intends to employ the beneficiary permanently in the United States as a food supervisor/cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, certified by the United States Department of Labor (DOL). The director denied the petition, finding that the petition was filed under a wrong category. The director determined that the beneficiary could not be found qualified for classification as a skilled worker when the job offered only required the applicants to have one year of work experience in the job offered. The director also determined that the petitioner failed to establish that it had the continuing ability to pay the proffered wage from the priority date.

As set forth in the director’s July 5, 2012 denial, the issues in this case are whether or not the petitioner has established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker, and whether the petitioner has demonstrated the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives her lawful permanent residence.

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), and considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 the regulation at 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 AAO notes that the position as stated on the certified ETA Form 9089 requires the beneficiary to have at least 12 months (one year) of work experience in the job offered or in the alternate occupation as a chef. The petitioner, however, indicated on Part 2 of the Form I-140, that it was filing the petition for a skilled worker (requiring at least two years of specialized training or experience).

On appeal, counsel for the petitioner states that the Form I-140 petition erroneously indicated the skilled worker category and that the correct designation should be other worker (requiring less than two years of training or experience).

The regulation at 8 C.F.R. § 204.5(l)(4), in pertinent part, provides:

Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to re-adjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

As to the petitioner's ability to pay, 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 either the Form ETA 750 (Application for Alien Employment Certification) or the ETA Form 9089 (Application for Permanent Employment Certification) was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the priority date is April 30, 2001.² The offered wage as stated on the ETA Form 9089 is \$47,133 per year. As noted above, the position requires at least one year of work experience in the job offered or in the alternate occupation as a chef. Further, consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977), the petitioner must also demonstrate that, as of the priority date, the beneficiary had the qualifications stated on either its Form ETA 750 or ETA Form 9089 as certified by the DOL and submitted with the instant petition.

To demonstrate that the petitioner has the continuing ability to pay the proffered wage, counsel submitted copies of its profit and loss statements for the years 2009 through 2011. The director stated that USCIS could not accept unaudited financial statements as evidence of the petitioner's ability to pay.

We agree. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements *must* be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. An unaudited financial statement consists of the unsupported assertions of management. In this case, none of the profit and loss statements submitted is audited. Therefore, the AAO declines to accept any of the profit and loss statements submitted as evidence of the petitioner's ability to pay. In addition, the petitioner has not submitted any evidence showing that it has the ability to pay the proffered wage from April 30, 2001.

We also note that the record contains no evidence demonstrating that the beneficiary had the requisite work experience in the job offered or in the alternate occupation as a chef before the priority date (April 30, 2001). On the ETA Form 9089 signed by the petitioner and the beneficiary on March 24, 2012, the petitioner represented that the beneficiary worked as a cook at [REDACTED] from April 1, 2000 to November 30, 2000. Submitted along with the certified ETA Form 9089 and the Form I-140 petition was a copy of the beneficiary's Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement issued by [REDACTED] for 2000.

The regulations at 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(A) provide, "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."

Neither the beneficiary nor the petitioner has submitted any letter of employment verification establishing the beneficiary's qualifications for the job offered.

² The AAO notes that the Form ETA 9089 was electronically submitted to and certified by DOL on March 23, 2012. However, the petitioner elected to utilize the filing date from a previously submitted Application for Alien Employment Certification (Form ETA 750), which is April 30, 2001. Therefore, April 30, 2001 is the priority date in this case.

In summary, we agree with the decision of the director to dismiss the petition for the reasons stated above, with each considered as an independent and alternative basis for the decision. 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.