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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

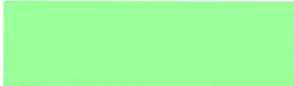


U.S. Citizenship
and Immigration
Services

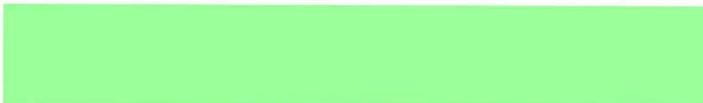


DATE: **MAY 24 2013**

OFFICE: TEXAS SERVICE CENTER

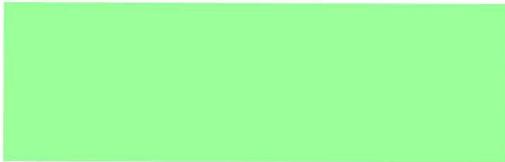
FILE: 

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,

 for
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 convenience store. It seeks to permanently employ the beneficiary in the United States as a chief cashier. 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).¹

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). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 27, 2004. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the record does not support a finding that the beneficiary possessed the minimum experience required to perform the offered position by the priority date. The director also found that the petitioner did not establish it had the continued ability to pay the proffered wage from the priority date onward, in particular the petitioner failed to show it could pay the proffered wage in 2007.

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.²

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).

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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).

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). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EXPERIENCE: Two (2) years in the job offered or in the related occupation of managerial or supervisory experience

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 director noted several inconsistencies in the record, which called into question the veracity of the information in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

The Form ETA 750B states that the beneficiary was a sales supervisor for [REDACTED] Pakistan, from March 1998 to August 2000. To document this experience, the petitioner submitted a letter dated February 2, 2004 from that employer. The director issued a request for evidence (RFE) asking for evidence that the beneficiary’s previous employer was in fact an operating business (such as government records or preprinted letterhead), and whether

the beneficiary had in fact been a sales supervisor during the dates claimed. In response to the RFE, the petitioner submitted a letter from [REDACTED] signing for [REDACTED] as the Chief Executive. The letter stated that the beneficiary was employed as a sales supervisor from March 17, 1998 through August 15, 2000.

The director issued a Notice of Intent to Deny (NOID) the petition, citing inconsistencies in the record which caused doubts as to the veracity of the evidence. The director noted that the purported response from [REDACTED] owner, [REDACTED] bore a signature which was noticeably different from prior correspondence. The director also noted that the beneficiary would have been sixteen years old at the time he was elevated to sales supervisor.

In response to the NOID, the petitioner provided a new letter from the employer wherein [REDACTED] explained at length that his business was very small, and could not justify large expenses (such as preprinted letterhead) that would establish that it is in fact an operating business. Two photographs of what the petitioner claims to be [REDACTED] were submitted into the record. These photos do show a very small store which appears to accommodate only two employees at a time. From the picture, it appears that customers interact with the employees at a counter at the front of the store, and do not have access to the shelves behind the counter. The pictures include a sign written in a language other than English. Although a letter accompanying the pictures claims the signs give the name of the business [REDACTED] the translation of the signs in the photographs do not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

With regard to the discrepant letters, [REDACTED] explained that the reason the two signatures appeared so different is that one of his accountants, who was familiar with his business dealings, signed the letter for him while [REDACTED] was out of town.

[REDACTED] went on to state that in Pakistan it is not uncommon for a young person, like the beneficiary, to be made a sales supervisor at such a young age.

[REDACTED] response creates more questions. Although [REDACTED] claims that the beneficiary's duties included training new employees and managing the "sales department," he does not provide details explaining how such a small operation would have need of such a responsible employee. Furthermore, he does not explain how often the store had turnover of employees who would require training, how old these employees were, and how many people the sales department included. [REDACTED]. [REDACTED] repeatedly explains how small his business is, yet at the same time explains the large responsibility and burdens the beneficiary's position included. From the record it is not clear how much relevant experience the beneficiary actually acquired. Furthermore, [REDACTED] failed to explain

why such a small operation would have multiple accountants; and why an accountant (instead of another employee) would draft and sign an employment verification letter on his behalf.

The director also noted that the beneficiary's employment history in the United States contained inconsistencies. The beneficiary is the subject of two employment based immigrant visa petitions. The instant petition was filed on September 18, 2007, and is supported by a labor certification with the priority date of April 27, 2004. On the labor certification, the beneficiary listed his employment experience, and included his job with [REDACTED] (March 1998 to August 2000); and, stated he was self-employed doing odd jobs from May 2001 to the "present." The beneficiary signed this form under penalty of perjury on March 23, 2004, stating that his responses were true and complete.

Along with the instant petition, the beneficiary filed a Form I-485, Application to Register Permanent Residence or Adjust Status. With that form the beneficiary was required to submit a Form G-325A, Biographic Information. The beneficiary completed and signed this form on May 21, 2007. On this form, the beneficiary stated that he had lived in Richmond, Virginia, from August 2002 to the date of signature in 2007. The beneficiary further stated that his employment had been limited to [REDACTED] from 1998 to 2000 and self-employment/odd jobs from May 2001 to the date of signature in 2007. This information mirrors the information on the related application for labor certification which supports the instant petition.

However, a second employment based immigrant visa petition was filed on April 19, 2006, and is supported by a labor certification with a priority date of September 6, 2005. Unlike the instant petition, which seeks to employ the beneficiary as a chief cashier, the other petition sought to employ the beneficiary as an Indian cook. On the labor certification the beneficiary claimed the following experience: [REDACTED] North Carolina (August 2002 through September 2004); and [REDACTED] (March 1998 through August 2000). The beneficiary signed the labor certification on November 21, 2006, under penalty of perjury attesting the information was true and correct. An employment verification letter from [REDACTED] was included with that petition which states the beneficiary worked as an Indian cook in [REDACTED] North Carolina during the dates claimed by the beneficiary.

We note that the two petitions, two labor certifications and the application to adjust status were handled by the same attorney.

The director noted that the experience and residences claimed by the beneficiary were inconsistent. We also note that the experience letter from India Palace II is also inconsistent with the evidence related to the instant petition and labor certification.

In regards to the discrepancies between the instant petition and the subsequent petition, the beneficiary provided an affidavit which states: "I have not provided anything contradictory regarding my employment history...I did not remember exact dates of employment that I had in the United States and did not want to give any incorrect information." We find the beneficiary's explanation

unpersuasive. First, we note that the beneficiary was assisted by the same counsel at every step of both petitions and adjustment process. Even if the beneficiary could not recall the exact dates he claims to have worked in North Carolina, he did not explain why he was unable to ask counsel to look through his records for that information. Furthermore, the beneficiary does not explain how he possessed that information in 2006, but did not have access to the information a year later. Finally, the beneficiary makes no attempt to explain why he provided inaccurate information about his residence, and instead he claimed to have lived in Richmond, Virginia continuously.

The beneficiary's letter goes on to address his employment with [REDACTED] and asserts that he assumed the title of sales supervisor before his seventeenth birthday. However, he does not explain what experience he possessed prior to that position which would have qualified him for a management role, nor does he explain precisely what his duties were, or how many people he supervised.

We find that the inconsistencies in the record render the evidence presented in the record to be unreliable. *See Matter of Ho, supra*. Consequently, the AAO affirms the director's decision that the petitioner has not established that the beneficiary possessed the minimum qualifications for the proffered job.

The director also found that the petitioner failed to establish its ability to pay the proffered wage in 2007. Petitioners bear the burden of showing a continued ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.³ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner did not establish that it employed the beneficiary or paid the beneficiary in 2007. In that year, its net income was negative, as were its net current assets. On appeal, citing to *Sonogawa*, the petitioner stated without elaboration, that the totality of the circumstances

³ *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

showed it could pay the proffered wage. However, unlike the petitioner in that case, here the petitioner has not provided evidence of a unique and unrepeatable event which adversely impacted its business. Nor has the petitioner shown that it enjoyed a substantial reputation in its industry. In short, the petitioner offered no evidence to establish that factors similar to *Sonegawa* existed in the instant case which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

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

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.