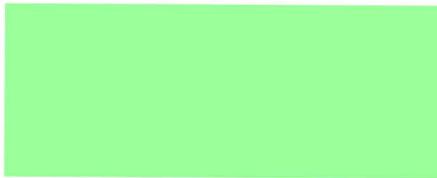




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 27 2013**

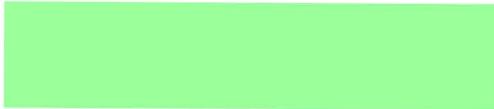
OFFICE: NEBRASKA SERVICE CENTER

FILE: 

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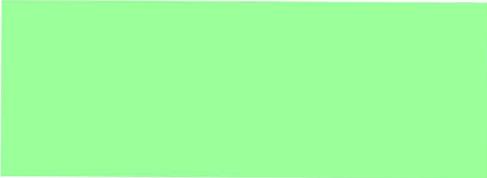
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially denied by the Director, Nebraska Service Center and came before the Administration Appeals Office (AAO) on appeal. The director's decision was affirmed and the appeal was dismissed by the AAO on November 22, 2010. The petitioner filed a motion to reopen and motion to reconsider the AAO's decision, which the AAO dismissed on July 21, 2012. The petitioner subsequently filed a second motion to reopen and motion to reconsider, which the AAO dismissed on March 29, 2013. The matter is now before the AAO on a third motion to reopen and a motion to reconsider. The motion will be granted. The previous decisions of the AAO, dated November 22, 2010, July 21, 2012, and March 29, 2013 will be affirmed, and the petition will remain denied.

The petitioner describes itself as an elderly care home. It seeks to employ the beneficiary permanently in the United States as a care giver. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). As set forth in the director's decision issued on January 14, 2009, the director determined that the petitioner had not established that it had the ability to pay the beneficiary's proffered wage from the priority date onward. The director denied the petition accordingly. The petitioner appealed the director's decision to the AAO. The AAO affirmed the director's decision on November 22, 2010, and further concluded that the beneficiary had not met the training requirements of the Form ETA 750. The petitioner then filed a motion to reopen and motion to reconsider that decision, which the AAO dismissed on July 21, 2012. The petitioner then filed a second motion to reopen and motion to reconsider the July 21, 2012 decision, which the AAO dismissed on March 29, 2013.

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 or motion.¹

The issues on the instant motion include: (1) whether the petitioner had the ability to pay the proffered wage in 2003, 2004, and 2005; (2) whether the labor certification required three months of "apprenticeship" training; and (3) if it is determined that the labor certification required this training, whether the beneficiary met this requirement prior to the priority date.

Ability to pay the proffered wage

The petitioner must establish its 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). The priority date of the instant case is March 14, 2003, and the proffered wage is \$20,800.00 per year.

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

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 wage paid, if any, and the proffered wage.² 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 record does not demonstrate that the petitioner employed the beneficiary in 2003, 2004, or 2005.³ The petitioner's net income for 2003, 2004, and 2005 consisted of \$871.00,⁴ \$6,056.00,⁵ and \$18,448.00, respectively, which are amounts less than the proffered wage. The petitioner's tax returns demonstrate net current assets⁶ for 2003, 2004, and 2005 of \$4,575.00, \$4,587.00, and (\$261.00), which are amounts less than the proffered wage.⁷ Further, the petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case which would permit a

² 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).

³ The AAO noted in its March 29, 2013 decision that the beneficiary's Form G-325A stated that he was employed by the petitioner since September 2002, but counsel for the petitioner states that this employment began in 2003. Counsel for the petitioner did not address this discrepancy in the instant motion.

⁴ 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 for 2003 and line 17e for 2004. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed September 4, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2003 and 2004, the petitioner's net income is found on Schedule K of its tax returns for these years. The petitioner's net income figure for 2005 are taken from line 21 of Form 1120S.

⁵ See n. 4.

⁶ Net current assets are the difference between the petitioner's current assets and current liabilities. According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" 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. A corporation's year-end current assets are shown on Schedule L of Form 1120S, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, lines 16 through 18.

⁷ The director determined that the petitioner has established its ability to pay the proffered wage in 2006 and 2007.

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.

Counsel for the petitioner has asserted that the petitioner's owner's personal assets demonstrate the petitioner's ability to pay the proffered wage. However, the AAO has previously held that because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Counsel has not provided any citations to case law or other relevant material that would support the AAO's consideration of a shareholder's personal assets in this matter. Therefore, the AAO will not consider the petitioner's owner's personal assets toward establishing the petitioner's ability to pay the proffered wage.

Accordingly, after careful consideration of the totality of the circumstances, the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary from the priority date onward.

Beneficiary's qualifications

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 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:

EDUCATION: Four years of high school.

TRAINING: Three months of "apprenticeship."

EXPERIENCE: None required.

OTHER SPECIAL REQUIREMENTS: None Required.

The regulation at 8 C.F.R. § 204.5(1)(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.

On motion, counsel for the petitioner states that "at no point did the petitioner ever require applicants to have had three months of apprenticeship prior to applying." The record reflects that Part 14 of the Form ETA 750A states the following:

State in detail the MINIMUM education, training, and experience for a worker to perform satisfactory the job duties described in Item 13.

Below Item 14, the labor certification states in the box for "Education" that the position requires four years of high school. The labor certification states in the box for "Training" that the position requires three months of "apprenticeship." The plain language of the labor certification demonstrates that the beneficiary must meet this minimum training requirement by the priority date to qualify for the instant position. See *Matter of Wing's Tea House*, 16 I&N Dec. at 159. The record reflects that the beneficiary has completed four years of high school. However, the petitioner has not demonstrated that the beneficiary had three months of apprenticeship in the position offered to meet the training requirement of the labor certification. The record does not contain a letter documenting that the beneficiary has this training as required by 8 C.F.R. § 204.5(1)(3)(ii)(A). The labor certification states in Part 14 that the beneficiary has "Certificates of Completion in Aging and Adult Services" that were issued on November 28, 2001 and January 28, 2002, but the record does not contain evidence of this documentation. Again, the AAO notes that the beneficiary claimed on Form G-325A to have commenced employment with the petitioner in the position offered as of September 2002, whereas counsel for the petitioner stated that this employment began in 2003. Therefore, the petitioner has not established that the beneficiary was qualified for the instant position as of the priority date, or prior to the beneficiary's employment with the petitioner in the position offered.

The AAO affirms the director's decision that the petitioner failed to establish its ability to pay the proffered wage from the priority date onward and affirms the AAO's prior decisions that have concluded that the beneficiary has not met the training requirement of the labor certification.

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).

The petition will remain 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. The previous decisions of the AAO dated November 22, 2010, July 21, 2012, and March 29, 2013 will be affirmed.

ORDER: The motion is granted, and the decisions of the AAO dated November 22, 2010, July 21, 2012, and March 29, 2013 are affirmed. The petition remains denied.