



U.S. Citizenship
and Immigration
Services

(b)(6)



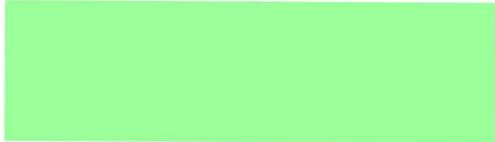
DATE: FEB 20 2014 OFFICE: TEXAS SERVICE CENTER



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:



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 Director, Texas Service Center, revoked the approval of the employment-based immigrant visa petition. The petitioner appealed this revocation to the Administrative Appeals Office (AAO), and, on December 26, 2012, the AAO dismissed the appeal. A subsequent motion to reopen was dismissed by the AAO on May 28, 2013. Another motion to reopen the case was dismissed by the AAO on November 27, 2013. The case is again before the AAO on motion to reopen and motion to reconsider. The case will be reconsidered and the appeal will again be dismissed. The petition will remain revoked.

The petitioner describes itself as a liquor store. It seeks to employ the beneficiary permanently in the United States as an evening manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director revoked the approval of the petition after determining that the petitioner had not established that the beneficiary possessed the work experience required by the labor certification. The AAO affirmed the director's decision and also found that the petitioner had failed to establish the ability to pay the proffered wage as of the priority date. The AAO dismissed the subsequent motion to reopen on May 28, 2013, because the evidence submitted on motion was not a proper basis for a motion to reopen. The petitioner filed another motion to reopen, which was dismissed by the AAO on November 27, 2013. The AAO again determined that the evidence submitted on motion could not be considered "new" and did not constitute a proper basis for a motion to reopen pursuant to 8 C.F.R. § 103.5(a)(2). The AAO also considered, *arguendo*, the evidence submitted by the petitioner on motion and determined that even if this evidence had satisfied the requirements for a motion to reopen, it would still be insufficient to establish: 1) that the beneficiary possesses the minimum requirements of the offered position set forth on the labor certification as of the priority date; 2) that the petitioner has the continuing ability to pay the proffered wage; and, 3) that a *bona fide* job offer exists.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

Eligibility for the Classification Sought

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 requires a minimum of completion of high school and two years of experience in the offered job of evening manager. The labor certification also states that the beneficiary qualifies for the offered position based on experience as a general manager with [REDACTED] from April 1987 until May 1995. 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 petitioner submitted an employment letter on letterhead for “[REDACTED] [REDACTED] who identified himself as the president of the company and who affirmed the beneficiary’s claim of employment there as general manager.

After the director determined that the typographical error in the letterhead called the credibility of the document into question, the petitioner submitted additional documentation regarding the beneficiary’s claimed former employer. This evidence included two new letters on [REDACTED] [REDACTED] letterhead affirming the beneficiary’s employment there from April 1987 to June 1995; the beneficiary’s Indian “Form No. 2D” personal income tax returns covering the years from April 1, 1987, through March 31, 1993 claiming income from [REDACTED]; original invoices from one of [REDACTED] suppliers from 2010; bank statements from [REDACTED] of [REDACTED] from 2010; a September 25, 2010 letter from the chief manager of the [REDACTED] stating that [REDACTED] had been a client for 22 years; and a letter from the Government of [REDACTED] Department regarding the February 15, 2003, issuance of a Tax Identification Number to [REDACTED]. The petitioner later submitted copies of pay receipts showing cash payments from [REDACTED] to the beneficiary from March 1988 to August 1992. It is noted that the “Receiver’s Signature” on these documents is markedly different from the signature of the beneficiary on the labor certification.

In the AAO’s latest (November 27, 2013) decision, we determined that the evidence submitted was not sufficient to overcome the issues of credibility that were raised by the letterhead containing a typographical error and the employment letter that gave different dates of employment than that claimed by the beneficiary on the labor certification. The AAO’s decision also stressed that the labor certification also requires that candidates for the job have completed high school. The labor

certification states that the beneficiary possesses a Secondary School Certificate from [REDACTED]. The record contains a Secondary School Certificate issued to the beneficiary by the [REDACTED] on June 17, 1973.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is “a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world.” See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission “is to serve and advance higher education by providing leadership in academic and enrollment services.” *Id.* EDGE is “a web-based resource for the evaluation of foreign educational credentials.” See <http://edge.aacrao.org/info.php>. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.¹

According to EDGE, a Secondary School Certificate from India is comparable to “less than completion of senior high school in the United States. May be placed in Grade 11.” Therefore, the AAO determined that the beneficiary did not possess the level of education required by the labor certification. On appeal, counsel submits a photocopy of a diploma suggesting that the beneficiary was conferred with a Bachelor of Commerce degree by [REDACTED] on April 9, 1985. Counsel states on motion that this diploma “clearly indicates that Beneficiary at a minimum has education equivalent US Associates for an accredited institution.” However, counsel did not explain why this degree was not listed on the labor certification where the beneficiary listed only his Secondary School Certificate.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In this case, rather than resolving inconsistencies, the evidence submitted on motion actually raises more issues of credibility. Doubt cast on any aspect of the

¹ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were only comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc. v. USCIS*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

Ability to pay the proffered 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 the instant case, the AAO's November 27, 2013, decision determined that the petitioner had failed to establish the ability to pay the proffered wage in 2001 or in 2003. On appeal, counsel states that the petitioner's net current assets "were substantially reduced in 2001 and 2003 due to temporary losses that were recovered in coming years." However, counsel submitted no further explanation of these losses and provided no evidence to corroborate his statement. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also makes a vague reference to a "[redacted] memo dated March 9, 2005," and states on appeal that USCIS should consider "shareholder wealth" in determining the petitioner's ability to pay the proffered wage. However, while USCIS may consider the funds a petitioner makes as shareholder compensation when determining the ability to pay the proffered wage, 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." The AAO noted in its latest decision that the petitioner's tax returns for 2001 and 2003 did not reflect any compensation of officers. The petitioner submitted nothing on motion to address this inconsistency.

The AAO also noted in its November 27, 2013, decision that the petitioner had petitioned for multiple beneficiaries and stated that the petitioner must establish the ability to pay the proffered

wage to each of those beneficiaries. Counsel states on appeal that none of the Form I-140 petitions have 2001 or 2004 priority dates. However, the petitioner is required to demonstrate its ability to pay the proffered wage to all beneficiaries of all petitions from the priority date until the petition is denied, withdrawn, or until the beneficiary attains permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The petitioner has submitted no evidence on motion regarding its ability to pay the wages offered to these other beneficiaries, nor has the petitioner submitted evidence regarding the withdrawal or denial of these other petitions or of the adjustment of status of these other beneficiaries.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not overcome the AAO's determination that the petitioner had not established the continuing ability to pay the proffered wage beginning on the priority date.

Bona fide job offer

The final issue raised by the AAO in its November 27, 2013, decision was whether a *bona fide* job offer still existed. The AAO noted that the petitioner did not possess a valid liquor license at the address claimed on the labor certification. In response to the AAO's August 30, 2013, Notice of Intent to Dismiss and Derogatory Information (NOID) counsel for the petitioner advised that the original work location listed on the ETA [REDACTED] closed in October 2008 and that the beneficiary has been employed at another location at 103 [REDACTED]. The AAO acknowledged that "the petitioner and Fran's Liquor have the same taxpayer identification number and, thus, would appear to be the same entity. However, the record fails to contain evidence in support of the petitioner's claim that [REDACTED] was formerly known as [REDACTED] and continues to operate under the same tax identification number as the identified petitioner, or that it would be the valid successor-in-interest to the petitioner on the labor certification, to continue processing based on the same labor certification." In addition, the AAO noted "the petitioner failed to submit evidence that the beneficiary's current position in Newton is the same as the position offered on the labor certification...the petitioner's response has not overcome the doubt cast on whether a bona fide job opportunity continued to exist after the closure of the purported worksite in [REDACTED]."

The AAO's October 30, 2013, NOID also noted that the address listed on the labor certification as the worksite appears to be a residential address and requested clarification of where the beneficiary would actually be working. The petitioner did not resolve these questions in response to the NOID or on motion. The petitioner has also failed to explain why, if the store called "[REDACTED]" was closed in 2008 and was replaced by another store, the name "[REDACTED]" was still being used on the petitioner's tax returns from 2009 through 2012.

On motion, the petitioner submits printouts from an online encyclopedia regarding the existence and location of [REDACTED]. The petitioner did not provide any of the missing documentation that was identified in the AAO's previous decision. Therefore, the petitioner has failed to establish that the instant petition is based on a continuing bona fide job opportunity that was available to U.S. workers.

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.

ORDER: The appeal is dismissed. The approval of the petition remains revoked.