



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: OFFICE: TEXAS SERVICE CENTER

JAN 23 2014

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 (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 (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO) which summarily dismissed the appeal on September 16, 2010. The petitioner filed a motion to reopen and reconsider the AAO's decision on October 15, 2010 which the AAO dismissed on February 28, 2013. On April 1, 2013, the petitioner filed a second motion to reopen and reconsider which the AAO dismissed on July 19, 2013. The petitioner has filed a third motion to reopen and reconsider that is now before the AAO. The previous decision of the AAO, dated July 19, 2013, will be reopened, a new decision entered, and the petition will remain denied.

The petitioner is a hardware company. It seeks to permanently employ the beneficiary in the United States as a glazier. 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 December 6, 2004. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date. The AAO's decision on July 19, 2013, which affirmed the two prior motions to reopen and reconsider, concluded that the petitioner had not established (1) that the beneficiary possessed the requisite two years of experience in the job offered and (2) that the petitioner had the ability to pay the beneficiary's proffered wage from the priority date onward.

The instant motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. 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. Therefore, the petitioner's motion is properly filed. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). AAO considers all pertinent evidence in the record, including new evidence properly submitted upon motion. 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.

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.

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 clearly 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 two years of experience in the job offered as a glazier. The labor certification states that the beneficiary qualifies for the offered position based on experience as a glazier for [REDACTED] from 1998 to April 2000. The labor certification also states that the beneficiary has been employed with the petitioner in the offered position since May 2002. 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 does not contain a letter from the beneficiary’s former employer, [REDACTED], as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains three affidavits from the beneficiary stating that the owner of his former employer [REDACTED], is unwilling to write an experience letter attesting to his employment there. The record also contains affidavits regarding the beneficiary’s experience with [REDACTED]. Two affidavits are from [REDACTED], one of the

beneficiary's co-workers at [REDACTED], one of the beneficiary's co-workers who states that he first met the beneficiary in "November or December of 1997" and that he helped train the beneficiary as a glazier; another is from [REDACTED], one of [REDACTED] customers; and another is an affidavit from counsel for the petitioner, attesting to her conversation with the owner of [REDACTED] and her attempts to contact [REDACTED]'s accountant.

On motion, counsel asserts that the AAO took the fifth paragraph of the beneficiary's second affidavit out of context. Counsel cited paragraphs three through ten and asserts that paragraph five quoted alone loses the meaning that the beneficiary intended. Paragraph three identifies the address and name of the owner of [REDACTED] and states that counsel contacted [REDACTED] accountant who stated that the owner would be reluctant to sign an experience letter regarding the beneficiary's employment there. In paragraphs four, five, and ten of the beneficiary's second affidavit, he states the following:

4. That I began working for [REDACTED] in November or December 1997 and worked there until March or early April of 2000; I began working at [REDACTED] in May 2000.
5. That initially I had difficulty recalling exactly when I began working for [REDACTED] but after going over my work history with my attorney, and mentally retracing the events that led me to decide to come to the United States and the steps I took to gain employment after entering this country, I was able to recollect specific events that occurred before I began working at [REDACTED]; how I came to begin working there and what made me decide to leave.

...

10. That when my cousin told me about the job at [REDACTED] I immediately applied for the position. To the best of my recollection I began working there at the end of November or beginning of December of 1997; I recall that for my first Christmas in the U.S., I was working there. [REDACTED] was located about eight blocks from where I was living at the time; I used to walk to the store and I remember feeling very cold while walking to the store.

The AAO referred to the information contained in paragraph four of the beneficiary's second affidavit in page four of its July 19, 2013 decision. Therefore, the entire meaning of the beneficiary's affidavit was considered in the context as described by counsel for the petitioner. Regarding paragraph five of the beneficiary's second affidavit, noted above, it is unclear why the beneficiary did not perform the steps taken to "retrace the events" that led him to come to the United States prior to the filing of the labor certification or prior to signing his first affidavit in the record.

The labor certification, as certified by the DOL states that the beneficiary began working for [REDACTED] in 1998. The beneficiary's first affidavit also states that he began working for [REDACTED] in 1998. Accordingly, the subsequent affidavits in which the beneficiary states that he actually began working for [REDACTED] in November or December 1997 do not constitute sufficient evidence to overcome what was certified on the labor certification and attested to in the beneficiary's first affidavit. In this case, counsel for the petitioner urges us to consider the beneficiary's later assertions regarding the date he began working for [REDACTED] (in his second and third affidavits), over his first assertions (in the labor certification and his first affidavit). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Therefore, the beneficiary's second and third affidavits which seek to correct the dates listed on the labor certification and in his first affidavit cannot stand in lieu of the regulatory required evidence of his claimed work experience.

Counsel further asserts that the other affidavits in the record corroborate the claim that the beneficiary began working for [REDACTED] in November or December 1997. The AAO noted the similarities in language used in these affidavits and that it seems unlikely that each affiant would recollect that the beneficiary began working for [REDACTED] in "November or December 1997," which is the exact phrasing used by the beneficiary in his second and third affidavits. Accordingly, the persuasive value of these affidavits is diminished. Therefore, the evidence in the record has not established when the beneficiary began working for [REDACTED] and that he met the experience requirements of the labor certification.

In the second affidavit from [REDACTED] a vendor who has done business with the petitioner and [REDACTED], he states that he first met the beneficiary in "November or December 1997" when the beneficiary was employed as a glazier. [REDACTED] states that to the best of his recollection, the beneficiary worked there for two years. He also states "in the course of doing business with [REDACTED] from December 1997 through April or May of 2000 I had occasion to see [the beneficiary] working as a glazier" and that he observed him "on different occasions" performing the duties of a glazier as outlined in the labor certification. On motion, counsel for the petitioner has submitted a third affidavit from [REDACTED] in which he stated that he would come into [REDACTED] "once a week, at different times of the day, different days of the week, and [the beneficiary] was always there." It is unclear why [REDACTED] first and second affidavits did not include this detail. [REDACTED] second affidavit states that "in the course of doing business with [REDACTED] from December of 1997 through April or May of 2000 [he] had occasion to see [the beneficiary] working as a glazier . . ." This affidavit does not establish that the beneficiary was employed full-time for [REDACTED] for two years. Additionally, as stated above, the similar language used in [REDACTED] second affidavit that he met the beneficiary in "November or December 1997" diminishes the persuasive value of this affidavit.

Counsel for the petitioner states that the instant case is similar to *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7 (D.D.C. 1988), (*Lu-Ann Bakery*) where the court held that affidavits are

acceptable evidence to establish that the beneficiary possesses the required experience for the position offered.

The issue in *Lu-Ann Bakery* involved an approved employment-based visa petition that the Immigration and Naturalization Service (INS) revoked after an investigation uncovered additional details regarding the beneficiary's claimed employment experience. *Id.* In that case, an investigator hired by the U.S. Consulate in Italy interviewed the beneficiary's former employer who stated that the beneficiary had only worked as an apprentice baker for minimal hours daily for approximately one year to 18 months, rather than as a baker for three years as stated in a letter she signed. *Id.* at 8. The INS issued the petitioner a notice of intent to revoke the approval of the petition and the petitioner responded by submitting an affidavit from the beneficiary's former employer, stating that the beneficiary had worked for her as a baker for nearly three years and that she was reluctant to explain this to the investigator because the beneficiary's work was done "off the books." *Id.* at 8-9.

However, the court's decision in *Lu-Ann Bakery* is distinguishable from the instant case for the following reasons. First, the regulation applicable in *Lu-Ann Bakery*, 8 C.F.R. § 204.2(i)(1),² stated that in cases based upon the beneficiary's experience or training, the petitioner must provide affidavits from the trainer or employer regarding such experience, and, "[i]f such affidavits cannot be obtained, the petitioner shall submit an affidavit by the alien beneficiary attesting to the reason therefor, and shall also submit other documentary evidence of the alien's qualifications, such as copies of company records or affidavits by persons other than the aliens trainers or employers" *Id.* at 10. The court stated that the INS should not have required "proof of contemporaneous evidence to support the petition, considering that [the petitioner] presented sufficient evidence under 8 C.F.R. § 204.2(i)(1) defendant to make a conclusive determination whether [the beneficiary] was qualified for preference status." *Lu-Ann Bakery*, 705 F. Supp. at 11. In other words, the court in *Lu-Ann Bakery* held that the INS should not have required additional evidence beyond the prescribed evidence that the regulation required at 8 C.F.R. § 204.2(i)(1). This differs from the instant case because the instant petitioner has not submitted any evidence that is prescribed by 8 C.F.R. § 204.5(l)(3)(ii)(A), which states the following:

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 regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires a letter from a trainer or employer regarding the beneficiary's employment. Unlike the regulation in *Lu-Ann Bakery*, this regulation does not allow for additional affidavits to be submitted if the letters from the trainer or employer cannot be obtained. In the instant case, the petitioner has not met the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A).

² The regulation at 8 C.F.R. § 204.2(i)(1) was the regulation in effect at the time *Lu-Ann Bakery Shop* was decided.

Second, the court in *Lu-Ann Bakery* did not hold that the INS cannot request contemporaneous evidence; rather it held by the INS could not deny or revoke a petition solely for a lack of contemporaneous evidence without first making a determination that the evidence presented is not accurate or credible. *Lu-Ann Bakery*, 750 F. Supp. At 12. The court stated the following:

The Court's ruling does not, of course, mean that the INS must accept as true or accurate the affidavits presented by the petitioner, nor does it mean that the INS may not consider as evidence the lack of contemporaneous evidence in its determination whether the petitioner has the requisite experience. What the INS cannot do, however, is deny or revoke a petition because of the fact that contemporaneous evidence has not been presented *without making a conclusive determination that the affidavits presented are not accurate or credible or otherwise concluding that the petitioner does not have the requisite experience.* (Emphasis added).

Id. In this case, the previous decisions by the AAO first addressed whether the beneficiary met the regulatory requirements of 8 C.F.R. § 204.5(1)(3)(ii)(A) by submitting an experience letter from the beneficiary's former employer. The director and the AAO noted that the beneficiary had not met this requirement. In response to the appeal and motions to reopen and reconsider that have followed, the AAO then addressed the affidavits in the record and determined that the dates of employment as stated in the beneficiary's first affidavit and on the labor certification conflicted with the subsequent affidavits in the record and the similar phrasing of several affidavits in the record that the beneficiary began working in "November or December 1997" weakens the petitioner's claim that these affidavits are accurate. The petitioner has not provided independent, objective evidence to establish the beneficiary's employment experience and to overcome the earlier assertions regarding his employment on the labor certification and in his first affidavit. Therefore, the petitioner has not established that the beneficiary possessed the required two years of experience for the position offered.

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 professional or skilled worker under section 203(b)(3)(A) of the Act.

As stated in the AAO's July 19, 2013 decision, the petitioner must also establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.³ See 8 C.F.R. § 204.5(g)(2).

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).

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.⁴ 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. Comm'r 1967).

The record contains the petitioner's IRS Form 1120 for 2004 which states net income of \$1,534.00 and net current assets of \$26,847.00, but these amounts do not establish that the petitioner had the ability to pay the beneficiary's proffered wage of \$35,796.80 for that year. On motion, counsel states that the petitioner had the ability to pay the proffered wage as demonstrated by its assets for 2004 of \$90,712.00 and the fact that the petitioner's partners have received bonuses for several years. First, USCIS will review the petitioner's net current assets which are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's current assets and liabilities for 2004 are \$90,712.00 and \$63,865.00, respectively, which equates to net current assets of \$26,847.00 and is insufficient to pay the beneficiary's proffered wage for 2004.

Second, the record contains an affidavit from the petitioner's owner, dated August 15, 2013, which quotes the petitioner's accountant as stating that for 2011 to 2012 the officers of the company took bonuses that increased payroll by \$30,000.00 which could have been used to pay the beneficiary's proffered wage. Any bonuses that the petitioner's officers received in 2011 or 2012 cannot be used to demonstrate the petitioner's ability to pay the beneficiary's proffered wage for 2004. Additionally, the petitioner's Form 1120 states officer compensation of \$31,200.00, but there is not any evidence in the record demonstrating that the petitioner's owner, as sole shareholder, was willing and had the personal financial ability in 2004 to forego this officer compensation in order to

⁴ 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).

⁵ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

pay the beneficiary's proffered wage for that year. The record also does not establish that any officer compensation payments were not fixed by contract or otherwise. Therefore, the petitioner has not established its ability to pay the beneficiary's proffered wage for 2004.

On motion, petitioner did establish its ability to pay the beneficiary's proffered wage for 2007. Accordingly, the AAO withdraws its finding in the July 19, 2013 decision regarding the petitioner's ability to pay the beneficiary's proffered wage in 2007. However, the AAO's decision finding that petitioner has not established its ability to pay the beneficiary's proffered wage in 2004 remains unchanged. Therefore, the petitioner has failed to establish that it had the ability to pay the beneficiary's proffered wage from the priority date of December 6, 2004 onward.

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. 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.

ORDER: The motion is granted. The petition remains denied.