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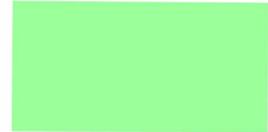
U.S. Citizenship
and Immigration
Services



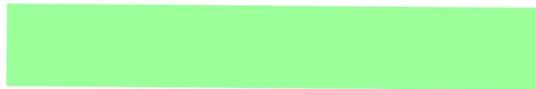
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JAN 13 2015

OFFICE: NEBRASKA SERVICE CENTER

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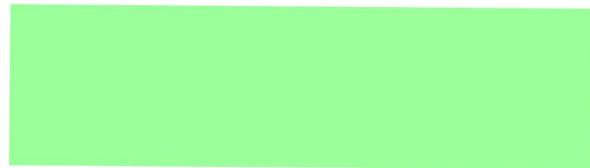


IN RE: Petitioner:
 Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or a Professional pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 denied by the Director, Nebraska Service Center (Director). The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and reconsider, which is now before the AAO. The motion(s) will granted, but the AAO will affirm its dismissal of the appeal.

The petitioner is a taxi and limousine service. It seeks to employ the beneficiary permanently in the United States as a “transportation general manager” pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience) of a non-temporary nature for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on November 26, 2007. The petition was accompanied by a copy of an ETA Form 9089, Application for Permanent Employment Certification, that was filed with the U.S. Department of Labor (DOL) on August 7, 2007, and certified by the DOL (labor certification) on August 10, 2007.

The labor certification specifies that the minimum level of education required for the job is a high school diploma or a “foreign educational equivalent” (Parts H.4 and H.9 of the ETA Form 9089), and that a minimum of two years of experience is required in the job offered or in an alternate occupation described as “president, general manager, or owner of a taxi/limousine company” (Parts H.6, H.10, and H.10-B of the ETA Form 9089). Based on these educational and experience requirements, the petition seeks classification of the beneficiary as a skilled worker.

On March 15, 2010, the Director denied the petition on the ground that the evidence of record failed to establish that the petitioner had the continuing ability to pay the proffered wage of the job offered from the priority date, August 7, 2007,¹ up to the present.

In dismissing the appeal on July 22, 2010, we found no basis to overturn the Director’s decision on the ability to pay issue. We affirmed the Director’s findings that the petitioner failed to establish its ability to pay the proffered wage of \$61,131.20 per year based on either its net income or its net current assets as recorded in its federal income tax returns for the years 2007 and 2008 – the only two tax returns submitted by the petitioner. We also found that the petitioner’s bank account did not demonstrate a sustainable ability to pay the proffered wage. In accord with the Director, we found that the totality of the petitioner’s circumstances – including its gross receipts in 2007 and 2008, as recorded on its tax returns – failed to establish its continuing ability to pay the proffered wage. *Cf. Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

¹ The priority date of the petition is the date the underlying labor certification application was received for processing by the DOL.

Beyond the decision of the Director, we also found that the petitioner failed to establish that the beneficiary had two years of qualifying experience, in accordance with the requirements of the labor certification. The ETA Form 9089 listed two former jobs for the beneficiary, both in the taxi business. They included (1) president and owner of [REDACTED] (spelled ' [REDACTED]' in the labor certification, but ' [REDACTED]' elsewhere in the record), located in [REDACTED] Sweden, from October 2, 1991 to May 2, 2003, and (2) president of [REDACTED] the Swedish company's U.S. subsidiary in [REDACTED] California, from May 2, 2003 to December 31, 2005. As evidence of this experience the record included a letter and a declaration from the beneficiary, both dated in March 2007, stating that he had worked as president and general manager of the [REDACTED] company from 1991 to 2005, as well as a certificate of registration for the Swedish company, dated May 3, 2005, which confirmed its registration on October 2, 1991, and identified the beneficiary as the owner. There was no evidence of the beneficiary's job experience at the U.S. subsidiary in [REDACTED] California. Thus, the documentation of record conflicted with the claim that the beneficiary's years with the Swedish company were 1991-2003, and that he worked at the U.S. subsidiary in the years 2003-2005. Moreover, we found that the beneficiary's declaration and letter attesting to his work with [REDACTED] did not comply with the regulatory requirements for employment letters, set forth at 8 C.F.R. § 204.5(l)(3). Since the issue of the beneficiary's qualifying experience was not raised by the Director in the denial decision, we did not find that it constituted an additional ground for dismissing the appeal. Nonetheless, we stated that the petitioner must address the issue in any future proceedings involving the beneficiary.

We also noted that the certified ETA Form 9089, while signed by the beneficiary and the petitioner, lacked the signature of the petitioner's counsel as required by 20 C.F.R. § 656.17. Accordingly, we stated that the petitioner must submit the ETA Form 9089 with all required signatures in any future filings.

The petitioner filed its motion(s) to reopen and reconsider on August 23, 2010. The requirements for a motion to reopen are set forth in the regulation at 8 C.F.R. § 103.5(a)(2):

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion(s) will granted in this case. However, for the reasons discussed hereinafter we will affirm our dismissal of the appeal for failure of the petitioner to establish its continuing ability to pay the proffered wage from the priority date up to the present.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part as follows:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). In this case, the ETA Form 9089 was accepted by the DOL on August 7, 2007. The proffered wage as stated on the ETA Form 9089 is \$29.39 per hour (which amounts to \$61,131.20 per year, based on a work year of 2,080 hours).

In our previous decision we noted that the beneficiary, as far as the record showed, had never been employed by the petitioner. Therefore, the petitioner could not establish its ability to pay the proffered wage based on compensation actually paid to the beneficiary. The record includes copies of the petitioner's federal income tax returns (Forms 1120S) for the years 2007 and 2008. In our previous decision we held that the petitioner could not establish its ability to pay the proffered wage of \$61,131.20 per year based on its net income or its net current assets in either of those years because its net income, as recorded on the Forms 1120S, was -\$3,758 in 2007 and \$48,033 (actually \$47,033) in 2008, and its net current assets, as recorded on the Forms 1120S, were -\$697,836 in 2007 and -\$169,300 in 2008.

On appeal counsel asserts that we neglected other figures in the tax returns that demonstrate the petitioner's ability to pay the proffered wage in 2007 and 2008. For example, in 2007 the petitioner listed in Schedule L, lines 10a and b, "buildings and other depreciable assets" worth \$1,107,724 "less accumulated depreciation" of \$155,835, leaving a balance of \$951,889 in its "current assets" ledger, according to counsel (in addition to \$16,956 in cash). Counsel is mistaken. While the \$951,889 figure in Schedule L is an asset, it is not a current asset. The only current asset listed in Schedule L is cash of \$16,956. Together these two figures amount to \$968,845 – the petitioner's "total assets" in 2007, as recorded on line 15 of Schedule L. (For 2008 the petitioner's total assets were calculated at \$510,272.)

Counsel's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage is without merit. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Furthermore, the petitioner's assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in determining the petitioner's ability to pay the proffered wage.

Counsel asserts that the petitioner's retained earnings of \$254,053 in 2007 – recorded on line 24 of Schedule L, after subtracting \$714,792 of current liabilities for “mortgages, notes, bonds payable in less than 1 year” (line 17 of Schedule L) from total assets of \$968,845 (line 15 of Schedule L) – were a reserve fund from which the petitioner could have paid the proffered wage that year. For 2008 the petitioner's retained earnings, calculated in the same manner, amounted to \$293,272.

Retained earnings are a company's accumulated earnings since its inception less dividends. *See* Joel G. Siegel and Jae K. Shim, *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, U.S. Citizenship and Immigration Services (USCIS) looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings.

Furthermore, even if retained earnings were considered separately from net income and net current assets, they might not be appropriate to include in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings fall under the heading of shareholder's equity on Schedule L of the petitioner's tax returns and generally represent the non-cash value of the company's assets. Thus, retained earnings do not generally represent current assets that can be liquidated during the course of normal business. Accordingly, they cannot properly be considered in determining the petitioner's ability to pay the proffered wage.

Counsel reiterates the claim made previously in its appeal brief, and prior to that in response to the Director's request for evidence, that the totality of the petitioner's circumstances, including the magnitude of its business operations, establishes its ability to pay the proffered wage, citing *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967) and an AAO decision in 2006. Counsel's claim is virtually a word-for-word recitation of its appeal brief. The points made in that brief were fully considered and discussed in our previous decision dismissing the appeal. We find no reason to consider these points anew, or change our analysis of them, in the current decision on motion. Nor did the petitioner submit any new evidence of its financial condition in support of the motion brief.²

² In our previous decision dismissing the appeal, we noted that the petitioner submitted no evidence of its finances for any years other than 2007 and 2008. Therefore, the record did not support counsel's claim that those two years were uncharacteristic. Although this claim is made again on motion, no additional supporting

As before, therefore, the petitioner has failed to demonstrate that the totality of its circumstances, as in *Sonegawa*, establishes its continuing ability to pay the proffered wage from the from the priority date onward.

Counsel cites the language in 8 C.F.R. § 204.5(g)(2) which permits bank account records to be submitted as evidence of a petitioner's ability to pay the proffered wage. The petitioner had already submitted bank statements from the years 2007 and 2008, counsel points out, showing that the petitioner had an average balance of over \$21,450 each month. Since this figure was far above the beneficiary's monthly wage of \$4,702.40, counsel claims that the bank statements demonstrate the petitioner's ability to pay the proffered wage in this case.

While the petitioner is correct insofar as the regulation permits bank account records to be submitted as evidence of its ability to pay the proffered wage, they are not a preferred form of evidence for the reasons discussed in our previous decision. Moreover, counsel's conclusion that the petitioner's average monthly account balance in 2007 and 2008 was sufficient to pay the proffered wage is faulty because it does not take into account that the bank balance would have dropped by \$4,702.40 each month as the wage was paid. At that rate the cumulative reductions of the bank account balance would have exceeded \$21,450 – the average monthly balance – during the fifth month of 2007. Thus, the bank account balance would have been totally depleted long before the petitioner was finished paying the full proffered wage of \$61,131.20 that year, and there would have been no bank account balance at all to pay any of the proffered wage in 2008.

For all of the reasons discussed above, the evidence of record does not establish that the petitioner has had the continuing ability to pay the proffered wage from the priority date in 2007 up to the present.³ Accordingly, we will affirm our dismissal of the appeal on this ground.

In our previous decision we indicated that the petitioner failed to establish that the beneficiary had 24 months of experience in the job offered or in an alternate occupation of president, general manager, or owner of a taxi/limousine company, as required on the labor certification. In particular, we found that the letter and the declaration attesting to the beneficiary's experience and describing his job duties at [REDACTED] in Sweden were signed by the beneficiary himself, which did not comply with the regulation at 8 C.F.R. § 204.5(l)(3), and that neither of these documents mentioned the two years the beneficiary allegedly spent working at the Swedish company's U.S. subsidiary in California, which was listed on the ETA Form 9089. In the motion brief counsel states that because the beneficiary was the owner/operator of both the [REDACTED] company and its U.S. subsidiary, his letter and declaration describing his "self-employment" complied with requirement of 8 C.F.R. § 204.5(l)(3) that the employment verification letter(s) come from the "employer." Counsel

evidence has been submitted. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

³ In any future proceedings the petitioner must submit evidence of its ability to pay the proffered wage from 2009 up to the present.

has resubmitted a copy of the registration certificate already in the record, dated May 3, 2005, which confirms the registration of the [REDACTED] Sweden, on October 2, 1991, and its ownership by the beneficiary. While no independent documentation was submitted of the beneficiary's work for the U.S subsidiary in [REDACTED] California, in the years 2003-2005, counsel suggests that this employment was not separately described because it was part and parcel of the beneficiary's overall work for the Swedish parent which, like the U.S. subsidiary, was wholly owned and operated by the beneficiary.

Based on the entire record, including the legal brief and associated materials submitted on motion, we find that the petitioner, by a preponderance of the evidence, has established that the beneficiary had at least two years of qualifying experience by the priority date of August 7, 2007, in conformance with the labor certification. Accordingly, we will not make deficient qualifying experience an additional ground for denying the petition and dismissing the appeal. In any future proceeding involving the beneficiary, however, evidence of the beneficiary's high school education should be submitted because it is a requirement on the labor certification. No such evidence is currently in the record.

As for the missing signature of the petitioner's original attorney on the certified ETA Form 9089, present counsel asserts that the petitioner is unable to obtain the signature, or additional records, from its former attorney. Present counsel does not explain what efforts have been made by the petitioner to contact former counsel, who is still in active practice according to the State Bar of California. The record shows that a Request for Duplicate Labor Certification from the DOL was initiated by USCIS at the petitioner's behest, in accordance with USCIS procedures.

Conclusion

In accordance with the foregoing analysis, we determine that the petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present, in accordance with 8 C.F.R. § 204.5(g)(2). Accordingly, the petition cannot be approved, and will remain denied.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). That burden has not been met in this action.

ORDER: The motions to reopen and reconsider are granted. The dismissal of the appeal is affirmed. The petition remains denied.