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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: **MAR 03 2015** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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, which is now before the AAO. The motion will granted, and the AAO will affirm its dismissal of the appeal.

The petitioner is a barber shop/beauty salon. It seeks to employ the beneficiary permanently in the United States as a barber pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). 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 August 16, 2007. The petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the U.S. Department of Labor (DOL) on August 30, 2006, and certified by the DOL (labor certification) on October 10, 2006.

The labor certification states that the wage offered for the barber position is \$14.00 per hour (which amounts to \$29,120 per year based on a work year of 2,080 hours). The labor certification specifies that there are no educational or training requirements for the job, but that two years of experience in the job offered is required (Part H.4, H.5, and H.6 of the ETA Form 9089). Based on these requirements, the petition seeks classification of the beneficiary as a skilled worker under section 203(b)(3)(A)(i) of the Act.

On July 7, 2009, 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 30, 2006,¹ up to the present – in particular, during the years 2006 and 2007.

The petitioner filed an appeal on August 7, 2009, which was supplemented by a brief from counsel. A supplemental brief and additional evidence was submitted by current counsel on May 1, 2012. We dismissed the appeal on November 3, 2012. While finding that the evidence of record – in particular, the Forms W-2 (Wage and Tax Statements) issued by the petitioner to the beneficiary for the years 2008-2011— established the petitioner’s ability to pay the proffered wage in those years, we agreed with the Director that the petitioner did not establish its ability to pay the proffered wage in the years 2006 and 2007.

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

The petitioner filed a motion to reopen with a brief from counsel and supporting documentation on November 30, 2012. Amplifying a claim first made in the supplemental brief filed on May 1, 2012, the petitioner asserted that it hired the beneficiary as a replacement for another employee whose annual wages exceeded the proffered wage in this case. According to the petitioner, the beneficiary was hired in January 2008 to replace [REDACTED] who was employed as a barber from March 2002 through December 2007 and left the petitioner at that time to take a position with another hair salon. As evidence thereof a letter was submitted from the petitioner's president, [REDACTED] and an affidavit from [REDACTED] along with a copy of his cosmetologist license. In addition, copies were submitted of the Forms W-2 issued to [REDACTED] for 2006 and 2007, which showed that he was paid a total of \$40,019 in 2006 and \$38,572 in 2007. Since both of these amounts exceeded the proffered wage in this case of \$29,120, the petitioner contended that its ability to pay the proffered wage in 2006 and 2007 has been established.

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 motion 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.

On April 8, 2014, we sent the petitioner a Request for Evidence (RFE) on four items in the record, which read as follows:

1. As evidence of the wages you paid [REDACTED] in 2006 and 2007, you have submitted Forms W-2, Wage and Tax Statements, for each of those years. The form for 2007, however, is handwritten. To confirm [REDACTED] wages for 2007, please obtain and submit verification from the Internal Revenue Service (IRS) of the content of his Form W-2 for 2007.
2. To confirm that [REDACTED] was no longer employed by you in 2008, please submit copies of your state quarterly wage reports (listing all your employees) for each quarter of 2008.
3. On January 10, 2008 you filed a Form I-140 petition on behalf of [REDACTED] which was denied on September 26, 2008. Please submit documentary evidence of [REDACTED] priority date (i.e. – the date you filed the ETA Form 9089 on his behalf with the DOL) and of the wage you offered to [REDACTED]. Also, please submit evidence of any wages paid to this sponsored worker.
4. The closing balance of your business checking account at [REDACTED] that appears on your year-end statement for 2007 (\$15,022.71) does not match the "end of tax year" figure for "cash" on Schedule L of your 2007 corporate income tax return, Form 1120S

(\$1,558), or the "beginning of tax year" figure for "cash" on Schedule L of your 2008 Form 1120S (the same figure – \$1,558). Please explain the discrepancy in these figures and/or submit certified Forms 1120S from the IRS for 2006, 2007, and 2008.

The petitioner responded to the RFE on June 5, 2014, with a recitation of previously submitted documents that were thoroughly considered in the earlier decisions issued by the Director and/or this office. The petitioner submitted new evidence that satisfactorily addressed items 1 and 4 in the RFE, but not items 2 and 3. With respect to item 2 the petitioner submitted a notice received from [REDACTED] of the Virginia Employment Commission, dated June 2, 2014, stating that the only tax and payroll reports she could retrieve from the years 2007-2010 were for the last quarter of 2007, the first quarter of 2008, and the last two quarters of 2010. Copies of the subject reports were appended to the notice. As for item 3, the petitioner's submission had nothing to do with our specific request, which related to another Form I-140 petition filed by [REDACTED] and asked for documentary evidence of his priority date, proffered wage, and wages paid (if any).²

As previously indicated, 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 30, 2006. The proffered wage as stated on the ETA Form 9089 is \$14.00 per hour, which amounts to \$29,120.00 per year based on a work year of 2,080 hours.

The petitioner's argument on motion is that the wages paid to [REDACTED] would have been available to pay the beneficiary as soon as [REDACTED] left the petitioner's employ because it was the petitioner's intention to replace [REDACTED] with the beneficiary. The petitioner's quarterly tax report to the Virginia Employment Commission for the first quarter of 2008, however, refutes the petitioner's claim that it replaced [REDACTED] with the beneficiary because both individuals are listed as employees and were paid during that quarter. This fact contradicts both the letter of the petitioner's president, [REDACTED] and the affidavit of [REDACTED] submitted in response to our RFE, each of which stated that [REDACTED] ceased to work for the petitioner in December 2007.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

² The petitioner's response to the RFE also addressed our referral of the labor certification to the DOL on August 16, 2013, for its opinion as to whether it was defective and should be revoked because of its failure to mention anywhere on the ETA Form 9089 that a barber's license from the Commonwealth of Virginia was required to qualify for the proffered position. After consultation with the DOL, we will not revoke the labor certification pursuant to 20 C.F.R. § 656.30(d).

In this case, no explanation has been furnished by the petitioner as to why both the beneficiary and [REDACTED] were listed as employees in the months of January to March 2008, and no further evidence has been submitted by the petitioner to show exactly when [REDACTED] left its employ. The quarterly tax reports for the last two quarters of 2010 do not list [REDACTED] as an employee, so it appears that he left sometime before July 1, 2010. But the lack of any quarterly tax reports from the second quarter of 2008 through the second quarter of 2010 make it impossible to determine the date of his departure.³ In any event, it is clear from the record that the employment of [REDACTED] and the beneficiary overlapped, and the beneficiary did not replace [REDACTED] as claimed, in January 2008.

Since [REDACTED] and the beneficiary were both employed and paid by the petitioner in the first quarter of 2008, and there is no evidence in the record that [REDACTED] ceased to be an employee before July 2010, we determine that the petitioner has failed to establish that it intended to replace [REDACTED] with the beneficiary. Accordingly, the petitioner has failed to establish that [REDACTED] wages would have been available to pay the beneficiary in the job offered at any and all times from the priority date onward – in particular, during the years 2006 and 2007. Therefore, we find no basis to reverse our prior finding that the petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date up to the present. On this ground alone, the petition cannot be approved.

The petitioner's failure to establish its ability to pay the proffered wage in the years 2006 and 2007 is exacerbated by its failure to submit requested information about its I-140 petition for [REDACTED]. That petition, according to the records of U.S. Citizenship and Immigration Services (USCIS), was filed on January 10, 2008. Its priority date (when the underlying labor certification was filed with the DOL) would have been sometime prior to that – at least back in 2007, and perhaps earlier. The petitioner must produce evidence that its job offers to every beneficiary are realistic – *i.e.* that it has the ability to pay the proffered wages to each of the beneficiaries from the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence (or the petition is denied, as in the case of [REDACTED]. See *Matter of Great Wall*, 16 I&N Dec. at 144-145; see also 8 C.F.R. § 204.5(g)(2). In our RFE we requested the petitioner to submit specific evidence about the petition for [REDACTED] – including the priority date, the proffered wage, and whether any wages were paid. We needed that evidence in order to determine the petitioner's ability to pay the proffered wage of that petition during the years at issue in this proceeding – 2006 and 2007. Since the petitioner has not submitted any evidence or information about its other I-140 petition, we cannot determine whether the petitioner had the ability to pay the proffered wage of that beneficiary, much less that of the instant beneficiary, in 2006 and 2007. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). For this reason as well, the petition cannot be approved.

³ We note that the record includes copies of the petitioner's Forms W-3 and the Forms W-2 it issued to each of its employees for the years 2006 and 2007. The same forms for 2008, 2009, and 2010 would at least show what year [REDACTED] ceased to be an employee of the petitioner. However, no such forms have been submitted for those years.

In its response to our RFE, the petitioner refers to the claim made previously in its supplemental appeal brief filed on May 1, 2012, that the Director failed to properly apply the “totality of circumstances” test in determining the petitioner’s ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967). The petitioner neglects to mention, however, that we considered the petitioner’s “totality of circumstances” in our decision dismissing the appeal, concluding that they did not establish the petitioner’s continuing ability to pay the proffered wage. The petitioner has submitted no new evidence of its financial condition in support of the motion brief. Accordingly, we find no reason to change our prior “totality of circumstances” analysis in the current decision. The petitioner has failed to demonstrate that the totality of its circumstances, as in *Sonogawa*, establishes its continuing ability to pay the proffered wage from the from the priority date onward.⁴

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, as required by 8 C.F.R. § 204.5(g)(2). Therefore, 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 motion to reopen is granted. The dismissal of the appeal is affirmed. The petition remains denied.

⁴ In its response to our RFE the petitioner also alludes to the claim already twice rejected in these proceedings (in the previous decisions of the Director and this office) that the monthly balances in its business account at [REDACTED] were sufficient to pay the proffered wage of the job offered in 2006 and 2007. While the regulation at 8 C.F.R. § 204.5(g)(2) permits bank account records to be submitted as evidence of a petitioner’s ability to pay the proffered wage, they are not a preferred form of evidence for the reasons discussed in our previous decision. The petitioner asserts that it had the ability to pay the proffered wage in 2006 and 2007 out of its [REDACTED] bank account based on the fact that the lowest monthly balance in those two years was \$11,376.40, well above the monthly proffered wage of \$2,427. The petitioner’s claim is faulty, however, because it does not take into account that the bank account balance would have dropped by \$2,427 each month as the wage was paid. If we were to calculate from the beginning of 2007, for example, the cumulative monthly withdrawals from the bank account to pay the proffered wage would have exceeded the closing monthly balance by July 31, 2007 (when it stood at \$15,955.54), and the gap would have steadily widened thereafter since the closing monthly balance never exceeded \$16,175.50 for the rest of the year and by December 31, 2007 stood at just \$15,022.71 – approximately \$14,000 below the annual proffered wage of \$29,120. Thus, the bank account balance would have been totally depleted long before the petitioner was finished paying the full proffered wage in 2007.