



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF NNPO-O- INC.

DATE: NOV. 6, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, the operator of a convenience store/gas station, seeks to permanently employ the Beneficiary as a store manager under the immigrant classification of other worker. *See* Immigration and Nationality Act (the Act) § 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the record did not establish the Petitioner's continuing ability to pay the proffered wage or the Beneficiary's educational qualifications for the offered position. Accordingly, the Director denied the petition on December 11, 2014.

The record shows that the appeal is properly filed and alleges specific errors of fact and law. *See* 8 C.F.R. § 103.3(a)(1)(v). The record documents the case's procedural history, which is incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record, including new evidence properly submitted on appeal.¹

I. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay a beneficiary the full proffered wage, we next examine whether it generated sufficient annual net

¹ The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow submission of additional evidence on appeal.

income or net current asset amounts to cover the difference between the wages paid, if any, and the proffered wage.² If a petitioner's net income and net current asset amounts are insufficient to demonstrate its ability to pay, we may also consider the overall magnitude of its business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In the instant case, the petition's priority date is May 13, 2009, the date the U.S. Department of Labor (DOL) received the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), for processing. See 8 C.F.R. § 204.5(d). The labor certification states the proffered wage for the offered position of store manager as \$17.84 per hour, or \$37,107.20 per year for a 40-hour work week. The Beneficiary attested on the labor certification to his employment by the Petitioner since August 2004.

At the time of the Director's decision, the record did not establish the Petitioner's ability to pay the proffered wage in 2009. The record did not contain reliable evidence of the amount of wages the Petitioner paid the Beneficiary that year. A copy of the Petitioner's 2009 federal income tax return also reflected net income and net current asset amounts below the annual proffered wage.

However, in response to our notice of derogatory information and intent to dismiss (NOID) dated June 25, 2015, the Petitioner submitted a copy of the Beneficiary's IRS Form W-2 Wage and Tax Statement for 2009. The Form W-2 indicates the Petitioner's payment of \$12,000 to the Beneficiary that year. The Petitioner's 2009 net income amount of \$32,638 exceeds the \$25,107.20 difference between the annual proffered wage and the amount the Petitioner paid the Beneficiary that year. The record on appeal therefore establishes the Petitioner's ability to pay the proffered wage in 2009. The record also establishes the Petitioner's ability to pay from 2010 through 2013 based on its payments to the Beneficiary and/or its annual amounts of net income or net current assets.

The record establishes the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore withdraw the Director's contrary finding on this issue.

II. THE BENEFICIARY'S EDUCATIONAL QUALIFICATIONS

A petitioner must also establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); see also *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

² Federal courts have upheld our method of determining a petitioner's ability to pay. See *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rizvi v. Dep't of Homeland Sec.*, -- Fed. Appx. --, 2015 WL 5711445, **1-2 (5th Cir. Sept. 30, 2015); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

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In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. See *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the accompanying labor certification states the requirements of the offered position of store manager as a U.S. high school diploma or an equivalent foreign credential, plus at least 12 months of experience in the job offered. The Beneficiary attested on the labor certification to receipt of a high school diploma in India in 1992.

The record contains a copy of an Indian high school leaving certificate in the Beneficiary's name, dated July 8, 1992. The record also contains a copy of a notice from the [REDACTED] in India, indicating the Beneficiary's passage of a secondary school examination in March 1992.

The Director found that the Beneficiary's foreign educational credentials did not equate to a U.S. high school diploma. The Director reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). EDGE is a peer-reviewed source of information about foreign education equivalencies. See Am. Assoc. of Collegiate Registrars & Admissions Officers, at <http://edge.aacrao.org/info.php> (accessed Aug. 27, 2015).³ EDGE reports that an Indian high school leaving certificate represents less schooling than needed to obtain a U.S. high school diploma.

Even if the Director had not reviewed EDGE information, the Petitioner did not submit evidence of the U.S. equivalency of the Beneficiary's Indian leaving certificate. The Petitioner therefore did not meet its burden of establishing the Beneficiary's educational qualifications for the offered position as specified on the accompanying labor certification.

On appeal, the Petitioner argues that it need only demonstrate the Beneficiary's possession of "a high school diploma," not necessarily "a high school completion diploma." However, the accompanying labor certification indicates that the offered position requires a U.S. high school diploma or a foreign equivalent of a U.S. high school diploma. U.S. high school diplomas generally reflect 12 years of formal education. U.S. Dep't of Ed., Int'l Affairs Office, "Structure of the U.S.

³ Federal courts have found EDGE to provide reliable information about foreign education credentials. See *Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (finding that U.S. Citizenship and Immigration Services (USCIS) has discretion to discount letters and evaluations if they differ from reports in EDGE, which is "a respected source of information"); *Tisco Grp., Inc. v. Napolitano*, No. 09-10072, 2010 WL 3464314, *4 (E.D. Mich. Aug. 30, 2010) (finding that USCIS properly weighed evaluations submitted by a petitioner and EDGE information to conclude that a beneficiary's foreign Bachelor's and Master's degrees were comparable to only a U.S. Bachelor's degree); *Sunshine Rehab Servs., Inc. v. USCIS*, No. 09-13605, 2010 WL 3325442, **8-9 (E.D. Mich. Aug. 20, 2010) (holding that USCIS did not abuse its discretion in preferring EDGE information to reach its conclusion).

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Education System: School Leaving Qualifications,” Feb. 2008, *available at*, <https://ww2.ed.gov/about/offices/list/ous/international/usnei/us/elsequals.doc> (accessed Aug. 27, 2015). Therefore, a foreign secondary school credential representing less than 12 years of formal education does not equate to a U.S. high school diploma. The instant record does not establish the Beneficiary’s possession of a U.S. high school diploma or its foreign equivalent. *See Matter of Hong Kong Video Tech.*, 1998-INA-202, 2001 WL 1055170, *3 (BALCA Aug. 17, 2001) (stating that an employer must document the required U.S. equivalency of a foreign national’s educational credentials because the employer may not treat a foreign national more favorably than a U.S. worker).

In response to our NOID, the Petitioner states that the Beneficiary is attempting to obtain additional documentation from India in support of his possession of a U.S. high school equivalency. The Petitioner states that it will submit additional evidence “as soon as it is received.” The Petitioner’s response was received on July 24, 2015, and nothing further has been received.

However, we cannot accept a response to a notice of intent to dismiss more than 30 days after the notice’s service. *See* 8 C.F.R. § 103.2(b)(8)(iv) (stating that “[a]dditional time to respond to a . . . notice of intent to deny may not be granted”). We therefore must decide the matter on the record before us.

As discussed above, the record on appeal does not establish the Beneficiary’s possession of the educational qualifications specified on the accompanying labor certification. We will therefore affirm the Director’s finding and dismiss the Petitioner’s appeal on this ground.

III. THE BENEFICIARY’S QUALIFYING EXPERIENCE

Beyond the Director’s decision, the record also does not establish the Beneficiary’s qualifying experience for the offered position.⁴ Our NOID of June 25, 2015 notified the Petitioner of deficiencies in the evidence of the Beneficiary’s qualifications.

As previously indicated, the accompanying labor certification states the requirements of the offered position of store manager as a U.S. high school diploma or a foreign equivalent, plus at least 12 months of experience in the job offered. The Beneficiary attested on the labor certification to full-time employment as a store manager for [REDACTED] Massachusetts from February 1, 1998 to April 1, 2000. The labor certification does not indicate the Beneficiary’s possession of any other related employment experience before starting work for the Petitioner in August 2004.

⁴ We may deny a petition on valid grounds unidentified by a director. *See* 5 U.S.C. § 557(b) (stating that, unless limited by notice or rule, an administrative agency on review retains all the powers it possessed in issuing the original decision); *see also Soltane v. Dep’t of Justice*, 381 F.3d at 145 (recognizing our appellate review on a *de novo* basis); *Spencer Ent., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003) (finding that an applicant provided no legal authority barring us from denying an application on valid grounds unidentified by a service center).

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A petitioner must support a beneficiary's claimed qualifying experience with a letter from an employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must provide the name, address, and title of the employer, and a description of the beneficiary's experience. *Id.*

The Petitioner submitted letters from the purported owner of [REDACTED] dated April 10, 2001 and September 12, 2014. The letters state the Beneficiary's full-time employment by [REDACTED] as a store manager from February 1, 1998 to April 1, 2000 consistent with the information on the labor certification.

The Director noted, however, the dissolution of [REDACTED] on August 31, 1998 by the Commonwealth of Massachusetts because the corporation did not timely submit annual reports. Evidence of record indicates the corporation's retroactive revival on [REDACTED]. *See* Mass. Gen. Laws, ch. 155, § 56 (stating that a Massachusetts corporation is revived as if it had never been dissolved). The September 12, 2014, letter states [REDACTED] maintenance of operations during the dissolution period. The Petitioner's copy of its 2009 federal tax return also indicates its operations during the period. The record therefore establishes [REDACTED] continuing operations during the dissolution period.

However, the record contains inconsistencies regarding the Beneficiary's claimed qualifying experience at [REDACTED] from February 1, 1998 to April 1, 2000. As the Director noted in his Request for Evidence dated July 15, 2014, the Beneficiary attested on a prior labor certification application to his full-time employment as a store manager at [REDACTED] in India from November 1997 to January 2000, a period that includes most of the time he purportedly worked for [REDACTED] in the United States. The Beneficiary also attested that he began working full-time for the prior labor certification employer in February 2000, before his purported end date of employment with [REDACTED].

Also, USCIS records contain a copy of a Kentucky court decree dissolving the Beneficiary's prior marriage, which he submitted in support of a motion in removal proceedings. The February 1, 2000, decree states that the Beneficiary "is self-employed in [the] hotel business," not a store manager. In addition, the Beneficiary's motion included an April 30, 2008, affidavit in which he testified that he lived in Kentucky from October 1996 to May 1998, after he purportedly started work with [REDACTED] in Massachusetts on February 1, 1998. These inconsistencies of record cast doubts on the Beneficiary's claimed qualifying experience for the offered position. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

In response to our NOID, the Petitioner argues that the Beneficiary could not have worked for [REDACTED] in India from November 1997 to January 2000 because he has remained in the United States since entering the country in 1996. The Petitioner submitted a copy of a statement by the Beneficiary, indicating his employment by [REDACTED] in 1995 and his entry into the United States the following year. The Beneficiary stated that other reported dates of his employment at [REDACTED] "may have been a mistake."

The record contains several documents consistently stating the Beneficiary's entry into the United States without inspection on September 15, 1996, including: the instant Form I-140, Petition for Alien

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Worker; a prior Form I-140; the Beneficiary's application for cancellation of removal in removal proceedings; and a Form I-862, Notice to Appear. USCIS records also contain a copy of a May 10, 2002, letter from the purported owner of [REDACTED]. The letter states the Beneficiary's employment by the business in India as a manager from February 1994 to July 1996.

The Beneficiary's statement indicates his employment in the hotel business in Kentucky in 1997 and 1998. The Petitioner argues that the Kentucky court decree did not find the Beneficiary's residence in the state at the time of issuance of the marriage dissolution decree in 2000, but rather at the time of the filing of the marriage dissolution action.⁵

The Petitioner also argues that the Beneficiary moved from Kentucky to Massachusetts in 1998 to work for [REDACTED]. However, the Beneficiary's statement identifies his start date of employment with [REDACTED] as February 1, 1999, not February 1, 1998 as stated on the instant labor certification.

The Petitioner submitted copies of three bank account statements addressed to the Beneficiary in Massachusetts between December 1999 and July 2000. However, the record does not contain documentary evidence to support the Petitioner's argument that the Beneficiary moved to Massachusetts in 1998. Indeed, the record shows that the former Immigration and Naturalization Service Office in [REDACTED] Kentucky received a letter from a doctor stating the Beneficiary's visit to his office on October 2, 1998 in [REDACTED] Illinois, which is just across the Ohio River from [REDACTED] Kentucky. The doctor's letter suggests the Beneficiary's continued residence in Kentucky as of October 1998.

Because the Petitioner has not resolved inconsistencies in the Beneficiary's claimed dates of employment and places of residence, the record does not establish the Beneficiary's purported qualifying experience at [REDACTED] in Massachusetts from February 1, 1998 to April 1, 2000. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). We will therefore also dismiss the Petitioner's appeal for this reason.

IV. CONCLUSION

The record establishes the Petitioner's continuing ability to pay the proffered wage of the offered position from the petition's priority date onward. We will therefore withdraw the Director's contrary finding. However, the record does not establish the Beneficiary's educational qualifications for the offered position. We will therefore affirm the Director's denial of the petition and dismiss the Petitioner's appeal. The record also does not establish the Beneficiary's qualifying experience for the offered position. We will also dismiss the appeal for this reason.

The petition will be denied for the above-stated reasons, with each considered an independent and alternative basis for denial. In visa petition proceedings, a petitioner bears the burden of establishing

⁵ Neither the decree nor the Petitioner indicates the filing date of the marriage dissolution action.

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eligibility for the benefit sought. INA § 291; 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 12128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of NNPO-O- Inc.*, ID# 13088 (AAO Nov. 6, 2015)