



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

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

MATTER OF A-F- INC.

DATE: NOV. 10, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of furniture finishing services, seeks to permanently employ the Beneficiary as a furniture finisher under the immigrant classification of skilled worker. *See* Immigration and Nationality Act (the Act) § 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). 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 Petitioner did not provide all the documents specified in the Director's request for evidence (RFE) of January 22, 2015, including a properly signed Form I-140, Immigrant Petition for Alien Worker. Accordingly, the Director denied the petition on March 20, 2015.

The appeal is properly filed and alleges specific errors of fact and law. The record documents the case's procedural history, which will be 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.²

I. THE VALIDITY OF THE PETITION'S FILING

An applicant or petitioner must sign a benefit request. 8 C.F.R. § 103.2(a)(2). By signing a Form I-140, a petitioner certifies "under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it are all true and correct." Thus, the integrity of the petition process requires an employer's signature on the form.

The instant Petitioner did not sign the petition it filed. Rather, the Beneficiary signed the Form I-140 received by U.S. Citizenship and Immigration Services (USCIS) on August 7, 2014.

² 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.

The Director could have rejected the petition. *See* 8 C.F.R. § 103.2(a)(7)(i) (stating that “[a] benefit request that is not executed may be rejected”). Instead, the Director accepted the petition and issued the RFE, requesting the Petitioner to submit an amended and properly signed Form I-140.

The Petitioner’s RFE response of record includes evidence of the Beneficiary’s qualifying experience for the offered position, as the RFE requested. The February 23, 2015, cover letter to the response states that the filing also includes an amended Form I-140 with the Petitioner’s original signature on it. However, the record does not contain an amended and signed Form I-140 in the response.

On appeal, the Petitioner asserts that it provided an amended and signed Form I-140 in response to the RFE and that USCIS must have lost the document. The appeal includes U.S. Postal Service evidence of the delivery of the Petitioner’s RFE response to the Nebraska Service Center. The appeal also includes an amended Form I-140 signed on May 12, 2015 by the Petitioner’s president/shareholder.

The record on appeal does not establish the Petitioner’s claimed submission of an amended and signed Form I-140 in its RFE response. The U.S. Postal Service materials indicate USCIS’ receipt of the Petitioner’s RFE response. However, the materials do not identify the contents of the response.

The record does not suggest that USCIS lost part of the Petitioner’s RFE response. The Petitioner did not submit a copy of the amended and signed Form I-140 that it purportedly included in its RFE response. *See* U.S. Citizenship & Immigration Servs., “Form Filing Tips,” at <http://www.uscis.gov/avoid-scams/form-filing-tips> (accessed Oct. 28, 2015) (advising petitioners and applicants to “[k]eep copies of all forms and other documents that you file with USCIS”).

The amended and signed Form I-140 submitted on appeal is dated after the Petitioner’s submission of its RFE response. Thus, the Form I-140 submitted on appeal does not cure the absence of an amended and signed Form I-140 in the RFE response. *See* 8 C.F.R. § 103.2(b)(14) (stating that “[f]ailure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request”).

The Petitioner’s mere assertion does not establish its submission of an amended and signed Form I-140 in its RFE response. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citation omitted) (finding a petitioner’s unsupported assertion insufficient to meet the burden of proof in visa petition proceedings). Because the record does not establish the petition’s proper filing, we will affirm the Director’s decision and dismiss the appeal.

II. THE PETITIONER’S ABILITY TO PAY THE PROFFERED WAGE

Even if the petition was properly filed, the record does not establish its approvability.³

³ We may dismiss an appeal on valid grounds unidentified by a director. *See* 5 U.S.C. § 507(b) (stating that, except as limited by notice or rule, a federal agency retains all the powers on review that it possessed in issuing the original decision).

(b)(6)

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A petitioner must demonstrate its continuing 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). In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. The labor certification states the proffered wage of the offered position of furniture finisher as \$25,480 per year.⁴

A. The Petition's Priority Date

A petition's priority date is generally the date the DOL accepted an accompanying labor certification for processing. *See* 8 C.F.R. § 204.5(d). However, an employer may use the priority date of a labor certification application it filed before March 28, 2005 if a job order has not been placed for the application. 20 C.F.R. § 656.17(d)(1).

To use the priority date of a prior labor certification application, an employer must "refile" the application for an "identical job opportunity," effectively withdrawing the original application. *Id.* A job opportunity is identical if the employer, foreign national, job title, job requirements, and job description are the same as those stated on the prior application. 20 C.F.R. § 656.17(d)(4).

On the accompanying ETA Form 9089, the instant Petitioner requested to use the filing date of its previously submitted application, case number [REDACTED]. The Petitioner submitted a copy of a decision indicating the DOL's denial of its prior application on February 24, 2012. The DOL decision states the prior application's filing date as July 7, 2011. The DOL approved the accompanying, refiled application on April 2, 2014.

The DOL assigned a priority date of December 10, 2012 to the underlying labor certification supporting the instant petition.⁵ This indicates that the DOL declined to consider the application as a refiling of a prior application for employment certification, but rather certified the application based on its actual filing date of December 10, 2012. Therefore, the priority date assigned to the instant petition is December 10, 2012.

⁴ Although not a basis for this decision, we note that the labor certification lists the prevailing wage as \$25,480 per year and indicates in Part F.4 of the ETA Form 9089 that the wage determination is for skill level IV. A review of the Foreign Labor Certification Data Center Online Wage Library reveals that the Level IV wage for a furniture finisher on July 5, 2012, the purported date of the prevailing wage determination, was \$45,365 per year. *See* [http://www.flcdatcenter.com/OesQuickResults.aspx?code=51-7021&\[REDACTED\]year=13&source=1](http://www.flcdatcenter.com/OesQuickResults.aspx?code=51-7021&[REDACTED]year=13&source=1) (accessed November 6, 2015). In any further filings, the Petitioner should provide a copy of the prevailing wage determination [P-100-12145-737] to demonstrate that the prevailing wage as listed on the ETA Form 9089 matches the prevailing wage as determined by the National Prevailing Wage Center.

⁵ We note that the labor certification does not include any filing date in Part O of the ETA Form 9089. The DOL letter accompanying the labor certification, however, states the priority date as December 10, 2012.

B. Evidence of the Petitioner's Ability to Pay

Evidence of ability to pay must include "copies of annual reports, federal tax returns, or audited financial statements." 8 C.F.R. § 204.5(g)(2).

In determining a petitioner's ability to pay, we examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If the petitioner did not pay the beneficiary the full proffered wage each year, we examine whether it had sufficient annual net income or net current asset amounts to pay the difference between the wage paid, if any, and the proffered wage.⁶

The instant Petitioner submitted copies of its state income tax returns for 2011 and 2012, which appear to show sufficient annual amounts of net income to pay the proffered wage those years. However, the state tax returns are not "federal tax returns" as required by 8 C.F.R. § 204.5(g)(2). The record therefore does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to regulations.

Also, the Petitioner submitted copies of the Beneficiary's IRS Forms W-2, Wage and Tax Statements, indicating that his annual wages exceeded the proffered wage from 2011 to 2013. However, the Forms W-2 indicate the Beneficiary's employment during that period by a company other than the Petitioner.

The employer stated on the Forms W-2 has the same address as the Petitioner. Its name is also similar to the Petitioner's. However, the Forms W-2 indicate the employer's possession of a different federal employer identification number (FEIN) than the Petitioner stated on the Form I-140, the accompanying labor certification, and its tax returns. *See* 20 C.F.R. § 656.3 (stating that, for labor certification purposes, an "employer" must have a valid, distinct FEIN).

The record does not establish the Petitioner's payment of the Beneficiary's wages from 2011 to 2013. The Forms W-2 for that period therefore do not demonstrate the Petitioner's ability to pay the proffered wage based on wages it paid the Beneficiary.

For the foregoing reasons, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. Therefore, we will also dismiss the appeal on this ground.

III. THE BONA FIDES OF THE JOB OFFER

The record also does not establish the *bona fides* of the job offer.

⁶ 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); *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); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

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A petitioner must intend to permanently employ a beneficiary pursuant to the terms of an accompanying labor certification. *See* INA § 204(a)(1)(F), 8 U.S.C. § 1154(a)(1)(F) (stating that an employer “desiring and intending” to employ a foreign national may file a petition); *Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg’l Comm’r 1966) (upholding a petition’s denial where a petitioner did not intend to employ a beneficiary as a live-in domestic worker pursuant to the terms of the accompanying labor certification).

In the instant case, public records indicate the Petitioner’s lack of authorization to conduct business at the geographic area of intended employment. Online government records state that its business privileges were suspended because it did not meet tax requirements. *See* Cal. Sec’y of State, “Business Search,” at <http://kepler.sos.ca.gov> (accessed Oct. 28, 2015).

The Petitioner’s reported suspension casts doubt on its intention to employ the Beneficiary in the offered position. The record therefore does not establish the *bona fides* of the job offer.

IV. CONCLUSION

The record does not establish the petition’s proper filing. We will therefore affirm the Director’s decision and dismiss the appeal. The record also does not establish the Petitioner’s ability to pay the proffered wage or the *bona fides* of the job offer. We will also dismiss the appeal for these reasons.

The petition will be denied for the foregoing reasons, with each considered an independent and alternative basis of denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the benefit sought. INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-F- Inc.*, ID# 14450 (AAO Nov. 10, 2015)