



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

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

MATTER OF K-F-C-

DATE: AUG. 23, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a non-profit youth soccer training club, seeks to employ the Beneficiary as director of exercise physiology. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least 2 years of training or experience.

The Director, Texas Service Center, denied the petition. The Director determined that the Petitioner did not establish that the Beneficiary met the minimum requirements for the proffered position. The matter is now before us on appeal. The Petitioner asserts that the Beneficiary is qualified for the proffered position because the Director erred in not recognizing experience gained after the priority date of the labor certification and requiring additional information regarding the experience that is not required by the regulation. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the instant petition. By approving the labor certification, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II) of the Act.

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant

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classification. See section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); see also, e.g., *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that the immigration service has authority to make preference classification decisions).

The priority date of this petition, which is the date the DOL accepted the labor certification for processing, is January 23, 2014.¹ See 8 C.F.R. § 204.5(d):

A. Beneficiary Qualifications.

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 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's degree in sports science.
- H.5. Training: None required.
- H.6. Experience in the job offered: 36 months.
- H.7. Alternate field of study: Exercise science.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 36 months as a soccer coach at an elite soccer club.
- H.14. Specific skills or other requirements: Spanish fluency is strongly preferred to be able to communicate effectively with the families of athletes in the area who are primarily Spanish-speaking.

Part J of the labor certification states that the Beneficiary's highest level of education related to the offered position is a master's degree in sports sciences from the [REDACTED] Ohio, completed in 2012. The record of proceedings contain a copy of the Beneficiary's 2012 master of science degree in education and transcripts from the [REDACTED] reflecting that he holds a master's degree in physical education-sports science/coaching. Accordingly, the Petitioner has established that the Beneficiary obtained at least a bachelor's degree in sports science or exercise science before the priority date.

¹ The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. See 8 C.F.R. § 245.1(g).

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Part K of the labor certification states that the Beneficiary qualifies for the offered position based on experience as:

- A coach with [REDACTED] a residential sports training center in [REDACTED] Florida, from May 1, 2007, to August 15, 2007 (40 hours per week).
- A player with the [REDACTED] Ohio, from August 1, 2007, to May 15, 2010 (20 hours per week).
- A coach with [REDACTED] Ohio, from January 1, 2009, to December 21, 2012 (15 hours per week).
- A graduate assistant with the [REDACTED] Ohio, from August 1, 2011, to December 21, 2012 (20 hours per week).
- A coach with [REDACTED] a residential soccer program in [REDACTED] New Zealand, from January 1, 2013, to June 30, 2013 (40 hours per week).
- A soccer camp coach with [REDACTED] a youth soccer academy in [REDACTED] Mexico, from July 1, 2013, to July 31, 2013 (30 hours per week).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* 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 contains the following documentation regarding the Beneficiary's experience with [REDACTED]

- An October 18, 2011, experience letter from [REDACTED] head coach, on [REDACTED] letterhead.
- An April 7, 2013, experience letter from [REDACTED] high performance academy coach & head of European operations, on [REDACTED] letterhead.
- A June 18, 2015, experience letter from [REDACTED] head coach, on [REDACTED] letterhead.

The letters are inconsistent regarding the Beneficiary's dates of employment, job title, and duties. [REDACTED] indicates that the Beneficiary was employed as a coach, while both of [REDACTED] letters indicate that the Beneficiary was an intern. [REDACTED] indicates that the Beneficiary's duties were in relation to football operations on and off the field with much of his duties related to front-office work such as "monitoring the [REDACTED] website and social media," "assisting academy staff in technical and tactical sessions," "daily monitoring of full-time academy players issuing GPS's," and "coding of individual video highlights of players." However, [REDACTED] describes the Beneficiary's duties as solely on the field as a coach. [REDACTED] does not provide specific dates for the Beneficiary's employment, indicating that he was employed for the past 3 months (July 2011

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to October 2011) which differs from the labor certification on which the Beneficiary claimed to work for [REDACTED] from January 1, 2013, to June 30, 2013. [REDACTED] letters are inconsistent regarding the Beneficiary's dates of employment by stating alternatively that he was employed from February through May 2013, and January 2013 through April 12, 2013. In all cases, the letters indicate that the Beneficiary was employed for only 3 months, rather than the 6 months claimed on the labor certification. We note that the record contains a letter from [REDACTED] stating that the Beneficiary visited the [REDACTED] as a football coach with [REDACTED] from February 24, 2013, to March 16, 2013. However, [REDACTED] was not the Beneficiary's employer or trainer.

The record contains two letters from [REDACTED] former assistant director for [REDACTED] [REDACTED] regarding the Beneficiary's experience with [REDACTED]. The March 15, 2013, experience letter indicates that the Beneficiary only "played for" [REDACTED] and was not employed in any capacity by [REDACTED]. However, [REDACTED] June 11, 2015, letter is ambiguous as it states that he coached, as well as "worked with" the Beneficiary from May to August of 2001, 2002, and 2003. Neither letter explicitly states that the Beneficiary was a coach or describes the Beneficiary's duties. Further, the dates provided by [REDACTED] differ from the dates of May 1, 2007, to August 15, 2007, provided by the Beneficiary on the labor certification.

The record contains two July 24, 2013, experience letters from [REDACTED] head men's soccer coach, on [REDACTED] letterhead regarding the Beneficiary's experience with the [REDACTED]. The letters indicate that the Beneficiary was coached by [REDACTED] for four seasons and was also his student assistant from August 2011 to December 2012. However, the letter does not provide specific dates or hours for the Beneficiary's work experience. Additionally, it is unclear whether the Beneficiary's work as a student assistant was in the proffered job of director of exercise physiology or as a soccer coach at an elite soccer club as required by the terms of the labor certification.

The remaining evidence regarding the Beneficiary's experience includes recommendation letters that do not testify to specific work experience or relate to experience that occurred after the priority date of the labor certification.

On appeal, the Petitioner asserts that the Beneficiary's experience up to the time the Form I-140, Immigrant Petition for Alien Worker, was filed should be considered in qualifying him for the proffered position because the regulation at 8 C.F.R. § 204.5(l)(2) states that a "skilled worker means an alien who is capable, *at the time of petitioning for this classification*, of performing skilled labor." However, a petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Wing's Tea House*, 16 I&N Dec. at 158.

The Petitioner contends that *Wing's Tea House* does not apply to the Beneficiary because the decision relies heavily upon an old version of the regulations that stated the filing date of a petition is the priority

date of the labor certification.² In *Wing's Tea House*, the Acting Regional Commissioner discussed *Katigbak*, 14 I&N Dec. at 45, and highlighted the reasoning behind the requirement that education or experience must be gained before the priority date: the beneficiary should not receive a priority date at a point in time when he or she is not qualified to perform the duties of the proffered position. *Wing's Tea House*, 16 I&N Dec. at 160. The same reasoning applies to the instant case. The Petitioner does not cite to any precedent to support its assertion that, under the current regulations, a Beneficiary may count experience gained between filing of the labor certification and the Form I-140 as qualifying experience. Accordingly, the Beneficiary may only qualify for the proffered position through experience gained before the priority date of the labor certification.

On May 3, 2016, we issued a notice of intent to dismiss and request for evidence (NOID/RFE) giving the Petitioner an opportunity to address the inconsistencies noted above. We requested that the Petitioner resolve the inconsistencies with independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On July 27, 2016, the Petitioner responded to our NOID/RFE, asserting that the requested evidence was additional information not required by regulations. As described above, the inconsistencies are material as to whether the letters are credible evidence of the Beneficiary's experience. *Id.* The information that we requested regarding the dates and hours of the Beneficiary's employment are necessary in the instant case because the labor certification indicates that the Beneficiary was employed on a part-time basis. The plain language of the labor certification requires 36 months of full-time experience. Accordingly, the specific dates of the Beneficiary employment, as well as the hours he worked, are material to establishing whether the Beneficiary obtained 36 months of full-time experience before the priority date.

The Petitioner states that, despite its diligent efforts, it has been unable to obtain additional letters or other documentation from the Beneficiary's employers. The Petitioner asserts that the documentation it submitted satisfies the regulatory requirements and sufficiently establishes that the Beneficiary has the requisite experience for the proffered position. As discussed above, due to the unresolved inconsistencies in the experience letters, the Petitioner has not established that the Beneficiary meets the experience requirements for the proffered position.

² The priority date is the date the DOL accepted the labor certification for processing. As noted in *Wing's Tea House*, the former regulation at 8 C.F.R. § 204.1(c)(2) stated that "the filing date of the petition... shall be the date the request for certification was accepted for processing by any office within the employment service system of the [DOL]." *Wing's Tea House*, 16 I&N Dec. at 159. In *Wing's Tea House*, although the Form I-140 was filed on December 11, 1975, the filing date of the petition pursuant to former C.F.R. § 204.1(c)(2) was August 12, 1974, the date the DOL accepted the underlying labor certification for processing. Under current regulations, the "priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the [DOL] shall be the date the request for certification was accepted for processing by any office within the employment service system of the [DOL]." 8 C.F.R. § 204.5(d).

B. Ability to Pay and Status as an Exempt Organization

Although not addressed by the Director, we find that the Petitioner has not established its ability to pay the proffered wage. In response to our NOID/RFE, the Petitioner notes that we addressed issues that were not grounds upon which the Director denied the petition. However, we may deny an application or petition that fails to comply with the technical requirements of the law 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 we conduct appellate review on a *de novo* basis).

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

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's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review

the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³

On the ETA Form 9089, the Beneficiary does not claim to have worked for the Petitioner. The proffered wage as stated on the ETA Form 9089 is \$15 per hour or \$31,200 per year (based on a 40-hour work week).

In support of its ability to pay the proffered wage, the Petitioner submitted unaudited 2013 and 2014 profit and loss statements as well as bank statements from March 31, 2014, to July 31, 2014. In response to our NOID/RFE, the Petitioner submitted its 2012 to 2015 tax returns and 2013 to 2015 unaudited balance sheets. The Petitioner's reliance on unaudited financial records such as the profit and loss statements and balance sheets is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. 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)). As there is no accountant's report accompanying the profit and loss statements or the balance sheets, we cannot conclude that they are audited statements and we cannot, therefore, find them to be reliable evidence of the Petitioner's ability to pay.

Likewise, reliance on the balances in the Petitioner's bank account is also misplaced. While the regulation at 8 C.F.R. § 204.5(g)(2) allows additional material "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Further, the Petitioner did not submit evidence to demonstrate that the funds reported on its bank statements reflect additional available funds that are not reflected on its tax returns.

The Petitioner's tax returns reflect \$22,551 and \$74,773 in net income for 2014 and 2015, respectively. Accordingly, the Petitioner has established that it had the ability to pay the proffered wage through net income in 2015, but not in 2014. In any future filings, the petitioner should submit its audited statement of financial position (balance sheet) to establish its net current assets.

USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N

³ 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.

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Dec. 612 (Reg'l Comm'r 1967). USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. On the petition, the Petitioner asserts that it was formed in 2000 and employs 18 employees. On appeal, it states that it has sponsored multiple soccer tournaments since 2012 and that it is an ongoing, viable business. While its revenues and salaries have steadily increased since 2012, the Petitioner did not submit any evidence of its activities prior to 2012 to establish its historical growth since 2000.

According to a July 12, 2000, IRS letter submitted by the Petitioner, [REDACTED] was granted a 501(c)(3) tax exemption with federal employment identification number (FEIN) [REDACTED]. In response to our NOID/RFE, the Petitioner asserts that it took the initial steps to create a corporation, but never finished the process and eventually filed articles of termination, but that it continued to exist and still exists as an unincorporated association. However, Tennessee Secretary of State records show that [REDACTED] was incorporated on October 30, 2003, was subsequently administratively dissolved/revoked on August 19, 2005, and later filed articles of termination on September 17, 2008. An entity that incorporates and dissolves should be issued a new FEIN. See *Do You Need a New EIN?*, IRS, www.irs.gov/businesses/small-businesses-self-employed/do-you-need-a-new-ein (accessed August 11, 2016). According to the Internal Revenue Service (IRS) letter granting exempt status, in order to maintain its status as an exempt organization, [REDACTED] was required to inform the IRS of any change in method of operation, name or address, and each new FEIN.

Furthermore, in our NOID/RFE, we informed the Petitioner that the IRS's exempt organizations select check indicates that the exempt status of [REDACTED] has been revoked because it did not file IRS Form 990, Return of Organization Exempt From Income Tax, or IRS Form 990-N electronic notice (e-postcard) for three consecutive years. See *EO Select Check*, IRS, www.irs.gov/charities-non-profits/exempt-organizations-select-check (accessed August 11, 2016). In response, the Petitioner asserts that it inadvertently overlooked the filing of the Forms 990, but that it has since rectified that omission. However, as of the date of this decision, the IRS' exempt organizations select check still indicates that the exempt status of [REDACTED] is revoked and, despite our request to do so, the Petitioner did not submit the corresponding tax transcripts or certified copies of its Forms 990 to establish that the returns were actually received and processed by the IRS. These issues must be addressed in any future filings.

Based on the totality of the circumstances in this case, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date.

II. CONCLUSION

In summary, the Petitioner has not established that the Beneficiary meets the minimum requirements

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for the proffered position. The Director's decision denying the petition is affirmed. The record also does not establish the Petitioner's continued ability to pay the proffered wage from the priority date onwards.

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 Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of K-F-C-*, ID# 16995 (AAO Aug. 23, 2016)