



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

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

MATTER OF B-L-D-

DATE: MAY 16, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a landscape contractor, seeks to permanently employ the Beneficiary as a landscape gardener under the immigrant classification of skilled worker. *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 two years of training or experience.

The Director, Texas Service Center, denied the petition. The Director found that the evidence of record did not establish the Petitioner's continuing ability to pay the proffered wage of the job offered from the priority date of the petition onward.

The matter is now before us on appeal. The Petitioner has submitted additional documentation and asserts that these materials establish its continuing ability to pay the proffered wage. Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL HISTORY

The instant petition, Form I-140, was filed on June 27, 2014. As required by statute, 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 October 11, 2012, and certified by the DOL (labor certification) on March 25, 2014. In section G of the labor certification the Petitioner stated that the proffered wage for the job of landscape gardener is \$36,837 per year. In section H of the labor certification the Petitioner stated that the job required 24 months of experience as a landscape gardener or as a farmer (boxes H.3, H.6, H.6-A, H.10, H.10-A, and H.10-B of the ETA Form 9089). In box H.11 of the labor certification the Petitioner described the job duties as follows:

Plan execute [*sic*] landscape operations and maintains grounds and landscape of industrial, commercial and residential customers. Prepares and grades terrains. Plans, seeks, sods, plants, fertilizes, mows and maintains lawns using manual and power operated equipment. Plants, transplants, fertilizes cultivates, trims and prunes, and maintains flowers, garden plants, shrubs and treet [*sic*] using manual and power-operated equipment. Measures, mixes and applies nutrients and fungicides. Cleans

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grounds using manual and power operated equipment. Digs trenches and installs drainage tiles. Maintains and repairs power operated equipment when required.

In section K of the labor certification, which the Beneficiary declared to be correct, the Petitioner stated that it had employed the Beneficiary as a landscape gardener since March 1, 2007, and before that the Beneficiary worked as a self-employed farmer at [REDACTED] in [REDACTED] El Salvador, from June 1, 2000 to March 1, 2007.

As evidence of the Petitioner's ability to pay the proffered wage and the Beneficiary's work experience the Petitioner submitted copies of the following documentation with the Form I-140 petition and in response to the Director's request for evidence (RFE):

- The Petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for the years 2012 and 2013;
- The Beneficiary's Form W-2, Wage and Tax Statement, for 2013;
- A letter from the Petitioner's owner and president, dated May 12, 2015, stating that "[a]s the sole officer and shareholder, the amount of money that I receive for compensation as an officer of [REDACTED] is wholly within my discretion and control. To the extent that [the company's] net income falls below what is required for the prevailing wage determination, I will divert any compensation I would receive as the company's sole officer to support the company's ability to pay the prevailing wage."
- A Spanish-language letter and English translation on the letterhead of the [REDACTED] El Salvador, dated May 1, 2014, and signed by [REDACTED] as Manager of the Department, stating that he knew the Beneficiary was originally from the [REDACTED] and was "employed by this municipality as agriculturist with our [REDACTED] during the period of June 2001 through March 2007."

On June 15, 2015, the Director denied the petition on the ground that the documentation of record did not establish that the Petitioner had the continuing ability to pay the proffered wage of \$36,837 per year from the priority date of October 11, 2012, onward. For 2012 there was no documentation of the Beneficiary's income, but the Petitioner's federal income tax return showed net income of \$158,685, which substantially exceeded the proffered wage. For 2013, however, the Beneficiary's Form W-2 showed that his pay was more than \$7,400 below the proffered wage, and this shortfall could not be covered by the Petitioner's net income or net current assets because its Form 1120S recorded a net loss for the year of more than \$22,000 and net current liabilities of approximately \$600,000. The Director discounted the letter from the Petitioner, stating that assets of the petitioning entity's shareholders cannot be considered in determining the corporation's ability to pay the proffered wage. The Director found that the Petitioner had not established its ability to pay the proffered wage in 2013, and denied the petition based on that finding.

The Petitioner filed an appeal on July 16, 2015, accompanied by a letter from counsel and additional documentation in support of the Petitioner's claim to be able to pay the proffered wage, including copies of its 2011 federal income tax return, Form 1120S; and the Beneficiary's Form W-2 for 2012.

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The Petitioner also resubmitted a copy of the letter from its owner and president and asserted that the Director misinterpreted the legal import of the letter. The Petitioner pointed out that the money diverted to pay the shortfall in the Beneficiary's salary would not be from dividends to its sole shareholder, but rather from compensation to its sole officer. This is an accepted funding source, the Petitioner contends, and should be taken into consideration, in accord with the "totality of the circumstances" test in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), in determining the Petitioner's continuing ability to pay the proffered wage.

On January 21, 2016, we issued an RFE requesting additional evidence of the Petitioner's continuing ability to pay the proffered wage of the instant Beneficiary – specifically, copies of the Beneficiary's Forms W-2 for 2014 and 2015; the Petitioner's federal income tax return for 2014; and the Petitioner's annual report, or audited financial statement, or federal income tax return for 2015. We also noted that the records of U.S. Citizenship and Immigration Services (USCIS) showed that two other I-140 petitions had been filed for other beneficiaries in 2002 and 2007, which were approved in 2003 and 2008. We requested information and documentation concerning those petitions including the dates of employment, offered wages, wages paid, and current immigration status of the respective beneficiaries. We also noted that the letter submitted as evidence of the Beneficiary's employment experience in El Salvador contained information that was inconsistent with information provided in the labor certification. Specifically, while the Beneficiary declared in the labor certification that he worked as a self-employed farmer in [REDACTED] the letter from the [REDACTED] stated that the Beneficiary was employed by the municipality rather than self-employed and worked in [REDACTED] rather than in the [REDACTED] which was identified as the Beneficiary's original place of residence in El Salvador. The letter also stated that the Beneficiary's period of employment was June 2001 to March 2007, which conflicted with the starting date of June 1, 2000, indicated in the labor certification. We requested additional evidence to resolve the foregoing inconsistencies and advised that any letter from the employer should comply with the substantive requirements of the regulation at 8 C.F.R. § 204.5(g)(1).

On April 19, 2016, the Petitioner responded to the RFE with another letter from counsel and additional documentation addressing the issues of the Petitioner's ability to pay the proffered wage and the Beneficiary's work experience. The evidence includes copies of the Forms W-2 issued to the Beneficiary for 2014 and 2015, the Petitioner's IRS Form 1120S for 2014, and the Petitioner's IRS Form 7004 application for a filing extension for 2015. With regard to the beneficiaries of its other two I-140 petitions, the Petitioner states that the first was employed until April 1, 2007, when he was terminated, while the second, apparently still employed, was granted lawful permanent residence on June 15, 2015, as evidenced by copies of his Form I-797 notice and his Form I-551 card. The Petitioner provided copies of the second beneficiary's Forms W-2 for the years 2012-2015. The Petitioner also submitted a new Spanish-language letter, with English translation, from the [REDACTED] this time from the Department of Accounting, dated February 26, 2016, and signed by [REDACTED] as the Municipal Accountant. The letter once again identifies the Beneficiary as a native of the [REDACTED] and states that he worked in the [REDACTED] "as an independent farmer

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with the [REDACTED] during June 2001 until March of 2007.” The Petitioner requests that we vacate the Director’s denial decision and approve the petition.

II. LAW AND ANALYSIS

A. The Petitioner’s Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) provides, 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 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.

Thus, 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 priority date is October 11, 2012. The proffered wage as stated on the ETA Form 9089 (Part G) is \$36,837 per year.

The Petitioner must establish that its job offer to the Beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the certified ETA Form 9089, the Petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the Beneficiary obtains lawful permanent residence. 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 addition to the instant Beneficiary, the Petitioner must establish its ability to pay the proffered wages of all its other beneficiaries of employment-based immigrant (Form I-140) petitions from the priority date of the instant petition until each beneficiary obtains lawful permanent residence. *Id.* 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 also be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967).

Based on the entire record, we conclude that the Petitioner has established by a preponderance of the evidence its continuing ability to pay the proffered wage of the instant Beneficiary, and the proffered wage of its other I-140 beneficiary, from the priority date of the instant petition – October 11, 2012 – up to the present. Thus, the Petitioner has overcome the ground for denial in the Director’s decision.

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B. The Beneficiary's Qualifications for the Job Offered

The Petitioner must also establish that the Beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. See *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). In evaluating the Beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification (Part H of the ETA Form 9089) to determine the required qualifications for the position.

As previously discussed, the labor certification requires two years of experience as a landscape gardener or as a farmer (ETA Form 9089, boxes H.3, H.6, H.6-A, H.10, H.10-A, and H.10-B). Box H.11 sets forth the job duties of the proffered position, and box H.14 ("Specific skills or other requirements") states that "only those skills necessary to carry out the job duties outlined in part H number 11" are required. No education or training is required by the labor certification.

Regarding the evidentiary requirement for prior experience, the regulation at 8 C.F.R. § 204.5(g)(1) provides as follows:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

In this case, the initial letter from the [REDACTED] dated May 1, 2014, and signed by the [REDACTED] stated simply that the Beneficiary had been "employed by this municipality as agriculturalist" at the [REDACTED]. The letter did not provide a specific description of the duties performed by the Beneficiary. Moreover, the information provided in the letter was inconsistent with that provided in the labor certification, which stated that the Beneficiary had been a "self-employed farmer" in [REDACTED] from June 2001 to March 2007.

The RFE we sent to the Petitioner advised that additional evidence was needed to resolve the inconsistencies regarding the nature and location of the Beneficiary's work experience in El Salvador. We also quoted the substantive requirements of 8 C.F.R. § 204.5(g)(1) for any new letter from a prior employer.

The Petitioner's response to the RFE included a new letter from the [REDACTED] dated February 26, 2016, which this time came from the [REDACTED] and was signed by the Municipal Accountant. The letter confirmed that the Beneficiary was a native of [REDACTED] and stated that he worked in the [REDACTED] as "an independent farmer" at the [REDACTED] municipal nursery from June 2001 to March 2007. This description of the Beneficiary's work at the municipal nursery is more in line with the description of the Beneficiary's employment in the labor certification as a "self-employed farmer" during this time period.

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However, the Petitioner has not explained why the labor certification states that the Beneficiary's work as a "self-employed farmer" was performed in [REDACTED] rather than [REDACTED]. Moreover, the second letter from the [REDACTED] like the first, does not provide a specific description of the job duties performed by the Beneficiary, as required by 8 C.F.R. § 204.5(g)(1).

Thus, the Petitioner has not resolved the conflict between the labor certification and the employment verification letters with regard to the location of the Beneficiary's work experience in El Salvador.¹ As we stated in our RFE, 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. Furthermore, the record does not include a specific description of the job duties performed by the Beneficiary while working in El Salvador during the time period of June 2000 (or 2001) to March 2007.

Based on the evidence of record, therefore, we conclude that the Petitioner has not established that the Beneficiary had two years of experience as a landscape gardener or as a farmer as of the priority date, as required for his classification as a skilled worker under the Act and to qualify him for the job offered under the terms of the labor certification.

C. Statutory Requirement of Permanent Employment

The Act provides that employment-based immigrant visas may be allotted, *inter alia*, to skilled workers, who are defined in section 203(b)(3)(A)(i) as follows:

Skilled workers. — Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), *not of a temporary or seasonal nature*, for which qualified workers are not available in the United States.

[Emphasis added.] The statutory language is clear that the type of employment which makes a qualified immigrant eligible for classification as a skilled worker is permanent, year-round employment. Per section 203(b)(3)(A)(i) of the Act, employment that is "temporary or seasonal in nature" is not a legal basis for skilled worker classification.

In his letter of July 15, 2015, which accompanied the Petitioner's appeal of the Director's decision, counsel indicated that the Beneficiary's employment as a landscape gardener lasts approximately eight months each year. In that same letter counsel stated that in 2012 the Beneficiary worked from mid-March to mid-December, a nine-month period of time. Based on this description the job offered in this petition appears to be seasonal in nature. As such, it would not be the type of job for which an employment-based immigrant visa for a skilled worker may be granted. Therefore, in any further

¹ Nor has the Petitioner resolved the date discrepancy between the labor certification, which states that the Beneficiary's job began on June 1, 2000, and the letters from the [REDACTED] which state that the Beneficiary's work began a year later, in June 2001.

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proceedings before USCIS the Petitioner must address this issue of the nature of the Beneficiary's employment – specifically, whether it is temporary/seasonal or permanent/year-round.

III. CONCLUSION

The Petitioner has not established that the Beneficiary had two years of experience as a landscape gardener or as a farmer as of the priority date, as required to qualify for the job offered under the terms of the labor certification and to be eligible for classification as a skilled worker under the Act. Accordingly, the appeal will be dismissed.

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 appeal is dismissed.

Cite as *Matter of B-L-D-*, ID# 15728 (AAO May 16, 2016)