U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
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U.S. Citizenship and Immigration Services

[redacted]

FEB 26 2004

FILE: WAC 02 132 54711 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for a Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as a beauty salon manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The director also determined that the petitioner had not established that the beneficiary had the requisite experience as of the priority date of the visa petition.

On appeal, counsel submits additional tax returns and documentation relevant to the petitioner's ability to pay the proffered wage and the beneficiary's experience. Counsel contends that the petitioner has demonstrated that it has the ability to pay the proffered wage and that the beneficiary has the four years work experience as required on the labor certification.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to 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.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

> (2) *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 [CIS].

The regulation at 8 C.F.R. § 204.5(l)(3) additionally 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.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information

Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Eligibility in this case rests upon whether the petitioner has established that the beneficiary possesses the requisite qualifications for the position and whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is June 7, 1996. The beneficiary's salary as stated on the labor certification is $12.86 per hour or $26,748.80 annually.

In this case, the petitioner initially submitted a copy of its Form 1120 U.S. Corporation Income Tax Return for the tax year of 1995. The return contained evidence that it represented the petitioner's financial data for the fiscal year beginning October 1, 1995 through September 30, 1996. It contained the following information:

Gross receipts or sales	$1,578,577
Officers' compensation	40,160
Salaries and Wages	(blank)
Taxable income before Net operating loss deduction	-0-

Schedule L of the petitioner's 1995 federal tax return reflected that the petitioner's net current assets were $80,001. This amount was sufficient to cover the beneficiary's salary of $26,748.80 as of the priority date of the petition.

On April 29, 2002, the director instructed the petitioner to submit additional evidence showing that it has the ability to pay the beneficiary's offered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director also requested that the petitioner provide evidence establishing that the beneficiary possesses the work experience required on the Application for Alien Employment Certification (Form ETA 750). In this case, the beneficiary must have four years experience in the job offered as set forth on Block 14 of the Form ETA 750.

By letter, dated July 11, 2002, counsel requested a sixty-day extension of time to respond to the director's request for evidence because the petitioner was out of the country on a business trip. In denying the petition, the director noted that the petitioner had failed to adequately respond to the request for further evidence and based his decision upon the evidence initially submitted. To the extent that the director addressed the merits of the petition, we will review these findings as they relate to the issues on appeal.

The AAO concurs with the director's conclusion that the record failed to establish that the petitioner had submitted evidence that the beneficiary met the required four years of experience as described on the labor certification. The director also concluded that while the 1995 tax return showed that sufficient net assets could cover the beneficiary's salary, the return was filed under the name of Juan Juan Inc. The director found that the record contained no evidence that the petitioner, Juan Juan Salon, is the same business entity as Juan Juan Inc. The AAO notes that the addresses and tax employer identification numbers are the same on the I-140 petition and on the tax returns filed under Juan Juan Inc. While the AAO is satisfied that these are the same entities, the evidence submitted on appeal raises questions as to whether the petitioner is still a viable business entity. The

evidence submitted on appeal also fails to establish that the petitioner has had a continuing ability to pay the proffered wage or that the beneficiary's work experience has clearly been established.

With respect to the beneficiary's qualifications, the evidence offered on appeal includes a copy of a March 1996 letter signed by [redacted] stating that the beneficiary worked for the Coiffrru Smarty's International beauty salon ("Coiffru Smarty's") as a hair/beauty salon manager from February 1991 until March 1996. M[redacted]igned as the "owner." The record also contains a copy of a California Board of Barbering and Cosmetology "affidavit of experience" signed by [redacted] dated February 1996. This affidavit states that the beneficiary worked at Coiffrru Smarty's from 1994 until 1996 in "barbering." Although the same person signed both documents, they raise questions as to the nature and scope of the beneficiary's position at Coiffru Smarty's during this period of time. Counsel asserts that the beneficiary's experience as a barber is irrelevant. This may be true, but it doesn't address the basic conflicting characterizations of the beneficiary's work experience attested by the same person. It is the petitioner's burden to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence will not suffice. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988). Because of the inconsistent evidence in the record of proceeding, the petitioner has failed to establish the beneficiary's qualifications.

Also submitted on appeal are copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for the tax years 1996 through 1999. The financial information contained on these returns indicates that while the figures given as taxable income before net operating loss deduction are insufficient to cover the beneficiary's offered wage of $26,748.80, Schedule L reflects that the petitioner's net current assets of $57,918, $97,337, $148,390 and $79,359, respectively, would be sufficient to meet the beneficiary's wages during those years. The tax returns submitted for 2000 and 2001, however, are not in the petitioner's name and are filed under a different employer tax identification number. Form 1120S, U.S. Income Tax Return for an S Corporation is filed by "Dream Hair, Inc., DBA Juan Juan" for the tax year of 2000. For the year 2001, a copy of a Form 1120S, U.S. Income Tax Return for an S Corporation has been submitted in the name of "Dream Hair, Inc." The addresses on both of these returns is not the petitioner's address as set forth in previous tax returns and on the labor certification.

Here, although a letter submitted on appeal by [redacted] as "owner" asserts that Dream Hair, Inc. is doing business as Juan Juan Salon which used to be called Juan Juan Inc., the record contains no evidence of corporate or contractual documentation establishing the manner by which the petitioner is still a viable business employer as Dream Hair, Inc. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof. *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972).

The AAO also notes that the regulation at 20 C.F.R. § 656.30 provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. If the employer/employee relationship changes, the validity of the approved labor certification may be affected; thus, if the employer filing the preference petition cannot be considered a successor-in-interest to the employer in the labor certification, the job opportunity as described in the approved certification no longer exists because the original employer no longer exists. *See, e.g., Matter of United Investment Group,* Int. Dec. 2990 (Comm. 1985).

Finally, even if the petitioner and Dream Hair Inc. were considered the same business entity, the petitioner's continuing ability to pay the beneficiary's offered wage of $26,748.80 has not been satisfied by the financial information contained in Dream Hair Inc.'s 2000 and 2001 Form 1120S corporate tax returns. Its 2000 tax return, which covers only two months, reflects that its gross receipts or sales were $11,300; its officers' compensation and salaries and wages were -0-; its ordinary income was $15,950; and its net current assets were $300. The petititioner did not provide any other evidence concerning the petitioner's ability to pay the proffered wage in 2000.

Although the 2001 tax return covers the entire tax year, the information provided fails to demonstrate that the beneficiary's offered wage could be met. Its gross receipts or sales were $1,248,568; its officers' compensation was $52,542; its salaries and wages were -0-; its ordinary income was $20,279 and the net current assets were -$62,231. Neither the ordinary income or net current assets could meet the beneficiary's offered wage. Counsel asserts that non-cash deductions such as depreciation are ways in which a business can minimize its tax liability and should be considered as part of the petitioner's ability to pay the proffered wage. We would only note that with regard to a petitioner's ability to pay, there is no precedent that would allow a petitioner to add back to the net income the depreciation expense charged for the year. *See Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049, 1054 (S.D.N.Y.). Since the petitioner has failed to establish its ability to pay the proffered wage in 2000 and 2001, the AAO cannot conclude that the petitioner has established a continuing ability to pay the beneficiary's wage pursuant to the requirements of 8 C.F.R. § 204.5(g).

Based on the evidence contained in the record, the petitioner has not demonstrated the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. The petitioner has also failed to clearly establish that the beneficiary's work experience satisfies the requirements of the labor certification or that the petitioner continues to be a viable business employer.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.