MATTER OF SMJG- CORP.

DATE: JULY 31, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a buyer, manager, and developer of commercial and residential properties, seeks to employ the Beneficiary as a development manager. It requests his classification under the third-preference immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based "EB-3" category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

After first granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that, as of the filing's grant, the Petitioner did not establish the Beneficiary's educational qualifications for the offered position. On appeal, we affirmed the Director's decision and denied the Petitioner's five following motions to reopen and reconsider. Our most recent decision also found that the Petitioner did not establish its required ability to pay the proffered wage. *See Matter of SMJG- Corp.*, ID# 347297 (AAO Nov. 15, 2017).

The matter is now before us on the Petitioner's motions to reopen and reconsider. The Petitioner submits additional evidence and asserts that we misinterpreted the job's requirements. It also contends that a totality of the circumstances demonstrates its ability to pay the proffered wage.

Upon review, we will deny the motions.

## I. MOTION REQUIREMENTS

A motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider, on the other hand, must establish that our prior decision misapplied law or policy based on the evidence at that time. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must also include supporting precedent or adopted decisions, statutory or regulatory provisions, or statements of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy. We may grant motions that satisfy these requirements and demonstrate eligibility for the requested immigration benefit.

## II. THE EDUCATIONAL REQUIREMENTS

To establish eligibility for the benefit sought, the Petitioner must demonstrate that the Beneficiary meets the minimum requirements of the offered position, as described on the accompanying labor certification. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977) (requiring a petitioner to establish a beneficiary's possession of all DOL-certified job requirements by a petition's priority date).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of a labor certification to determine the minimum requirements of an offered position. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

On motion, the Petitioner asserts that our prior decisions improperly ignored its acceptance of 10 years of experience as an alternative to the required six years of post-secondary study and six years of experience stated on the labor certification. Contrary to our findings, the Petitioner states that the position does not require at least six years of both post-secondary studies and experience. Rather, the Petitioner contends that the position requires a master's degree and six years of experience, or 10 years of experience without any post-secondary studies or additional experience.

The Petitioner notes that the specific vocational preparation (SVP) level of its claimed primary requirement (a master's degree plus six years of experience) matches the SVP level of its claimed alternative requirement (10 years of experience without post-secondary education and additional experience). *See* 20 C.F.R. § 656.3 (defining SVP as "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation"). As of the filing of the labor certification application, the Beneficiary already worked for the Petitioner and potentially qualified for the job based only on alternative experience requirements. Under applicable case law at that time, the SVP level of the alternative requirements therefore had to substantially equate to the SVP level of the primary job requirements. *See Matter of Kellogg*, 94-INA-00465, 1998 WL 1270641 *5 (BALCA Feb. 2, 1998) (*en banc*). Thus, the Petitioner argues that the SVP equivalency of its requirements indicates its compliance with *Kellogg* and its intention to alternatively require 10 years of experience without post-secondary education and additional experience.

However, the SVP equivalency of 10 years of experience to the stated primary requirements does not demonstrate the labor certification's acceptance of 10 years of experience alone to qualify for the job offered, or the Petitioner's intention to allow 10 years of experience in lieu of the required education and experience. Besides the plain language of the labor certification, other evidence of record does not support the Petitioner's claimed alternative requirement. As our prior motion decisions discuss at length, the documents that could shed light on the Petitioner's intent as of the labor certification

[1] This petition's priority date is July 30, 2003, the date an office within DOL's employment service system received the accompanying labor certification application. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

filing, its recruitment materials, do not support the Petitioner's argument. The Petitioner's newspaper and JobBank advertisements for the position require a master's degree and experience, without indicating any alternative requirement or specifying that experience alone could substitute for the required education. As our prior motion denials explain, "[w]hen an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." Memorandum from Anna C. Hall, Acting Reg'l Adm'r, DOL Employment & Training Admin., *Interpretation of "Equivalent Degree,"* 2 (June 13, 1994). Here, the Petitioner's recruitment materials for the position require a master's degree and experience, without notifying potential applicants of the sufficiency of experience alone. If the Petitioner intended to accept only experience to qualify for the position, it should have specified that intent to both the DOL and U.S. workers during the recruitment process. The record therefore does not establish the Petitioner's alternative acceptance of 10 years of experience without post-secondary education and additional experience.

The record does not establish the Beneficiary's possession, by the petition's priority date, of at least six years of post-secondary education. The record therefore does not establish the Beneficiary's educational qualifications for the offered position.

## III. ABILITY TO PAY THE PROFFERED WAGE

The Petitioner also asserts that, but for its incurrence of uncharacteristic expenses, the record would have demonstrated its ability to pay the annual proffered of $64,045.80 in 2003. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967) (allowing us to consider factors beyond a petitioner's net income and net current assets in determining its ability to pay a proffered wage). The Petitioner states that, in 2002 and 2003, it bought three properties that required significant renovations. As a result, it states that it incurred unusually high expenses in 2003, preventing it from demonstrating its ability to pay the $14,045.72 difference that year between the annual proffered wage and the amount it paid the Beneficiary.

Our two most recent decisions addressed this argument. We acknowledge that copies of the Petitioner's 2003 federal income tax returns indicate an annual amount of expenses that the Petitioner has not since reached. The record, however, lacks evidence of the Petitioner's expenses before 2003. Thus, as of the petition's approval in 2006, the record does not sufficiently establish the 2003 expenses as unusual. Also, the record lacks supporting, documentary evidence of the purported property purchases, the renovations, and the discretionary nature of the expenses. In addition, the petitioner in *Sonegawa* reported only one annual loss in a 10-year period. *Matter of Sonegawa*, 12 I&N Dec. at 614. Here, the Petitioner reported losses in every year but two since the petition's priority date. The Petitioner's motions therefore do not persuade us to change our *Sonegawa* analysis.

For the foregoing reasons, the record does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date onward.

## IV. CONCLUSION

The Petitioner's motions lack sufficient new evidence and legal authority to establish its ability to pay the proffered wage or the Beneficiary's educational qualifications for the offered position. We will therefore affirm our most recent decision.

**ORDER:** The motion to reopen is denied.

**FURTHER ORDER:** The motion to reconsider is denied.

Cite as *Matter of SMJG- Corp.*, ID# 1372698 (AAO July 31, 2018)