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U.S. Department of Homeland Security

Citizenship and Immigration Services

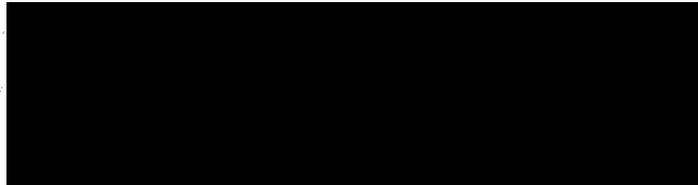
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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass, 3/F

425 I Street, N.W.

Washington, DC 20536



File: SRC 01 166 57425

Office: NEBRASKA SERVICE CENTER

Date:

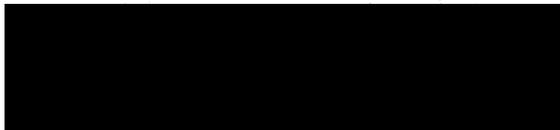
**DEC 17 2003**

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



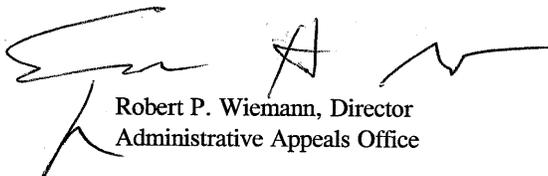
**INSTRUCTIONS:**

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.



Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner is a gas station and auto repair shop. It seeks to employ the beneficiary permanently in the United States as a garage manager. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

8 C.F.R. § 204.5(g)(2) states in pertinent 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.

Eligibility in this matter turns both on whether the petitioner has demonstrated the ability to pay the wage offered and whether the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750, as of the priority date of the petition. The petition's 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is December 29, 1997. The beneficiary's salary as stated on the labor certification is \$24.25 per hour or \$50,440 per year.

Counsel initially submitted insufficient evidence of the

petitioner's ability to pay the proffered wage and of the experience of the beneficiary. In a request for evidence (RFE) dated January 10, 2002, the director mandated petitioner's federal income tax return, annual report or audited financial statement for 1997, the priority date, and continuing to the present to establish the petitioner's ability to pay the proffered wage. The RFE exacted evidence of four (4) years of experience, as required in Form ETA 750, in letters from the beneficiary's former employers, with the name, address, and title of each, including dates and duties of the experience.

In response to the RFE, the petitioner offered a Texas Franchise Tax Certification, stating a charter date of February 7, 1995. The Immigrant Petition for Alien Worker (I-140) claimed that the petitioner began business in 1993, but neither date was relevant, either to the ability to pay the proffered wage, or the beneficiary's experience. The petitioner's further response included selected, unaudited financial statements for periods ending December 31, 2000, January 31, 2001, February 28, 2001, and September 30, 2001 (unaudited financial statements).

The petitioner offered no federal income tax return, annual report, or audited financial statement of any kind for 1997, the priority date, or continuing in 1998 or 1999. Counsel contended that total assets of over \$400,000, in the unaudited statement of September 2001, indicated the ability to pay the proffered wage. The petitioner's evidence encompassed no item required by the regulation or the RFE. See 8 C.F.R. § 204.5(g)(2) and the RFE.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Equally as puzzling, the petitioner withheld any letter from any employer and, hence, prevented proof of the beneficiary's previous experience and duties, as required by the RFE. Counsel's transmittal, in response to the RFE, admitted that pay stubs covered only three pay dates, viz., December 31, 1995, January 3, 1996, and February 31 [sic], 1996 (pay stubs). These referenced Société Nationale de Transport Maritime. The petitioner did not present any translation of the pay stubs. The petitioner offered no other evidence of the beneficiary's

requisite four (4) years of experience.

The pay stubs expressed a foreign language and currency. Since no translation accompanied them, regulations prevent any further consideration of them. 8 C.F.R. § 103.2(b)(3).

The director determined that the evidence established neither the petitioner's ability to pay the proffered wage at the priority date, and continuing thereafter, nor the beneficiary's minimum of four (4) years of experience, as required by the petitioner's Form ETA 750. Consequently, the director denied the petition.

With the appeal, counsel submits a Motion to Reopen/Reconsider (motion). It stipulates that the petitioner has no further information or evidence to offer and, somewhat tautologically, that the petitioner filed the appeal to preserve the right to appeal. These stipulations state no erroneous conclusion of law or statement of fact.

Counsel issues only a conclusion on appeal, namely, that:

We believe the examiner did not consider the totality of the evidence submitted.

On appeal, the duty lies, rather, with counsel to specify an erroneous conclusion of law or statement of fact. 8 C.F.R. § 103.3(a)(1)(v). Counsel's appeal to the totality of the evidence is not persuasive, apart from some specification of error. Yet, counsel offers none and declares the petitioner's evidence complete.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Provisions of 8 C.F.R. § 103.3(a)(1) impose, along with others affecting counsel, the consequence that:

(v) *Summary dismissal*. An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal...

The director determined that the evidence established neither the petitioner's ability to pay the proffered wage at the priority date, and continuing thereafter, nor the beneficiary's minimum of four (4) years of experience, as required by the petitioner's Form ETA 750. The petitioner has specified no erroneous conclusion of

law or statement of fact.

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 summarily dismissed.