

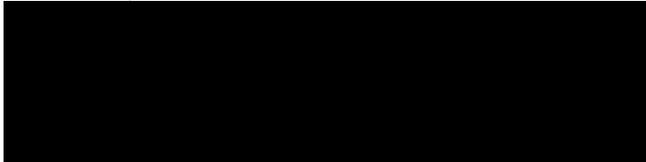
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U.S. Department of Homeland Security  
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street N.W.  
Washington, DC 20536



File: WAC 02 068 51869

Office: CALIFORNIA SERVICE CENTER Date:

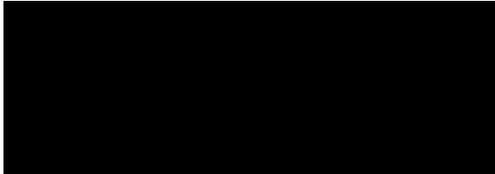
DEC 17 2003

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 the 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a packaging company. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. 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, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which 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 15, 1997. The beneficiary's salary as stated on the labor certification is \$16.22 per hour or \$33,737.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated March 20, 2002, the director required

additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE required either the petitioner's Form 1120, U.S. Corporation Income Tax Return certified by the Internal Revenue Service, annual report, or audited financial statement, for 1997 to the present. The RFE explicitly requested letters verifying the beneficiary's experience and the name, address, and telephone number at which to contact previous employers.

Counsel submitted, for 1997 to 2000, page 1 only of the unsigned and undated corporate tax returns. One letter, dated July 11, 1997, from an individual (the RB-G letter), alleged the beneficiary's employment during 1980-1981. The other, dated May 10, 1997, from a corporation (the J,SA letter), stated that he worked there from 1983 to 1988. Neither provided the months of employment or full-time status of the position.

The director initiated an investigation of these 1997 letters on February 26, 2003. The inquiry revealed that the telephone number given in the RB-G letter had belonged, for 7-8 years, to another enterprise and did not relate to the address given in the RB-G letterhead. The discrepancy in the J,SA letter, equally, negated the verification of employment. The address and phone number matched, but they pertained, for the last 10 years, to a totally different enterprise.

The director noted that the discrepancies were serious enough to warrant a finding that the petitioner submitted fraudulent documents, determined that the evidence did not establish that the petitioner had proved the two (2) years of experience required by Form ETA 750, and denied the petition.

On appeal, counsel avers that the investigation is wrong, but admits that the petitioner is still waiting on information about the RB-G letter. Counsel offers to prove that J,SA closed business in January 1998. That speculation does not address the provenance of the J,SA letter in 1997 from an address with a phone that, for 10 years, belonged to a totally different enterprise.

*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.

A family friend (CRJ) submits a letter on appeal. It recommends the beneficiary as a responsible, serious, and honorable person at work and claims that the beneficiary performed at J,SA as a mechanic in the maintenance department, from 1983-1988. The CRJ letter lays no foundation for the writer's knowledge of or access to the business records of J,SA. It gives no account, as the RFE required, of the address or phone at which the beneficiary's performance might have occurred. It raises more doubts about the reliability of the petitioner's evidence. The "ratification" of the CRJ letter avoids mention of the terms of employment and affirms the personal recommendation.

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

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

The director's finding of fraudulent documents to support the requirement of two (2) years of experience is supported by clear and convincing evidence. Offers of proof, on appeal, did not contradict the finding.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established with any probative evidence that the beneficiary had two (2) years of experience. Therefore, the petitioner has not overcome this portion of the director's decision. For this reason, the petition may not be approved.

Also, the RFE required proof of the ability to pay the proffered wage in the form of certified federal tax returns in accord with 8 C.F.R. § 204.5(g)(2). The petitioner, instead, produced merely page one of Forms 1120 for 1997-2000 and did not sign, date, or authenticate that. No probative evidence supports the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

Where the petitioner is notified and has a reasonable opportunity

to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before Citizenship and Immigration Services (CIS), formerly the Service or the INS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). For this additional reason, the petition may not be approved.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

A review of the Form ETA 750 and submissions on appeal reveals that the petitioner has not established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

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.