

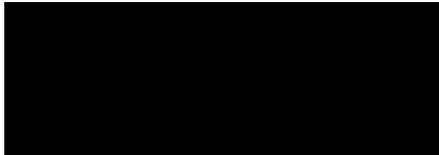
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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536



DEC 23 2003

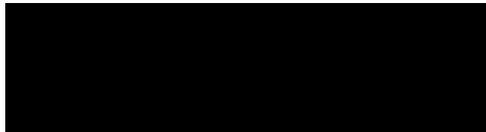
File: WAC 01 244 61513 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:



PUBLIC COPY

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

Mertz Care Home # 3 is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (Form ETA 750).

An individual has tendered Notice of Appearance as Attorney or Representative (G-28) for the petitioner. She has not, however, filed the requisite declaration disclaiming direct or indirect remuneration. See 8 C.F.R. § 292.1(a)(2)(iii). Notice is provided as a courtesy only.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 CFR § 204.5(g)(2) states:

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 hinges 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 July 18, 1997. The beneficiary's salary as stated on the labor certification is \$1,291.33 per month or \$15,495.96 per year.

The petitioner initially submitted insufficient evidence of the ability to pay the proffered wage. In a notice dated October 28, 2001 (RFE), the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage from the priority date, July 18, 1997, and continuing until the beneficiary obtains lawful permanent residence. The RFE quite explicitly exacted proof as of the priority date.

With Form ETA 750, an individual (EM), provided Schedule C, Profit or Loss from Business (EIN 77-0222968), for her 1995 and 1996 Forms 1040, U.S. Individual Income Tax Returns. In response to the RFE, another entity, Mertz Care Home, Inc. (EIN 77-0483560), submitted 1998 and 1999 Forms 1120-A, U.S. Corporation Short-Form Income Tax Returns. Without authority or explanation, the petitioner inserted Schedule C from the 1998 and 1999 Form 1040 for EIN 77-0222968 into the 1998 and 1999 Forms 1120-A for EIN 77-0483560. The petitioner also offered a 2000 Form 1040A (EIN 77-0222968).

Thus, at the completion of the response to the RFE, the record had no evidence at all as to 1997, the priority date. For 1998, Schedule C of EIN 77-0222968, in the petitioner's Form 1040, showed net profit of \$2,080, less than the proffered wage. Form 1120-A for 1998 from EIN 77-0483560 reflected a deficit of taxable income before net operating loss deduction and special deductions, (\$3,940), less than the proffered wage. Its balance sheet showed current assets of \$357 minus current liabilities of \$0 for net current assets of \$357, less than the proffered wage.

For 1999, Form 1120-A from EIN 77-0483560 reported \$127 taxable income before net operating loss and special deduction, less than the proffered wage. Its balance sheet, again, showed current assets of \$357 minus current liabilities of \$0 for net current assets of \$357, less than the proffered wage.

Also, at the completion of the response to the RFE, the record included the 2000 Form 1040, U.S. Individual Income Tax Return, but no Schedule C, Profit or Loss from Business. It reported adjusted gross income of \$28,439, equal to or greater than the proffered wage

Upon the completion of the response to the RFE, the director reviewed the record, relied on net income as stated in the federal income tax returns, and denied the petition.

8 C.F.R. § 103.2 (b) states in part:

Evidence and processing - (1) General. An applicant or petitioner must establish eligibility for a requested

immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is considered part of the relating application or petition.

When additional evidence is requested, 8 C.F.R. § 103.2(b)(8) prescribes:

In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted. Within this period the applicant or petitioner may:

(i) Submit all the requested initial or additional evidence;

(ii) Submit some or none of the requested additional evidence; or

(iii) Withdraw the application or petition.

The director specifically exacted the 1997 federal tax return, but the petitioner did not provide any within the time to respond. 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 INS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Provisions of 8 C.F.R. § 103.2(b) mandate that:

(13) *Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

On appeal, the 1997 Form 1040 with Schedule C (EIN 77-0222968) and 2000 Form 1120 appear to be rather tardy. In their favor, the Form 1040 reported adjusted gross income of \$45,727, greater than the proffered wage. The Form 1120 showed taxable income before net operating loss deduction and special deductions of \$161,555, equal to or greater than the proffered wage. They do not, however, alter the outcome. The petitioner did not establish the ability to pay the proffered wage in 1998 and 1999. The evidence

did not overcome the grounds of the director's decision.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Beyond the scope of the decision, the 1998 Form 1120-A (EIN 77-0483560) reports that Mertz, Inc. was incorporated on April 30, 1998. The CPA letter on appeal, dated March 19, 2002 asserts, in contradiction, one continuous operation from 1997 onward. The CPA letter does not claim net income or net current assets in any year equal to or greater than the proffered wage. It does not establish the status of a successor-in-interest for Mertz, Inc., though its 2000 Form 1120 shows sufficient net income. The petitioner has not submitted data to assess whether the adjusted gross income on the 1997 Form 1040 suffices to pay the proffered wage for the portion of the year after the priority date and for the household expenses of the petitioner. For these additional reasons, the petition may not be approved.

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.

After a review of the record, it is concluded that the petitioner did not establish the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.