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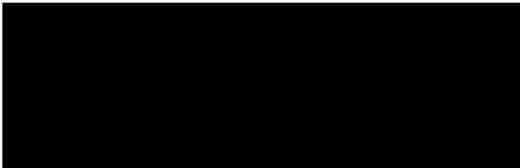
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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



**U.S. Citizenship
and Immigration
Services**



FILE: WAC 02 157 52856 Office: CALIFORNIA SERVICE CENTER Date: **APR 05 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for 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: SELF-REPRESENTED

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 preference 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 petition will be denied.

The petitioner is a landscaping service. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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.

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.

The regulation at 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 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. Here, the petition's priority date is July 28, 1998. The beneficiary's salary as stated on the labor certification is \$10.42 per hour for a forty-hour workweek, which equates to \$21,673.60 per annum.

With its initial petition, the petitioner did not provide any evidence of its ability to pay the proffered wages. In a request for additional evidence on June 25, 2002, the director issued a request for evidence which specifically requested regulatory-sanctioned evidence such as tax returns, annual reports, or audited financial statements. Alternatively, the director requested that the petitioner submit a current statement from a financial officer if the petitioner employed one hundred (100) or more workers as evidence of its ability to pay the proffered wage. In response to this request, the petitioner submitted a two-page unaudited financial statement covering the years 1991 through 2001.

On August 8, 2002, the director issued a second request for evidence of the petitioner's ability to pay the proffered wage from the establishment of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director repeated its request for regulatory-sanctioned evidence such as tax returns, annual reports, or audited financial statements for the period from 1998-2001. In addition, the director again offered the alternative of submitting a current statement from a financial officer of the organization if the petitioner employed one hundred (100) or more employees. In response to this second request for evidence, the petitioner submitted an unaudited financial statement from "the new," which the director found insufficient to establish the beneficiary's eligibility for the classification sought.

On November 5, 2002, the director issued a Notice of Intent to Deny, which specifically required the petitioner to submit U.S. Federal Tax Forms 1040, including all schedules, tables, and appropriate signatures on the returns, for the period from 1998 through 2001. In response to the Notice of Intent to Deny, the petitioner submitted a second copy of "the new," identical in content to the one previously submitted but signed by the petitioner's manager on each page. The director concluded that this evidence failed to establish the petitioner's ability to pay the proffered wage as of the priority date, and subsequently denied the petition on February 7, 2003.

On appeal, the petitioner submits a letter accompanied by additional evidence. The petitioner asserts that the evidence in the record establishes that the petitioner had the ability to pay the proffered wage during the relevant time period.

The AAO will first analyze the director's decision considering the evidence submitted prior to the decision of the director. The evidence that was newly submitted on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The regulation at 8 C.F.R. § 204.5(g)(2) specifies competent and probative evidence of a petitioner's ability to pay a proffered wage, such as the petitioner's tax returns, audited financial statements, and annual reports. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its 1998, 1999, 2000, and 2001 tax returns. These tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

In lieu of the requested tax returns, the petitioner provided unaudited financial statements as proof of its ability to pay the proffered wage. Unaudited financial statements have little evidentiary value because they are based solely on the representations of management. See 8 C.F.R. § 204.5(g)(2). The petitioner, however, alleges that by submitting a signed copy of the financial statement from "the new," it has overcome the director's finding that the financial evidence in the record is inadequate. This argument is clearly flawed because the petitioner, [REDACTED] Inc., with employer identification number [REDACTED] is not the same as "the new," nor is Trugreen, Inc. mentioned in the financial document. The petitioner has not shown whether the petitioner is the same as [REDACTED] Construction or [REDACTED] which are mentioned. In any case, a signed financial statement is

not an audited financial statement, even if it did pertain to the petitioning company.

On appeal, the petitioner submits copies of its Profit and Loss Statements for the years ending in 1999, 2000, 2001, and 2002.¹ These documents are insufficient to establish the petitioner's ability to pay the proffered wage for the relevant period. The regulation at 8 C.F.R. § 204.5(g)(2) states that: "Evidence of this ability [to pay the proffered wage] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements . . . In appropriate cases, additional evidence . . . may be submitted by the petitioner (emphasis added)." At best, the Profit and Loss Statements could be considered in addition to, but not independent of, federal tax returns, annual reports, or audited financial statements. Moreover, the petitioner has failed to produce any evidence of its financial performance for the year 1998, which is the year the priority date was established. Since the regulations clearly state that the petitioner must demonstrate proof of eligibility at the priority date, the petitioner has failed to meet its evidentiary burden. See 8 C.F.R. §§ 204.5(g)(2) and 103.2(b)(1) and (12).

The petitioner provides additional information in its letter regarding the nature of its business operations, and provides details regarding such factors as revenue and customer levels. The petitioner, however, provides no documentation to support these claims. 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).

The petitioner noted that CIS approved another petition filed by the petitioner, alleging that its ability to pay the proffered wage in that case was established based on the submission of comparable financial evidence (specifically, excerpts from "the new"). This allegation is not persuasive for two reasons. First, the proper forum for submission of this claim was before adjudication of the

¹ Please note, however, that the petitioner's letter erroneously states that it has included Profit and Loss Statements for 1998, 1999, 2000, and 2001. There is no Statement for 1998 in the record.

visa petition by the Service Center.² The introduction of this evidence for the first time on appeal is neither appropriate nor persuasive. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence substituted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceeding before CIS. See *Matter of Soriano*, 19 I&N 764, 766 (BIA 1998).

Second, the Administrative Appeals Office is never bound by a decision of a service center or district director. See *Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). If the previous petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of a prior approval that may have been erroneous. See *e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

Accordingly, after a review of the record, 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.

Beyond the decision of the director, it is noted that the petitioner has not submitted sufficient evidence to establish the beneficiary's qualifications for the proposed position. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

² Although the petitioner briefly refers to the alleged acceptance of comparable financial evidence in its letter to the director dated November 26, 2002, it failed to provide the director with a specific case reference or further documentation.

The job offer portion of the petitioner's labor certification states that the proffered position is that of a landscape gardener. The duties of the position are specified as follows:

Plant and design maintenance of garden and lawns of private residences and businesses. Must be familiar with trees, shrubbery and usage of different fertilizers and weed killer. Transplant shrubs and plants. Mow and trim lawns and shrubs using hand and power mower. For particular landscape effect plant trees, flowers and shrubs chosen by property owner. Apply supplemental liquid and dry nutrients to lawns and trees.

In addition, the petitioner states that two years of experience in the job offered and a resume or letter of qualifications is required. On the Form ETA 750 Part B, the beneficiary lists five employers for the period from November 1993 until the present.³

The regulation at 8 C.F.R. § 204.5(1)(3)(ii) states, in pertinent part:

- (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.

After initial review of the visa petition by the director, a request for evidence dated June 25, 2002 was forwarded to the petitioner, which requested that the petitioner provide specific written evidence on the letterhead of the previous employers that would support the beneficiary's claims of experience as listed on the Form ETA 750, Application for Alien Employment Certification. This request was made because the visa petition was not accompanied by independent evidence of the beneficiary's claims of employment experience.

³ The "present" was as of the date of the filing of the Form ETA 750, which was July 28, 1998.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) states:

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.

(Emphasis added).

As set forth in Section 14 of the Form ETA 750, Part A, the petitioner requires the beneficiary to have at least two years of experience as a landscape gardener. Thus, the beneficiary must prove that he has two years of relevant work experience prior to the priority date.

In response to the director's request, the petitioner submitted two documents. The first document is a letter from [REDACTED] Landscape and Construction, Inc., dated July 17, 2002. This letter, signed by the office manager, merely states that the beneficiary was employed as a construction laborer from 1995 to 1997. This evidence is insufficient for two reasons. First, the proffered position identified in the Form ETA 750 is a landscape gardener. Clearly, the titles of these positions are entirely different. Additionally, the documentation provided failed to list the duties of the beneficiary while working at this position as required by 8 C.F.R. § 204.5(1)(3)(ii)(A). Since no duties were provided on the employment verification letter, it is impossible to determine if the beneficiary's experience as a construction laborer qualifies him to perform the duties for the proffered position of landscape gardener.

Second, the employer lists the dates of the beneficiary's employment as 1995 - 1997, without specifying the months during which employment began and concluded. This fails to corroborate the Form ETA 750, where the beneficiary lists his dates of employment with this company as January 1995 to June 1996. The beneficiary further states on the ETA 750 that he began working at Figueroa Landscape in July 1996, which directly contradicts the supporting documentation and creates questions as to the validity of the beneficiary's claims. *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.

Since the above-referenced letter states that the beneficiary's employment with that company did not end until 1997, the duration of the beneficiary's employment with both Richard Cohen and Figueroa is uncertain. The petitioner, therefore, is obligated to reconcile such inconsistencies.

The second document, dated July 22, 2002, is from [REDACTED] Inc.⁴ This letter, signed by the office manager, merely states that the beneficiary was employed there from November 1993 to December 1994. While the dates of employment provided by the beneficiary on the ETA 750 are corroborated by this letter, the employer has failed to list the duties of the beneficiary during the course of his employment as required by 8 C.F.R. § 204.5(1)(3)(ii)(A). There is no independent verification, therefore, that the beneficiary in fact worked as a landscape gardener for W.B. Starr, Inc. during this period.

For the reasons set forth above, the two pieces of documentation provided in support of the beneficiary's qualifications are insufficient to independently verify the experience claimed on the Form ETA 750. Because the beneficiary's past employment experience cannot be verified, the AAO cannot conclude that the beneficiary is qualified for the position with two years of relevant work experience as specified on Form ETA 750, Part A, Item 14.

The director failed to address the insufficiency of this evidence during the adjudication of the visa petition. Therefore, the petitioner is advised that in addition to its failure to establish the ability to pay the proffered wage during the relevant period, it has further failed to show that the beneficiary is qualified to perform the duties of the proffered position.

⁴ On the form ETA 750, the employer from November 1993 to December 1994 is listed as [REDACTED]. The employment verification letter, however, is submitted by a company called [REDACTED]. While it appears that [REDACTED] may be related to West Bester (they share a common address), the petitioner should have provided an explanation regarding this issue.

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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.