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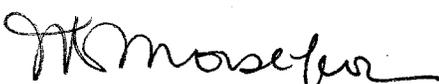
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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 employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a lamp manufacturer. It seeks to employ the beneficiary permanently in the United States as a furniture designer. 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel contends that the director erroneously based his decision on evidence reflecting that the petitioner had not already paid the proffered wage to the beneficiary.

Section 203(b)(3)(A)(i) of 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) also provides 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is December 11, 1997. The beneficiary's salary as stated on the labor certification is \$20.65 per hour or \$42,952 per year based on a 40-hour week. The visa petition indicates that the petitioner was established in 1980 and has twelve employees. The record also suggests that the petitioner has employed the beneficiary since 1990.

At the outset, the AAO notes that the petition has been submitted by a firm named "D'Lights." The approved labor certification also shows the same name as the petitioning employer. The federal tax identification number on both the petition and the labor certification is the same. The petitioner's street address on the visa petition is "532 W. Windsor Road." The employer's street address on the labor certification is "533 W. Windsor Road." As evidence of its ability to pay, however, the petitioner, through counsel, initially submitted partial copies of Form 1120, U.S. Corporation Income Tax Return for the years 1998, 1999 and 2000 filed by "Kent Erle, Inc. at " 533 West Windsor" with the same tax identification number as that shown on the visa petition and the labor certification. The record also contains an amended corporate tax return for 1998. The tax returns reflect that

Kent Erle, Inc.'s taxable income before the net operating loss (NOL) deduction and special deductions was \$158,505, \$247,526, and \$45,733, respectively.

On May 23, 2002, the director requested additional evidence from the petitioner in order to establish its continuing ability to pay the beneficiary's wage offer of \$42,952 per year as well as provide additional documentation of the beneficiary's experience. The director specifically advised the petitioner to submit copies of the wages paid to the beneficiary by the petitioner from March 1990 to the present.

The petitioner responded by submitting copies of the beneficiary's Wage and Tax Statements (W-2s) issued by Kent Erle, Inc. for 1991 through 1994 and 1996 through 2001. They reflect that the beneficiary was paid \$18,237.89 in 1997; \$20,182.81 in 1998; \$21,046.78 in 1999; \$22,669.89 in 2000; and \$20,175.30 in 2001. The record contains one payroll record from 1990 with the petitioner's name on it, as well as a copy of an Internal Revenue Service form, dated August 12, 1996, addressed to the beneficiary, which appears to be overlaid with a copy of a 1995 payroll document with the petitioner's name printed above the beneficiary's information.

The director denied the petition based on his review of the beneficiary's 1997 – 2001 W-2s issued by Kent Erle, Inc. The director found that the petitioner had not been paying the proffered wage to the beneficiary. The director further advised the petitioner and the beneficiary to submit additional financial data if the petitioner filed an appeal. The director did not discuss the information submitted on Kent Erle, Inc.'s corporate tax returns.

On appeal, counsel asserts that because the petitioner has not employed the beneficiary at the full proffered wage does not mandate a denial of the immigrant visa petition. The AAO concurs with counsel. Current regulations do not actually require the obligation to pay the wage offered in the ETA -750A to begin until the alien adjusts his or her status in the United States or enters the country using an immigrant visa issued on the basis of an approved employment based petition and approved labor certification.¹

In this case, the overriding issue is whether the financial data relating to Kent Erle, Inc. can be used to support the petitioner's ability to pay the proffered wage. The petitioner has not explained why it submitted tax returns and W-2s issued by Kent Erle, Inc., rather than its own if it is the actual U.S. employer. The director also failed to request evidence from the petitioner explaining the discrepancy between the names and addresses used on the visa petition and the financial documentation. If credible first-hand evidence exists to show that both entities are the same, then the director should review the information provided on Kent Erle, Inc.'s tax returns as well as the beneficiary's W-2s.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request additional updated evidence from the petitioner including complete federal tax returns, annual reports, or audited financial statements pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

¹ This may not foreclose the existence of a separate legal obligation to pay at least the prevailing wage pursuant to different regulatory provisions applying to aliens with non-immigrant status.