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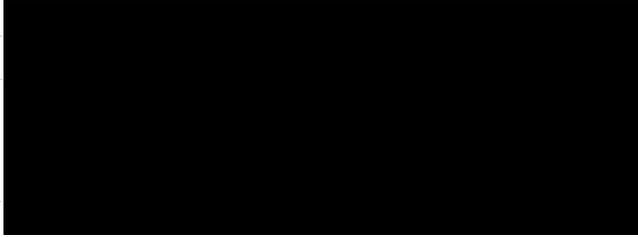
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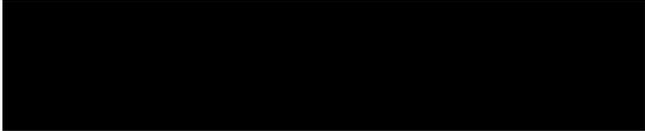
**U.S. Citizenship
and Immigration
Services**



FILE: EAC-02-067-53171 Office: VERMONT SERVICE CENTER

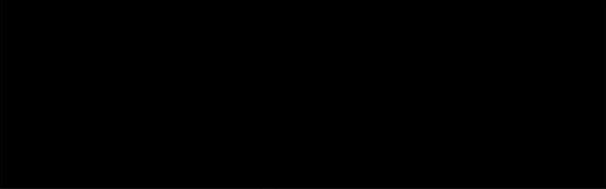
Date: **APR 28 2004**

IN RE: Petitioner:
Beneficiary:



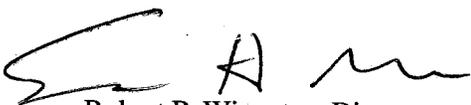
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, Vermont Service Center, and came now before the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed by the AAO in a decision dated January 29, 2003. The petitioner filed a motion to reconsider on February 18, 2003. The motion will be granted. The prior decisions of the director to deny the petition and of the AAO to dismiss the appeal are affirmed.

The petitioner is an installation and repair firm for seamless gutters. It seeks to employ the beneficiary permanently in the United States as a sheet metal installer. The priority date on the petition is March 13, 1997. The beneficiary's salary as stated on the labor certification is \$23.84 per hour or \$49,587.20 per year. In denying the petition the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the time of filing.

The petitioner's evidence before the director included the petitioner's bank statements of March 7, 1997 and October 31, 2001, and the petitioner's Form 1065 U.S. Partnership Tax Return for 1997. The tax return reflected ordinary income of \$28,301. The Schedule L balance sheet attached to the petitioner's tax return for 1997 was left blank, apparently because as a partnership with total receipts of less than \$250,000 and total assets of less than \$600,000 the petitioner was exempt from completing the Schedule L. See Petitioner's Schedule B, Question 5, and Schedule L, both attached to Form 1065 for 1997.

On appeal the petitioner submitted all bank statements from February 7, 1997 to February 5, 1998 with ending balances ranging from \$3,530.81 to \$15,511.96. Counsel asserted in his brief that the requirement that the petitioner establish sufficient resources to pay one year's proffered wages was not found in the statute.

The AAO dismissed the appeal on the grounds that there was no evidence that the funds shown in the petitioner's bank account represented additional funds beyond the tax returns. The AAO concurred in the director's finding that the petitioner's tax return failed to establish the beneficiary's proffered wage as of the priority date.

The regulation at 8 C.F.R. § 103.5(a)(1) states in pertinent part as follows.

Any motion to reconsider an action by [CIS] filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. . . .

Three days are added to the permissible period when the notice of the decision is by mail. 8 C.F.R. § 103.5a(b).

The regulation at 8 C.F.R. § 103.5(a)(3) states as follows.

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application or law or [CIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner's motion for reconsideration was filed within 33 days of the service of the decision by the AAO. The motion is timely. The motion asserts that the decision of the AAO was incorrect based on the evidence of record at the time of that decision. The motion fails to cite specific legal authority, but it makes an argument grounded on the structure of the employment-based provisions of the Immigration and Nationality Act. The motion therefore meets the minimum requirements of a motion to reconsider. The AAO will therefore grant the motion to reconsider, and will address the issues raised in the motion concerning the merits of the case.

In the petitioner's motion for reconsideration, counsel emphasizes that on the priority date and through the date of the appeal the petitioner always had money in the bank sufficient to pay the proffered salary. No authority is cited by counsel to indicate that the decision of the AAO to dismiss the appeal in this case was incorrect as a matter of law. As was stated in the AAO decision, 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. Tex. 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).

Counsel's reliance on bank statement balances therefore fails to address the finding of the AAO that the information in the petitioner's tax return for 1997 was insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date.

Counsel also asserts that the requirement that the petitioner establish its ability to pay the proffered wage through the date of lawful permanent residence "is fallacious, since lawful permanent residence cannot be issued or granted until the I-140 is approved." With regard to this point, no unreasonable requirements are imposed by the regulations. In adjudicating the I-140 petition the director relied on the most recent evidence submitted by the petitioner. The only tax return submitted in evidence by the petitioner was the 1997 tax return, submitted in response to a specific request for the petitioner's 1997 return in a Request for Evidence (RFE) dated February 8, 2002. But that same RFE also more generally requested additional evidence to establish the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. Returns for the years 1998, 1999, 2000 and 2001 should have been available for submission as evidence prior to the May 6, 2002 deadline for the RFE, but were not submitted in evidence. Since the director found that the evidence in the 1997 return was insufficient to establish the petitioner's ability to pay the proffered wage as of the March 7, 1997 priority date, it was not necessary for the director to consider later years. The record contains no explanation of the absence of tax returns for those years. Counsel's assertion that the requirement to establish the petitioner's ability to pay the proffered wage until the beneficiary obtains permanent residence is a "fallacious" interpretation of the statute therefore has no foundation in the record of the instant case, since the petitioner failed to submit its most recent tax returns which should have been available as of the deadline for the RFE.

For the foregoing reasons, the petitioner's motion to reconsider fails to establish that the decision of the AAO was based on an incorrect application of law or CIS policy or to establish that the decision was incorrect based on the evidence of record at the time of that decision. *See* 8 C.F.R. § 103.5(a)(3).

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 motion to reconsider is granted. The prior decisions of the director to deny the petition and of the AAO to dismiss the appeal are affirmed.