



U.S. Citizenship
and Immigration
Services

Bl



FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **AUG 02 2004**

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

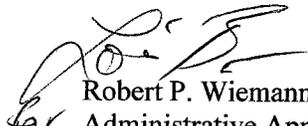
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

for 
Robert P. Wiemann, Director
Administrative Appeals Office

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Italian & Greek seafood restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook.

The director determined that no original ETA 750 labor certification had been submitted with the petition, but only a copy, and denied the petition. On appeal counsel states that the original ETA 750 labor certification had been submitted with the initial submission of the 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(l)(3)(i) states in pertinent part: "Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor."

The record indicates that the I-140 petition was initially filed on February 11, 2003. An I-485 application to adjust status to permanent residence was concurrently filed by the beneficiary of the instant petition. At the same time counsel submitted a copy of the Form ETA 750 individual labor certification and attachments, including documents reflecting the petitioner's recruitment efforts and a letter dated January 8, 1998 from the petitioner's owner stating that the beneficiary had been employed as a cook by the petitioner since 1997 and stating a job offer to the beneficiary in a permanent position as specialty cook. No additional evidence was initially submitted.

In a request for evidence (RFE) dated November 20, 2003, the director requested the original ETA 750 individual labor certification, and requested initial 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.

In response to the RFE counsel submitted a letter dated February 11, 2004 which stated that the original labor certification had been submitted with the initial filing of the petition. With the letter counsel submitted the following: additional copies of the ETA 750 and attachments; copies of the petitioner's Form 1120S U.S. income tax returns for an S corporation for the years 1998 through 2002; copies of bank statements for an account of the petitioner at League City Bank & Trust, League City, Texas; and copies of bank statements for an account of the petitioner at the First Community Bank, N.A., Pearland, Texas.

The director determined that the petitioner's submissions of counsel did not include the original ETA 750 individual labor certification. The director therefore denied the petition.

On appeal counsel submits no additional evidence. Counsel states on appeal that the original labor certification was submitted with the initial filing on January 28, 2003, and that the Texas Service Center had been notified of that fact in the petitioner's response to the RFE.

Since no additional evidence has been submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

The regulation at 8 C.F.R. § 103.2(b)(4) states in pertinent part:

Submitting copies of documents Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with [Citizenship and Immigration Services].

The record of proceeding in an I-485 application for adjustment of status filed by the beneficiary contains a copy of a labor certification apparently issued by the Department of Labor, with copies of supporting documents. That copy appears to have been submitted with the I-485 application, which was filed concurrently with the instant I-140 petition. The record of proceeding in the instant petition contains another copy of that same labor certifications, also with copies of supporting documents, submitted in response to the RFE. However, the record contains no original labor certification.

In his notice of appeal counsel asserts, "The original labor certification approval was submitted with the initial filing on January 28, 2003." Nonetheless the record contains no indication of any filing on January 28, 2003. The instant petition was received by Citizenship and Immigration Services (CIS) on February 4, 2003, and the receipt of the petition was entered into a CIS database on February 11, 2003. The file contains no indication of any prior submission of the instant petition. Counsel offers no evidence in support of his assertion that the petition was initially submitted on January 28, 2003. Even assuming that counsel's reference to January 28, 2003 refers to the date on which counsel mailed the petition, counsel offers no evidence to support that fact. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). CIS databases also contain no indication of any prior filing of an I-140 petition by the petitioner on behalf of the beneficiary in the instant petition.

Regarding the director's decision, the director noted counsel's assertion in his letter of February 11, 2004 that the original labor certification had been submitted at the same time as the initial filing of the I-140 petition. The director then stated that it was "difficult to believe" that the original labor certification had been submitted as asserted by counsel, since the other evidence submitted with the I-140 was in the record, as was a copy of the labor certification. The director found that the petitioner had failed to submit an original labor certification as required by the regulation at 8 C.F.R. § 204.5(i)(3). That regulation states the requirement for submitting an individual labor certification, though it does not specifically address the issue of submitting a copy of an individual labor certification, rather than an original. The requirement to submit an original is contained in the regulation at 8 C.F.R. § 103.2(b)(4), quoted above. The director correctly concluded that the petition must be denied for failure to submit the original labor certification.

For the reasons discussed above, counsel's assertions in his notice of appeal fail to overcome the decision of the director.

Beyond the decision of the director, it is noted that the petitioner has filed two other I-140 petitions since January of 2003 for two other beneficiaries. One of those petitions was apparently filed on the same day as the instant petition, since the receipt of that petition was entered into the CIS database on February 11, 2003, the same date on which the receipt of the instant petition was entered into the database. The beneficiary in that petition is apparently the elder brother of the beneficiary in the instant petition. The petition on behalf of the elder brother was approved by the director on January 29, 2004. The other petition was entered into the CIS database on November 17, 2003. That petition remains pending.

Even assuming that no other grounds existed for denying the instant petition, the petitioner has the burden to prove its ability to pay the proffered wage to the beneficiary in the instant petition. *See* 8 C.F.R. § 204.5(g)(2).

It is not necessary for the purposes of the present decision on appeal to analyze the petitioner's financial evidence submitted in the instant case, which consists of the petitioner's Form 1120S U.S. income tax returns for an S corporation for the years 1998 through 2002 and copies of bank statements for accounts of the petitioner at two banks. But even if the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending.

Where a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant case contains no information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, nor about the priority dates of those petitions, nor about the present employment status of those other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

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.