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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, 3/F
425 I Street N.W.
Washington, D.C. 20536



MAR 17 2004

File: EAC 02 057 54955 Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other Worker 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 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 employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 an unskilled or "other worker." The petitioner is a laundry and dry cleaning business. It seeks to employ the beneficiary permanently in the United States as a manager. 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 asserts that director erroneously denied the petition based on a typographical error on the financial documentation.

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.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *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.

The issue raised on appeal is whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. 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 April 12, 2001. The beneficiary's salary as stated on the labor certification is \$14.96 per hour or \$31,116.80 annually.

In this case, the petitioner appears to be organized as a sole proprietorship. The petitioner's sole proprietor initially submitted evidence of his ability to pay the proffered wage in the form of a copy of his Form 1040, U.S. Individual Income Tax Return for the year 2000, including Schedule C (Profit or Loss from Business). The information provided reflects that the sole proprietor declared a business

income of \$324,135 in Schedule C and on line 12 of page one, and an adjusted gross income of \$322,430 on line 33 of page one. Line 32 also reflects a total of \$1,705 of deductions taken on page one. The adjusted income figure was carried over to line 34 on the second page as \$22,430 rather than \$322,430. Subsequent calculations on page two appear to be based on \$22,430 as the adjusted gross income. This return, dated June 21, 2001, was stamped with "CLIENTS COPY retain for your records" and was signed by the sole proprietor and an accountant on page two.

In his request for evidence dated February 8, 2002, the director noted these inconsistencies and requested an explanation. The director also requested copies of the petitioner's quarterly tax returns for 2001, Form W-3, Transmittal of Wage and Tax statements 2001 tax year, and verification of the beneficiary's qualifying work experience.

In response, counsel submitted a copy of a reference letter and a translation, a copy of another individual Form 1040 tax return for the year 2000 naming the sole proprietor as the filer, copies of the petitioner's quarterly tax returns, a copy of the petitioner's 2001 W-3, and a copy of an unaudited financial statement for a period from March 1, 2001 to February 28, 2002, showing only monthly gross sales and cost of goods sold. In the accompanying cover letter, counsel stated that the second tax return is a copy of the actually filed return and that the "CPA states to us that the client provided us with a copy of the initial work paper draft of the tax return, instead of the filed tax return." Counsel asserts that according to the CPA's assurances, there were no inconsistencies on the filed return and the initially provided return should have been shredded. This tax return, also dated June 21, 2001, shows no figure on line 32 of page one and an adjusted gross income of \$324,135 on line 33 of page one and line 34 of page two. Subsequent calculations on page two appear to be based on \$324,135 as the sole proprietor's adjusted gross income.

The director denied the petition on July 31, 2002. The director did not accept counsel's explanation concerning the contradictions between the two tax returns. The director noted that the initially submitted returns were signed and stamped by the preparers. The director stated that this tax return "does not appear to be a working or draft document that requires shredding as stated in your response. Further, you did not provide a copy of the CPA's statement that could corroborate your statement regarding the reliability of the return." The director concluded that the petitioner had failed to provide credible evidence of continuing ability to pay the proposed salary of the beneficiary. We concur.

On appeal, counsel again asserts that the initial tax return contained a typographical error that reduced the petitioner's adjusted gross income by \$300,000, and that the second package submitted with the response should have been accepted as proof of the petitioner's ability to pay the proffered wage. Counsel argues that the unsigned copies of tax returns had been accepted in the past.

It cannot be concluded that the director erred in finding that the conflicting tax returns submitted lacked credibility, notwithstanding counsel's arguments. 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). As noted by the director, the petitioner could have provided some corroboration of what tax returns were actually filed with the IRS. The best evidence would have been a copy of the IRS printout showing the actual figures declared. It is the petitioner's burden to resolve

any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Based on the evidence in this record, however, we cannot conclude that discrepancies between the tax returns were satisfactorily resolved or that the petitioner has convincingly demonstrated its continuing ability to pay the beneficiary's proffered salary of \$31,116.80.

Beyond the decision of the director, we note that the petitioner failed to submit sufficient evidence to establish the beneficiary's work history or her identity. The regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence relevant to qualifying experience or training be submitted in the form of letters from current or former employers or trainers and must include the name, address, and title of the writer and a specific description of the alien's duties. In this case, the reference letter submitted, and as translated, neither indicates a name or title of the author and provides only a partial address. There is also no clarification in the record to show how the beneficiary named in the reference letter as "Rabab Ahmed Essat Attia" is the same individual named on the visa petition as "Rabab A. Eldemerdash."

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.