



U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 126 54152 Office: VERMONT SERVICE CENTER

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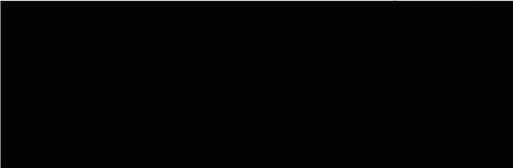
IN RE: Petitioner:
Beneficiary:



MAY 21 2004

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:



identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

DISCUSSION: The preference 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 is a restaurant. It seeks to employ the beneficiary permanently in the United States as a grill cook. 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.

On appeal, counsel submits a Form I-290B and additional evidence.

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 April 26, 2001. The beneficiary's salary as stated on the labor certification is \$13.52 per hour for a forty-hour workweek, which equates to \$28,121.60 per annum.

Counsel for the petitioner did not submit any documentary evidence in support of the visa petition.¹ Consequently, the director issued a request for evidence (RFE) on May 29, 2002, which specifically requested that the petitioner submit a copy of its 2001 federal tax return or other regulatory-sanctioned evidence such as annual report. The director also requested copies of the beneficiary's W-2 forms if the petitioner had employed the beneficiary in 2001, and an experience verification letter establishing that the beneficiary possessed the experience required for the position as set forth on the labor certification. In response to the RFE, counsel for the petitioner submitted an experience verification letter from the petitioning entity, and a copy of the beneficiary's W-2 forms for 2001 issued by an entity other than the petitioner. The director determined that the evidence contained in the record did not establish that the petitioner had the ability to pay the proffered wage during the relevant time period, and denied the petition.

On appeal, counsel submits a Form I-290B accompanied by a copy of the 2001 tax return for an entity other than the petitioner.

¹ Although counsel alleges in a cover letter that it was enclosing an experience verification letter with the initial petition, no such evidence is present in the record.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage.

Counsel for the petitioner submitted W-2 forms for the alleged beneficiary (although the beneficiary's first name displayed on the W-2 forms differs from the first name displayed on the visa petition and labor certification form by one letter). The director noted that the wages paid for 2001 totaled \$9,317.22. Since the proffered wage in this case is \$28,121.60, the director correctly determined that the petitioner had not established its ability to pay the proffered wage during the relevant time period. The AAO concurs with the director's decision, and notes that the record of proceeding contained no additional evidence that established the financial ability of the petitioner to pay the proposed salary.²

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will examine the petitioner's net income figure as 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. 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). Although specifically requested by the director in the RFE, counsel failed the petitioner's tax return prior to adjudication.

On appeal, counsel submits for the first time a copy of the petitioner's alleged 2001 federal tax return.³ This evidence will not be considered. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Specifically, the RFE issued on May 29, 2002 specifically states:

Submit the 2001 U.S. federal income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax return. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.

² The AAO also notes that the employer named on the W-2 forms submitted differs from the petitioning entity.

³ On appeal, counsel states on the Form I-290B that she would be sending a brief and/or additional evidence to the [AAO] within 30 days. As of the date of this decision, no additional evidence (other than the tax return submitted with the Form I-290B) has been received by this office. In addition, the AAO notes that the entity named on the tax return differs from the petitioning entity.

The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Accordingly, a review of the record confirms that the petitioner has provided no evidence to warrant the conclusion that it had the ability to pay the proffered wage during the relevant time period.

Beyond the decision of the director, the AAO notes discrepancies in the record that have not been addressed. First, the W-2 forms and the tax return submitted refer to an entity called Ticino, Inc., which was incorporated in 1990. Counsel for the petitioner provides no information clarifying the relationship between this entity and the petitioner, nor does the record contain any evidence that Ticino, Inc. qualifies as a successor-in-interest to the petitioner. The AAO further notes that the names of the petitioner on the labor certification and on the visa petition differ slightly, and Ticino, Inc. is not listed or referred to on either of these documents.

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.

If the petitioner chooses to take further action in this matter, the petitioner must clarify these discrepancies.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.