

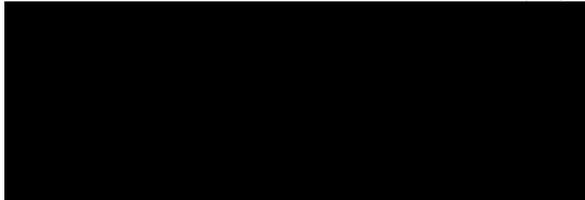
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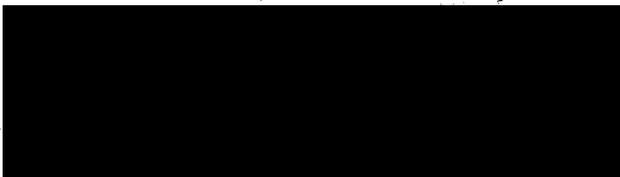
Office: NEBRASKA SERVICE CENTER

Date:

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

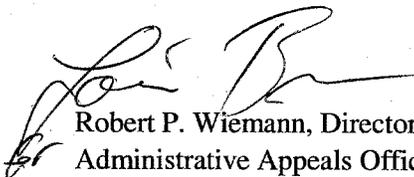
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Nebraska Service Center, whose decision was affirmed by the Administrative Appeals Office (AAO), on appeal. The matter is now before the AAO on counsel's motion to reopen.

The petitioner is an Alaska wilderness tour operator. It seeks to employ the beneficiary permanently in the United States as a wilderness tour guide. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on June 24, 1996, and approved by the Department of Labor on June 26, 1997. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition on April 9, 1998. An appeal was filed with the AAO, which issued a decision dismissing the appeal on May 12, 1999. Counsel filed a motion to reopen the decision of the AAO on June 11, 1999.

In support of the motion to reopen counsel has submitted a brief and offers additional evidence in the form of a certified translation of the 1996 German tax return of Dieter Zirngibl, the petitioner's foreign partner.

The AAO grants the motion and considers the additional arguments and evidence raised in the motion.

Counsel's Assertion in the Motion to Reopen

The AAO's previous decision upheld the director's finding that the evidence did not support the petitioner's ability to pay the proffered wage. Counsel had argued that the foreign partner's assets ought to be considered in determining the ability to pay the wage. It was unnecessary for the AAO to consider whether such assets could be considered as it found that the petitioner had failed to offer sufficient evidence establishing this foreign source of income noting that the only evidence submitted was an unaudited balance sheet for 1996 listing the foreign partner's assets in German currency.

Counsel's motion asserts that the previous decisions erred in not considering the foreign partner's 1996 German tax return, noting that it had been accompanied by an affidavit from Zirngibl, the foreign partner, which summarized pertinent information from the tax return to demonstrate funds available to pay the wage. Counsel's motion acknowledges that the tax return itself had not been translated and notes that a certified translation was being offered, but that no schedules were attached.

In challenging the decision not to consider the "unaudited balance sheet for 1996" counsel cites to the portion of 8 C.F.R. § 204(g)(2) which provides that in appropriate cases, alternative evidence, including profit/loss statements may be submitted. Counsel further asserts that the information the AAO described as an unaudited balance sheet was a German tax return. (Motion at p. 2) Counsel goes on to argue that because a certified translation of the German tax return has been submitted, it should be treated as the equivalent of a U.S. tax return, and alternatively, that the record should be deemed to be an annual report and a profit/loss statement for the company.

The AAO does not accept counsel's contention for several reasons. First, the assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The documents themselves are not clearly identified as tax returns. The only indication from the documents themselves that they are tax returns is a handwritten English notation which provides, "Deiters '96 Returns." This is hardly a reliable identifier, particularly as it is not apparent that financial information appears on any type of official government form. Furthermore, the documents appear to be clearly identified in the translation and cover letter of the tax advisor as "year-end financial statements." Finally, the tax advisor's cover sheet itself notes that the documents were based upon information provided by the client and were not produced by means of an audit. None of this information supports the contention that these are, in fact, German tax returns, and offers support for the previous finding that the records were unaudited financial statements.

Moreover, while Citizenship and Immigration Services (CIS) will consider the assets of a general partner of a general partnership, the petitioner has not provided any evidence of Mr. Zirngibl's personal income. The record does not establish how Mr. Zirngibl's business is organized. As a corporation is a separate legal entity, *see Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), the income of Mr. Zirngibl's business is not necessarily indicative of Mr. Zirngibl's personal income. Further, if other parties have an interest in the company, its income cannot be fully attributable to Mr. Zirngibl or available to him to pay the proffered wage. Finally, despite the handwritten notation that the company had gross income of DM 859,790.48 and operating expenses of DM 471,507.02 in 1996, those numbers actually reflect assets plus capital and capital respectively. The company actually showed net income, profit, of only DM 8,922.31, or \$5,756.33 according to the exchange rate for December 31, 1996, as listed at www.oanda.com. This income is far less than the proffered wage of \$19,344. Moreover, the record contains no evidence that Mr. Zirngibl has other income from which to cover his own personal expenses. Thus, even if we consider the unaudited financial statements, they are not persuasive evidence of the petitioner's ability to pay the proffered wage as of the priority date.

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 reopen is granted, however, the decision of the AAO dismissing the appeal is affirmed.