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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

AUG 23 2005

SRC 02 102 53928

IN RE:

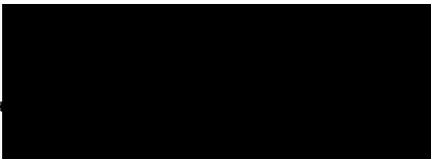
Petitioner:



Beneficiary:

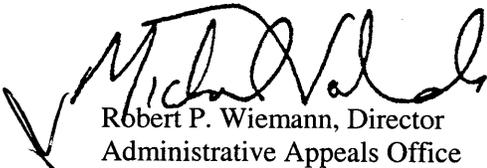
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as an orthodontic technician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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, that petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.¹ The director denied the petition accordingly.

On appeal, the current counsel for petitioner submits a brief 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 nature, for which qualified workers are not available in the United States.

The regulation 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 14, 2000. The proffered wage as stated on the Form ETA 750 is \$6.42 per hour (\$13,353.60 per year). The Form ETA 750 states that the position requires two years experience.

To prove the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted Internal Revenue Service (IRS) Form 1120-A tax returns for years 2000, 2001, and 2002.

¹ The director determined that the petitioner had "... submitted a letter of experience for the beneficiary that could not be verified and that has not been substantiated with other independent evidence" The director denied the petition for fraud on this ground.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$13,353.60 per year from the priority date.

- In 2002, the Form 1120-A² stated taxable income loss³ of <\$81.00>.⁴
- In 2001, the Form 1120-A stated taxable income of \$4,300.00.
- In 2000, the Form 1120-A stated taxable income of \$5,396.00.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

- In 2002, the Form 1120-A⁵ stated taxable income loss of <\$81.00>. The petitioner paid the beneficiary wages in 2003 of \$26,128.00. Therefore, the sum of these two figures is more than the proffered wage of \$13,353.60 per year.
- In 2001, the Form 1120-A stated taxable income of \$4,300.00. The petitioner paid the beneficiary wages in 2002 of \$25,672.00. Therefore, the sum of these two figures is more than the proffered wage of \$13,353.60 per year.

Therefore, for the period 2001 through 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had established that it had the ability to pay the beneficiary the proffered wage, but not at the time of filing of the Alien Employment Certification (2000). There was no wage payment evidence submitted for 2000 although the 2000 Form 1120-A tax return demonstrated a positive \$10,224.00 in net current assets, \$3,129.60 below the proffered wage.

The second issue in this case relates to the proof of the qualifications of the beneficiary in the position of an orthodontic technician. The petitioner's initial submission included a letter in English from a previous employer, one Geraldo Silva, dated October 2001, that stated the beneficiary's occupation title and term of employment that is, from March 1989 to January 1996. The letter did not describe the beneficiary's job duties, wage rate, nor was it notarized.

The regulation 8 C.F.R § 204.5(l)(3)(ii) states in pertinent part:

- (A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

² The fiscal year for the petitioner was July 1 through June 30th.

³ IRS Form 1120-A, Line 24.

⁴ ⁴ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁵ The fiscal year for the petitioner for which it reported income for tax purposes was July 1, 2002 through June 30 2003.

(B) Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

There were two Notices to Deny (NOID) of the petition sent to the petitioner requesting additional information and documentation "... to overcome the presumption of fraud in this case." The first NOID is dated June 26, 2003. In it the Service Center requested additional information as relates the letter mentioned above attesting to the beneficiary's prior work experience in Brazil, as follows:

* * *

"Provide sworn statements from previous employers attesting to any experience requirements of the labor certification. Such letters must list the alien's exact dates of employment, title(s) and duties. Provide evidence of wages by the former employer."

In response to the first NOID, a letter dated July 17, 2003, written in English, describing the job duties, giving the occupation title, and term of employment was submitted into evidence.

A second NOID was sent to petitioner on February 12, 2004 informing it of the following results of an investigation of the July 17, 2003 letter. The Service Center had sent the "Silva" letter to the Fraud Prevention Unit at the American Consulate in Rio Janeiro, Brazil to have it verified. As stated in the director's decision:

* * *

The Fraud Prevention Unit called [redacted] to verify the [above mentioned] letter. The Fraud Prevention Unit was informed by one of the dentists who works for the company that the beneficiary performed some work for them but never had strong ties with them. The beneficiary worked as an independent contractor for a short period of time.

The director determined that petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition because "... the petitioner submitted a letter of experience for the beneficiary that could not be verified and that has not been substantiated with other independent evidence, the petition is hereby denied for fraud." The director's decision was dated March 25, 2004.

In the appeal of the matter petitioner's second counsel asserted.

"We believe that the documents requested by the department can be obtained. We are expecting some to arrive from Brazil shortly. With these additions, petitioner will be able to present reliable and sufficient proof"

Subsequently, current counsel submitted the following notarized Portuguese to English translations of documents: a letter dated April 18, 2004 from [redacted] a municipal occupational license for a dental clinic having the address as [redacted] a certain Dr. [redacted] recounting his conversations with the investigators of the Fraud Prevention Unit; a municipal certification of the business license [redacted] in dental prosthesis from August 1983

through May 2004, the date of certification; and an affidavit of an accountant that the beneficiary was employed by [REDACTED] from March 1989 through January 1996 as well as collateral identity affidavits.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal. However, we are aware that petitioner's original counsel was convicted of immigration fraud, and, therefore he was not an aid but an impediment to petitioner's interests in this case. The petitioner's current counsel has forthrightly cooperated with the Service Center, and, he has submitted probative substantiation of the beneficiary's work experience, albeit, late in the case. We find that the additional documentation does satisfy the regulation 8 C.F.R § 204.5(l)(3)(ii) above recited.

Therefore, the petitioner has submitted proof that the beneficiary met the experience requirement prior to the filing of the labor certification application as required by case law and regulation. The petitioner has established that the beneficiary has the requisite experience as stated on the labor certification petition.

The petitioner has presented sufficient evidence, as recounted above, of the beneficiary's qualification and work experience to support the petition. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

As mentioned above in the analysis of petitioner's ability to pay the proffered wage, it has paid the beneficiary approximately twice the proffered wage for tax return years 2001 and 2002, and, it had net current assets within \$3,129.60 of the proffered wage.

The regulation recited above (8 C.F.R. § 204.5(g)(2)) requires that the evidence of the ability to pay be established upon the priority date. The Service will examine the totality of the circumstances presented in the record of proceedings according to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioner has established that it is profitable and viable, with a willingness to pay the beneficiary twice the proffered wage.

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 met that burden.

ORDER: The appeal is sustained.