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FILE:

Office: VERMONT SERVICE CENTER

Date: **JUL 07 2005**

IN RE: Petitioner:
 Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled 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 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 immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) affirmed the director's decision. The matter is now again before the Administrative Appeals Office (AAO) on a motion to reconsider. The motion will be granted. The prior decision of the AAO will be affirmed. The appeal will remain dismissed, and, the petition will remain denied.

The petitioner is a fast food restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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. The director denied the petition accordingly. The AAO affirmed that decision, dismissing petitioner's appeal of the director's decision. On the motion to reconsider, petitioner's counsel failed to specifically assert that the director made an erroneous conclusion of law or a statement of fact as a basis in his decision.

Counsel submitted a cover letter that stated in its entirety:

"On behalf of my clients, [the petitioner], I am filing this Motion to Reconsider your decision dated March 2, 2004. We are submitting the enclosed income tax returns for an S Corporation to prove that the Petitioner has the ability to pay the salary of the employee-beneficiary."

In support of the motion, counsel submits federal income tax returns for the petitioner "S" corporation. There was no brief with the documents submission. The tax returns documents now submitted were not previously considered by the director because the petitioner did not submit them despite a request by the Service Center that the returns be submitted to meet the petitioner's burden of proof and to aid the director's determination of petitioner's ability to pay the proffered wage.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion does not qualify as a motion to reconsider because counsel fails to identify any erroneous conclusion of law or statement of fact for the appeal, and, he asserts no precedent decisions for any position. There was no brief in the matter. Petitioner's counsel, in his cover letter transmitting the abovementioned documents, does not raise any issues of law or fact.

The regulation at 8 C.F.R. § 103.5(A)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion does qualify as a motion to reopen. There are new facts presented here by petitioner that related to its initial evidence accompanying the petition, and to the issue of whether or not on the priority date of the alien labor application the petitioner had the ability to pay the beneficiary the proffered wage.

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 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 unavailable.

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 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.

(D) *Other Workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 November 29, 2000. The proffered wage as stated on the Form ETA 750 is \$588.80 per week (\$30,617.00 per year). This is an unskilled labor position.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center on March 11, 2002, requested the petitioner's corporate tax returns and the beneficiary's W-2 Wage and Tax Statements pertinent to that issue consistent with 8 C.F.R. § 204.5(g)(2).

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted copies of the petitioner's 1040 Individual Tax Returns for years 2000, and 2001. Now upon motion, petitioner for the first time submits three unsigned and undated tax returns (Form 1120S) for tax years 2001, 2002, and 2003. Unsigned and undated tax returns are not acceptable documentary evidence.

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. There is no evidence that the petitioner employed the beneficiary.

There is evidence, from the W-2 statements presented, that the petitioner already employs an employee with the same family name. There is no evidence submitted concerning the apparent familial relationship between the petitioner's employee and the beneficiary. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, [REDACTED] BALCA May 15, 2000). There would also be a disabling factor if the offer were made because an existing employee desires the petitioner to support a visa petition for purely non-employment related reasons.

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. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted late on appeal, in any event. There is still no information submitted relating to the year 2000. Consequently, the appeal will be dismissed.

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. The documentation submitted by petitioner does not establish that petitioner had the ability to pay the proffered wage on the priority date. Accordingly, the motion will be denied, the decision of the director will be affirmed, and the petition will remain denied.

ORDER: The appeal is dismissed, and, the petition will remain denied.