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Bob
MAR 21 2005



FILE: [REDACTED]
WAC 01 085 53914

Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition approval was revoked by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be withdrawn; the petition will be remanded for further action and consideration.

On December 5, 2003, the director issued a decision revoking the earlier approval of the I-140 petition, stating that while adjudicating the adjustment of status petition he discovered that the beneficiary did not qualify for the benefit sought under the I-140 petition. The director found that the petitioner had submitted three Form I-140 petitions for different beneficiaries and that the evidence failed to establish the petitioner's ability to pay the proffered wage to the beneficiary, both in the instant case and in those for the two other beneficiaries. Relying on *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), the director determined an error of judgment in approving the petition was sufficient cause for the revocation. On October 14, 2003, he had notified the petitioner of his intent to revoke.

Also on December 5, 2003, the director denied the beneficiary's I-485 application for adjustment of status because of his decision to revoke his approval of the underlying I-140 employment petition.

The petitioner appealed the director's revocation decision, submitting no additional evidence. On the notice of appeal the petitioner gave as the reason for the appeal that "all relevant information regarding taxes and w2 forms [sic] was submitted with the original applications."

In considering the instant appeal the AAO will first examine the procedure used by the director in revoking the prior approval of the I-140 petition.

The director initially approved the employment-based preference visa petition. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140).

The director cited the failure of the petitioner to establish the petitioner's ability to pay the proffered wage of the beneficiary and of the other beneficiaries on whose behalf the petitioner had submitted employment-based petitions. Such a revocation does not fall under the regulation at 8 C.F.R. § 205.1(a)(iii), which specifies the permissible grounds for automatic revocation of a petition. Instead, the regulation at 8 C.F.R. § 205.2 states:

(a) General. Any [CIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of [CIS].

(b) Notice of intent. Revocation of the approval of a petition of self-petition under paragraph (a) of this section will be made only on notice to the petitioner or self-petitioner. The petitioner or self-petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and in opposition to the grounds alleged for revocation of the approval.

(c) Notification of revocation. If, upon reconsideration, the approval previously granted is revoked, the director shall provide the petitioner or the self-petitioner with a written notification of the

decision that explains the specific reasons for the revocation. The director shall notify the consular officer having jurisdiction over the visa application, if applicable, of the revocation of an approval.

(d) Appeals. The petitioner or self-petitioner may appeal the decision to revoke the approval within 15 days after the service of notice of the revocation. The appeal must be filed as provided in part 3 of this chapter, unless the Associate Commissioner for Examinations exercises appellate jurisdiction over the revocation under part 103 of this chapter. Appeals filed with the Associate Commissioner for Examinations must meet the requirements of part 103 of this chapter.

On October 14, 2003, the director issued a notice of intent to revoke the prior approval of the I-140 petition on the ground that the petitioner had not established its continuous ability to pay the wages specified in all three employment-based immigrant visa-petitions filed, totaling \$66,497.60. The director stated that on the petitioner had reported \$15,812 in ordinary income on its Form 1120S tax return for 2001, it, and similarly had reported \$32,623 in ordinary income on its return for 2002, leaving a deficit between the wages proffered overall and its income-based ability to pay. The director advised the petitioner to provide new evidence supporting the petition and rebutting its revocation within 30 days or he would revoke his prior approval of the petition.

On December 5, 2003, the director proceeded to revoke the petition, recounting the petitioner's November 11, 2003 response, which, in pertinent part, had stated:

The above mentioned beneficiary is already on the payroll. She is receiving \$10.95 p/h with an average of 36 hours per week. Net salaries and wages reported on form 1120S of \$73,509.00 for the taxable years 2002, reflects the amount paid last year to Mrs. Maria E. Candia. Therefore I am able to pay her prevailing wages without any problems. Without her actual wages, my net income would be increased to \$51,239.00.

In the revocation notice the director stated he was not convinced by "the evidence submitted if other documents are available such evidence [sic] of income verification from the beneficiary shall be in the form of copies of federal tax returns along with W-2s."

According to the record of the instant petition, the director had approved the petition on December 12, 2001, without any inquiry regarding the petitioner's ability to pay. The documents purporting to show ability to pay, submitted with the petition when filed on February 20, 2001, were the following:

- A state unemployment insurance report stating that the petitioner had paid a total of \$110,000 in taxable wages for 1997, 1998 and 1999, along with \$39,400 in taxable wages for the year ending June 30, 2000; and,
- A 2000 Form 940-EZ, employer's annual federal unemployment tax return, reporting \$44,600 in total taxable wages for the year.

Before approving the petition on December 12, 2001, the director had issued two requests for evidence (RFE), neither of which asked for further proof of ability to pay. In the course of processing the beneficiary's Form I-485 application for adjustment of status, however, the director learned of two other employment-based immigrant visa petitions the petitioner had filed on behalf of two other cosmetologists. The director subsequently denied one of the two, also now before the AAO, WAC 03 025 53690. As to the other visa petition, first approved and then revoked, WAC 02 224 53110, the petitioner has not appealed. There

remain, therefore, two visa petitions for which the petitioner must establish ability to pay the combined wages that total \$45,552.

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 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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 19, 1997. The proffered wage as stated on the Form ETA 750 is \$10.95 per hour, which amounts to \$22,776 annually. On the Form ETA 750B, signed by the beneficiary on June 5, 1997, the beneficiary did not claim to have worked for the petitioner.¹

In determining the petitioner's ability to pay the proffered wage during a given period, 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 the instant case, despite its statement to the contrary, the petitioner has yet to establish that it employed and paid the beneficiary the full proffered wage in 1997 or subsequently. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure 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. Texas 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).

¹ On November 11, 2003, the petitioner stated it has already employed the beneficiary, who receives the proffered hourly wage and who works an average of 36 hours a week.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner's tax returns² show that the petitioner had an ordinary income of \$15,812 in 2001, leaving a balance of a negative \$29,740 for the proffered wages for the two beneficiaries. For tax year 2002, the petitioner had an ordinary income of \$32,623, leaving a deficit of \$12,929.

Because in the instant proceedings the director did not request Form 1120S tax returns for 1997 to date of appeal in 2003, the AAO is unable to perform an analysis of the petitioner's net income or of its assets and liabilities from the Schedule L's for the pertinent years. This petition is being remanded for the director to afford the petitioner an adequate opportunity to establish its ability to pay. In two RFE's issued in June 2001 and October 2001, the director had not asked for more evidence of the petitioner's ability to pay. Nor on October 14, 2003, when he sent a notice of intent to revoke, did the director specify the evidence the petitioner should submit to establish ability to pay, although he did cite to the correct regulations. However, in the notice of revocation, the director used figures drawn from a pair of incomplete tax returns in the records of separate proceedings without allowing the petitioner an opportunity to verify the completeness of the returns in the record of proceedings. While the burden of proof remains squarely on the petitioner, the director should have given the petitioner an opportunity to respond to the adverse information on which the director based his revocation. The director could have done so by stating he was using the information from parts of two tax returns drawn from other record(s) of proceedings. *See* 8 C.F.R. § 103.2(b)(16). This office notes that the director's petition dismissal would not warrant a remand had the petitioner been the one to submit the incomplete returns in response to the notice of intent to revoke, or had the director issued the denial based upon other documents.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issue stated above. The director may request any additional evidence considered pertinent for each relevant year. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

² Copies of the front pages of the petitioner's tax returns for 2001 and 2002 are not part of the record in the instant proceedings but in the non-record portion of the file, apparently copied from records of the petitioner's other employment-based visa-petition files.