



U.S. Citizenship
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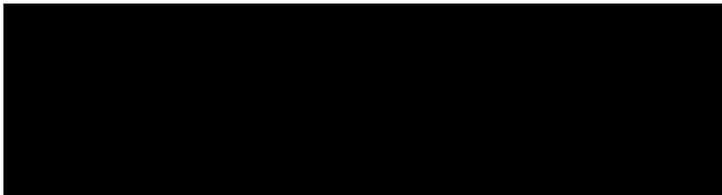
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FILE: LIN 04 151 51312 Office: VERMONT SERVICE CENTER Date: NOV 10 2005

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:



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

The petitioner is a health and fitness club, marketing and management services corporation. It seeks to employ the beneficiary permanently in the United States as a business development manager. 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 petitioner appealed the decision as mentioned below.

Under the appeal section for the basis of the appeal, counsel asserted that the director should have issued a request for evidence “for the 2003 [sic 2002¹]” tax return and, by implication, the director should then have waited to make its decision since the return was unavailable and it could not be produced. Petitioner had requested an extension of the time to submit the 2002 return to the U.S. Internal Revenue Service. Counsel asserts that the director’s conduct is a gross abuse of discretion and a violation of the petitioner’s due process rights. Counsel cites no legal precedent for the contention. According to counsel, the 2002 U.S. federal tax return should now be available. However, the return is not in the record of proceeding, and therefore the petitioner has not come forward with proof to demonstrate its ability to pay the proffered wage.

Counsel submitted a Form I-290B appeal in this matter. In the section reserved for the “one block that applies...” counsel marked the preprinted “box” that states “I am submitting a brief and/or additional evidence to the AAU [now AAO] within 30 days.” Despite three notices to counsel requesting the same and specifically the U.S. federal tax return for tax year 2002, no brief or additional evidence has been received.

Where a visa petition is denied based on a deficiency of proof, and, the petitioner was not put on notice of the deficiency and given a reasonable opportunity to address it before the denial, and where the petitioner proffers additional evidence addressing the deficiency with the appeal, then in the ordinary course we will remand the record to allow the district or service center director to consider and address the new evidence. A petitioner may be put on notice of evidentiary requirements by various means, such as a requirement in the regulations that a particular document be submitted with the visa petition; or a notice of intent to deny, letter, or form noting the deficiency or requesting additional evidence. In this case, the petitioner was put on notice of the required evidence by the AAO in three separate notices and given a reasonable opportunity to provide it for the record before the denial. Therefore, we will adjudicate the appeal based on the record of proceedings before the director. See *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Also, the regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part: “An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.”

Counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact as a basis for the appeal and the appeal must be summarily dismissed.

¹The 2001 tax year for the petitioner begins on October 1, 2001, and, ends on September 30, 2002. There was also submitted a copy of an extension request to delay the filing of the petitioner’s 2002 federal return until June 15, 2004.

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ORDER: The appeal is summarily dismissed.