

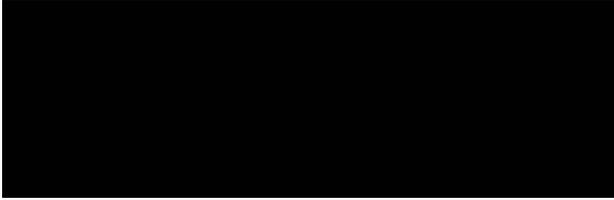
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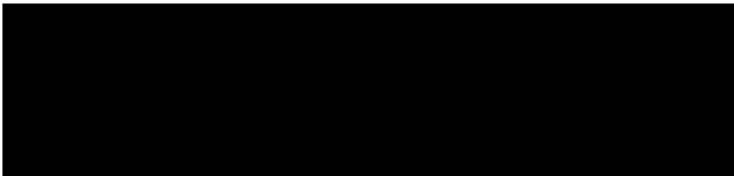
FILE: [Redacted] Office: VERMONT SERVICE CENTER
EAC 04 005 51317

Date: DEC 29 2006

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

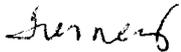
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

for 
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a geriatric care facility. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a geriatric care manager/home attendant. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion counsel submitted a brief but no additional evidence.

Counsel states that the service center failed to provide counsel with the request for evidence issued in this case, issuing it instead only to the petitioner. Counsel states that, contrary to the finding of this office in the decision to dismiss the appeal, the petitioner was prejudiced by this omission.

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 instant motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

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.

With the Form I-140 petition in this matter counsel submitted a properly executed Form G-28 Entry of Appearance. However, both a request for evidence issued in this case and the director's decision of denial stated that no effective entry of appearance was then provided. Because the service center construed the appearance entered by counsel to be ineffective it did not provide counsel with the request for evidence in this matter, issuing it only directly to the petitioner. In the decision of denial the director found that the petitioner had failed to demonstrate its ability to pay the proffered wage. On appeal, counsel noted the procedural error by the service center and urged that the matter be reopened.

This office dismissed the appeal on April 14, 2005. In the decision to dismiss the appeal this office noted that counsel and the petitioner had submitted no additional evidence pertinent to the director's basis for the denial of

the petition in this matter, the petitioner's ability to pay the proffered wage, and had not, therefore, demonstrated that the procedural error had prejudiced the petitioner.

On the motion counsel urges that the petitioner was, in fact, prejudiced by the failure of the service center to post a copy of the request for evidence directly to him. However, counsel again provides no additional evidence or argument pertinent to the petitioner's ability to pay the proffered wage.

Absent any indication that counsel has additional evidence or argument to submit to support the proposition that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date, counsel is unable to demonstrate that the petitioner was prejudiced by the service center's procedural error in failing to provide a copy of the request for evidence directly to counsel. Although counsel may have been denied an opportunity to respond directly to the request for evidence, the decision of denial made clear in what way the director found the petition and supporting materials inadequate. On appeal, counsel had the opportunity to provide whatever evidence he may have wanted to provide in response to the request for evidence. However, counsel failed to provide such evidence and failed to otherwise address the director's basis for the denial on appeal. Counsel has again failed to address the basis of the denial and failed to provide evidence of the petitioner's ability to pay the proffered wage on the motion. Counsel has not demonstrated that the petitioner was prejudiced by the procedural error and has not demonstrated, therefore, that the previous decision of this office should be changed.

The substantive basis for the decision of denial, the petitioner's failure to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, was adequately addressed in the decision to dismiss the appeal. Counsel has provided no additional evidence or argument pertinent to that basis for denial and it need not now be revisited.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The motion is granted. The AAO's April 14, 2005 decision to dismiss the appeal in this case is affirmed. The petition is denied.