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U.S. Citizenship
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Services

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BE

FILE: WAC 04 147 50358

Office: CALIFORNIA SERVICE CENTER

Date: JUN 07 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be summarily dismissed.

The petitioner is a Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a Thai chef. 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 denied the petition accordingly.

Counsel submitted a Form I-290B appeal in this matter pursuant to the regulation at 8 C.F.R. § 103(a)(2)(iii). In the section reserved for the basis of the appeal, counsel states:

The regulation relied upon ... [i.e. 8 C.F.R. § 204.5(g)(2)¹, and 8 CFR § 204.5(l)(3)(ii)²] by the agency is [sic] *ultra vires*³ and therefore unlawful. Moreover the agency is now on record stating that it is abandoning that regulation.⁴

¹ 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.

² The regulation at 8 CFR § 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.

(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.

³ The term "*ultra vires*" in common usage refers to conduct that exceeds those powers granted by law. The director's decision that "... the petitioner has failed to establish sufficient financial viability to warrant or support a permanent full time position from the priority date [i.e. October 22, 2001] of the petition and continuing until the present ..." and, that "... the petitioner failed to submit additional evidence as requested ... to substantiate the Beneficiary's foreign work experience claimed in ETA 750 ..." is supported by the regulations at 8 C.F.R. § 204.5(g)(2) and 8 CFR § 204.5(l)(3)(ii)(A)(B) respectively.

⁴ Counsel's assertion as found in his brief and there is no reference or other citation to substantiate it. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec.

The agency's decision is therefore unlawful. This appeal should therefore be sustained.

Counsel's statement on appeal contains no specific assignment of error concerning the director's decision as it relates to the evidence submitted and the regulations at 8 C.F.R. § 204.5(g)(2) and 8 CFR § 204.5(l)(3)(ii)(A)(B). Alleging that the director erred in some way not related to the director's decision as it is based upon regulation⁵ cited in the decision is an insufficient basis for an appeal.

Further, since counsel has not appealed the director's decision that "... the petitioner's failure to submit additional evidence as requested ... to substantiate the Beneficiary's foreign work experience claimed in ETA 750 ..." or offered additional evidence in on this issue as required by the regulation at 8 CFR § 204.5(l)(3)(ii)(A)(B), petitioner's petition must be dismissed.⁶

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.

ORDER: The appeal is summarily dismissed.

533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

⁵ There are sufficient precedent cases concerning the ability to pay the proffered wage in cases involving employment based preference petitions. See *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). Counsel's contention that the regulation relied upon (i.e. 8 C.F.R. § 204.5(g)(2)) was *ultra vires* of the U.S. Citizenship and Immigration Services (CIS) powers under The Administrative Procedures Act, is in itself incorrect since CIS derives its powers in this area from the Immigration and Nationality Act, 8 U.S.C. § 1153, *et seq.* Moreover, until amended, CIS regulations remaining binding.

⁶ Counsel's appeal statement contains no specific assignment of error concerning the director's decision as it relates to the evidence submitted and the regulations.