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FILE: EAC 04 103 50048

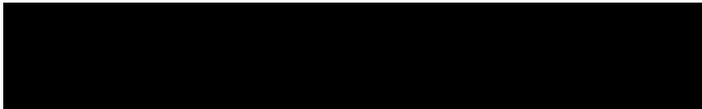
Office: VERMONT SERVICE CENTER

Date: JUN 07 2006

IN RE:

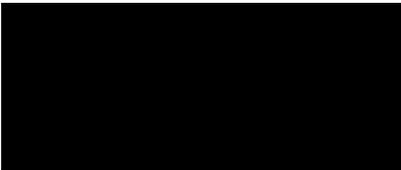
Petitioner:

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a night assistant manager. The acting 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.

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.

Counsel submitted a Form I-290B appeal in this matter. In the section reserved for the basis of the appeal, counsel inserted,

The petitioner was not given the opportunity to clarify its exact financial position. Petitioner's appeal [sic] was denied without a request for additional information. Petitioner was more than able to pay the proffered wage at the time the labor certification was filed.

On the form appeal counsel indicated that he would provide a brief or evidence within 30 days. No brief or evidence was submitted, either with the form appeal or subsequently. On February 24, 2006 this office sent counsel a facsimile transmission asking whether he had submitted any such information, argument, or documentation. Counsel did not respond to that facsimile.

Counsel's statement on appeal contains no assignment of substantive error in the basis for the acting director's decision of denial, but rather alleges a procedural error. Therefore this office will address only the allegation of procedural error.

The regulation at 8 C.F.R. § 103.2(b)(8) states, in pertinent part,

Request for evidence. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by [CIS] prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises

underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence

If the petitioner had neglected to submit some portion of the initial evidence, evidence of its ability to pay the proffered wage, for instance, then the service center would have been obliged to issue a request for evidence. The petitioner, however, submitted the first page of the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return, which shows its taxable income before net operating loss deductions and special deductions. The acting director found that the tax return had failed to demonstrate the ability to pay the proffered wage, rather than that the evidence was incomplete. No request for evidence was required in the instant case.

Even if a request for evidence were required the failure to issue it would be harmless error. Counsel was afforded, on appeal, an opportunity to address the sole issue set forth in the Acting Director's notice of denial and to provide additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The opportunity to submit additional evidence would have rendered moot the failure of the service center to issue a request for evidence if issuance of such a request were required. Counsel submitted no such evidence and the petitioner has failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.