

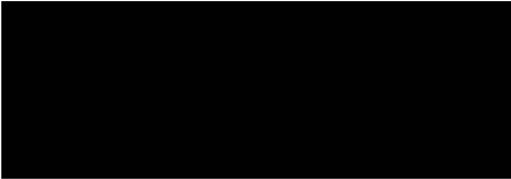


U.S. Citizenship  
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Services

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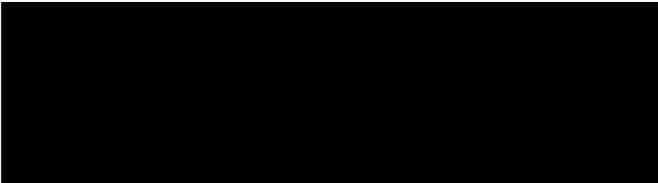


FILE: EAC-03-086-51300 Office: VERMONT SERVICE CENTER Date: MAR 24 2006

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

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

The petitioner is an engine rebuilding company. It seeks to employ the beneficiary permanently in the United States as an automotive machinist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$19.04 per hour, which amounts to \$39,603.20 annually. On the Form ETA 750B, signed by the beneficiary on February 12, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on January 21, 2003. On the petition, the petitioner claimed to have been established on February 1, 1991 and to currently have seven (7) employees. The items on the petition for the petitioner's gross annual income and its net annual income were left blank. With the petition, the petitioner submitted a one page statement of Cash Receipts and Disbursements of [REDACTED] and [REDACTED] Properties for the year ended December 31, 2001 with accountant's compilation report pertinent to the petitioner's ability to pay the proffered wage.

In a request for evidence (RFE) dated February 26, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage

beginning on the priority date. The director also specifically requested the 2001 United States federal income tax return with all schedules and attachments or as an alternative annual reports covering 2001 that are accompanied by audited or reviewed financial statements, the beneficiary's Form W-2 Wage and Tax Statements, information on the proffered position, Form W-3 Transmittal of Wage and Tax Statement covering the year 2001, Form 941 Employer's Quarterly Federal Tax Return for each quarter of 2001 and for the first quarter of 2002 and Form 1096 Annual Summary and Transmittal of United States Information Return.

In response to the RFE, counsel stated in his letter that "[s]ince the beneficiary resides in Syria and has never been to the United States, there's no W-2 form for him." Counsel did not submit the requested documents except a letter dated March 17, 2004 from [REDACTED] CPA, responding to counsel's question regarding the petitioner's capacity to pay for an additional \$40,000 salary. The petitioner's submissions in response to the RFE were received by the director on May 10, 2004.

In a decision dated August 3, 2004, the director determined that although specially requested, there was no tax return submitted with the response and the record did not establish that the petitioner had the ability to pay the proffered wage at the time of filing, and denied the petition.

On appeal, counsel submits a brief without additional evidence.

Counsel contends on appeal that "the petitioner filed an I-140 visa petition along with its 2001 federal tax return and documentation of the beneficiary's prior experience. ... [The director] by decision dated June August [sic] 3, 2004 then denied the visa petition on the basis that the petitioner's 2001 tax return does not establish that [the petitioner] had the ability to pay the offered wage at the time of filing. ... [The director] opined that the petitioner did not document its ability to pay the offered wage solely based upon the fact that in the tax year covering April 2001 the petitioner's net income was a loss of \$54,407 and that in the same year the petitioner's current assets were \$6,552." However, the record of proceeding for the instant case does not contain the petitioner's 2001 tax return. Counsel's submission letter dated January 17, 2003 accompanying with the petition states in pertinent part the following:

We are pleased to enclose herewith an I-140 visa petition on behalf of our above-captioned matter, together with the following:

1. G-28
2. Approved Labor Certification
3. Form ETA 750 A & 750 B
4. Affidavits, in lieu of letter of experience, prepared by business owners confirming his past experience as Automotive Machinist
5. Financial Statement for petitioning company for the year ending December 31, 2001.
6. Check in the sum of \$135.00

The above letter shows that counsel did not submit the petitioner's 2001 tax return with the petition in January 2003. The RFE issued by the director on February 26, 2004 also evidences that the petitioner did not submit its tax return. The RFE states documentation contained in the original submission to establish that the petitioner possessed the ability to meet the proffered wage consisted of a one-page compilation of the petitioner and another entity. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements

must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. A compilation is the management's representation of its financial position and is the lowest level of financial statements relative to other forms of financial statements. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the director concluded in the RFE that "compiled statements are not sufficient documentation with which to establish the financial figures that would be provided by a tax return."

Because the record does not contain the petitioner's tax return to be considered in determining its ability to pay the proffered wage, the director specially asked in the RFE for the petitioner to "submit the 2001 United States federal income tax return(s), with all schedules and attachments, [REDACTED] However, the petitioner did not submit its federal tax returns in response to the RFE ignoring the director's request. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for the year of filing the petition. The 2001 tax return would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

As previously noted, counsel asserts on appeal that the director denied the petition on the basis that the petitioner's 2001 tax return does not establish that it had the ability to pay the offered wage at the time of filing and the director opined that the petitioner did not document its ability to pay the offered wage solely based upon the fact that in the tax year covering April 2001 the petitioner's net income was a loss of \$54,407 and that in the same year the petitioner's current assets were \$6,552. Counsel's assertion is misplaced. The denial decision dated August 3, 2004 states in pertinent part as follows:

Documentation contained in the original submission to establish that [the petitioner] possessed the ability to meet the proffered wage consisted of a one-page compilation for the petitioner and another entity.

Therefore, on February 26, 2004, [CIS] advised that compilations are not sufficient documentation with which to establish [the petitioner's] viability and requested that [the petitioner] submit the appropriate income tax return covering the year 2001 along with W-2 Wage and Tax Statements reflecting wages paid to the beneficiary ...

In response to our request we received one letter from the attorney of record and one letter from a certified public accountant, each discussing the financial situation of the petitioner and quoting figures from the tax return; however, although specifically requested, there was no tax return submitted with the response.

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petitioner was filed.

In addition, CIS record shows that the petitioner filed another Immigrant Petition for Alien Worker (Form I-140) for another worker on February 10, 2003 (Receipt number: EAC-03-125-50816) at the same wage, using the priority date of April 24, 2001, reflected on a Form ETA 750. The director denied that petition on June 1, 2004. However, the AAO sustained an appeal from the denial and approved that petition on November 2, 2005. Therefore, the petitioner must show that it had sufficient income to pay all the proffered wages to the beneficiaries from the priority date for each of them until they obtain their lawful permanent residence.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.