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U.S. Citizenship
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FILE: WAC-02-031-58942 Office: CALIFORNIA SERVICE CENTER Date: MAY 02 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 (AAO) on appeal. The appeal will be remanded.

The petitioner is a HVAC – air conditioner maintenance company. It seeks to employ the beneficiary permanently in the United States as a janitor. 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)(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 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 September 11, 1997. The proffered wage as stated on the Form ETA 750 is \$6.25 per hour, which amounts to \$13,000.00 annually. On the Form ETA 750B, signed by the beneficiary on August 29, 1997, the beneficiary claimed to have worked for the petitioner beginning in September 1988 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on June 29, 2001.

The I-140 petition was submitted on October 29, 2001. On the petition, the petitioner claimed to have been established on October 12, 1940 and to currently have over 100 employees. In the items on the petition for gross annual income and for net annual income the petitioner wrote "confidential." With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated January 17, 2002, 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 requested information for the years 1997 to the present. In the RFE, the director also stated, "In the case of a company that has over one hundred (100) or more workers a current statement from a financial officer will suffice. (RFE, January 17, 2002, at 2).

In response to the RFE, the petitioner submitted additional evidence, including seven pages from a publication of the petitioner describing its services, but without any financial information. The additional evidence also included a letter dated April 8, 2002 from the corporation's secretary which included the statement, "The corporate financial statements are kept in our main office in Los Angeles and are considered confidential." The petitioner's submissions in response to the RFE did not include copies of annual reports, federal tax returns, or audited financial statements, nor did those submissions include a statement from a financial officer of the petitioner. The petitioner's submissions in response to the RFE were received by the director on April 27, 2002.

The director issued a notice of intent to deny (ITD) dated May 9, 2002. The director stated that the regulation at 8 C.F.R. § 204.5(g)(2) requires copies of annual reports, federal tax returns, or audited financial statements, and that such evidence had been requested in the RFE. The director stated that in response to the RFE the director had received a letter from the corporation's secretary and a profile of the company, and that the evidence in the record was insufficient to establish the petitioner's ability to pay the proffered wage during the relevant period. The director afforded the petitioner thirty days to submit additional information, evidence or arguments to support the petition. The director then stated, "Failure to respond to this request will result in the denial of the petition."

The file contains no indication of any response by the petitioner to the ITD.

In a decision dated July 16, 2002, the director stated that an ITD had been issued on May 9, 2002. The director stated that a reasonable amount of time was afforded the petitioner to provide evidence in support of the petition and in opposition to the proposed denial. The director then stated as follows: "[CIS] records indicate that since the notice of Intent to Deny was issued and that since that date [CIS] has not received any communication from the petitioner concerning this matter. Accordingly, the petition is denied." (Director's decision, July 16, 2002, at 2).

The petitioner filed a Form I-290B notice of appeal on August 15, 2002, accompanied by additional evidence. In the notice of appeal, the petitioner¹ stated "We do not recall to received your letter dated May 9, 2002 'Notice of Intent to Deny' otherwise we could submit the necessary information. Your letter 'Notice of Intent to Deny' was attached to your letter dated July 16, 2002 'Notice of Decision.'" (I-290B, block 3 (grammatical and spelling errors in the original)).

The file contains no indication that the record was transmitted to the AAO after the Form I-290B notice of appeal was submitted. The heading block of the I-290B bears the hand written words "Service motion," but the record contains no indication of who wrote those words, nor is it certain from the record what those words are intended to communicate.

¹ The person who signed the I-290B notice of appeal form is [REDACTED], who states her address as "C/ Special Services, Inc.," at a street address on [REDACTED] in Paramount, CA, which is not the petitioner's address which appears on other documents in the record. [REDACTED] is not recognized as a representative of the petitioner, since no Form G-28 Notice of Entry of Appearance as Attorney or Representative was submitted by her. However, [REDACTED] has submitted a memorandum transmitting documents to CIS with the petitioner's name at the heading and in which she states her title as "Corporation's Secretary." (Memorandum from [REDACTED], April 8, 2002). [REDACTED] has also signed a document in the record on the letterhead of the petitioner as "Personnel Administrator." (Letter from [REDACTED] Nov. 14, 2002, at 2). Since [REDACTED] has asserted that she is an officer of the petitioner, her statements on behalf of the petitioner will be considered to be those of the petitioner.

The filed also contains a second RFE, which is dated August 27, 2001. However, the year 2001 is an apparent typographical error, since the I-140 petition was not filed until October 29, 2001. The correct date of the second RFE appears to be August 27, 2002, that is, twelve days after the I-290B notice of appeal was submitted. The second RFE states that the petitioner is given until November 19, 2002 to submit additional evidence. On the non-record side of the file, a copy of page two of the second RFE bears date stamps of August 27, 2002 and November 19, 2002, which is further confirmation that the second RFE was issued on August 27, 2002, and not on August 27, 2001.

In the second RFE, the director again requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director again 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 requested copies of the beneficiary's Form W-2 Wage and Tax Statements for 2000 and 2001.

In response to the second RFE, the petitioner submitted additional evidence, including copies of Form W-2 Wage and Tax Statements showing compensation received by the beneficiary from the petitioner for the years 1996 through 2001. The petitioner's submissions included a summary of the petitioner's annual federal unemployment tax (FUTA) information for 2000. The petitioner's submissions in response to the RFE did not include copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's submissions in response to the RFE were received by the director on November 22, 2002.

According to the regulation at 8 C.F.R. § 103.2(b)(8), the time for responding to an RFE must be twelve weeks. The second RFE was issued on August 27, 2002, and the twelve-week period following that date expired on November 19, 2002, which was a Tuesday. The regulation at 8 C.F.R. § 103.5a(b) allows three additional days for an action when a notice is served by mail. The second RFE set a deadline of November 19, 2002 for a response, a date which did not include the three extra days allowed by the regulation at 8 C.F.R. § 103.5a(b). **By regulation the period was therefore extended to November 22, 2002. The petitioner's submissions on November 22, 2002 in response to the second RFE were therefore timely.**

The record contains no indication of any further action by the director after the submission of the petitioner's response to the second RFE. If the notation in the heading of the I-290B of "Service motion" was intended to indicate a reopening of the petition by the director, then any such action must be documented. The issuance of a second RFE twelve days after the receipt of the I-290B notice of appeal suggests that the director had reopened the petition.

Since the record lacks any explanation for the issuance of the second RFE and lacks any documentation of a new decision by the director after receiving the response to the second RFE, the petition must be remanded to the director to document the procedural reason for the issuance of the second RFE and to issue a new decision in the light of the petitioner's submissions in response to the second RFE.

ORDER: The decision of the director is withdrawn. The petition is remanded to the director for actions consistent with this decision.