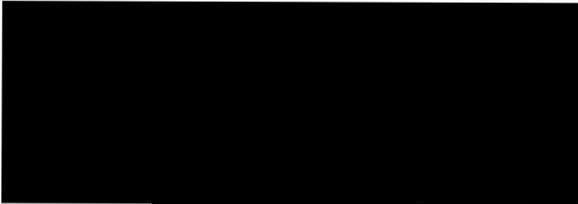




U.S. Citizenship
and Immigration
Services

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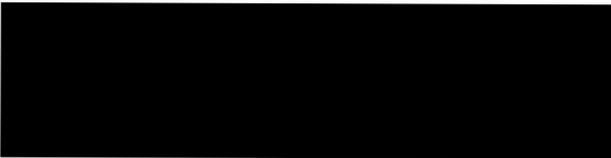
FILE: [REDACTED]
SRC 03 018 56635

Office: TEXAS SERVICE CENTER Date: MAY 15 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a baked goods corporation. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. The director determined that the petitioner had not submitted documents that have any relationship to the petitioner, to show the ability to pay the proffered wage, or to the location where the alien beneficiary will work. The director 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 nature, for which qualified workers are not available in the United States.

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.

The regulation at 8 CFR § 204.5(1)(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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$9.40 per hour (\$17,108.00 per year based upon a 35 hour/week). The Form ETA 750 states that the position requires three years experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for 2001; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on November 26, 2003, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested copies of the following documentation:

- Articles of Incorporation.
- Petitioner's U.S. federal tax returns for 2002.
- Form 941 Employer's Quarterly Federal Tax Returns for 1999 and 2002 with information to include the names, social security numbers and number of weeks worked for all employees for each quarter.
- Occupancy license.
- License to conduct business.
- Tax resale permit.
- Health Department permits for 2001, 2002, and 2003.
- Petitioner's lease/mortgage agreement.
- Franchise agreement.
- Assumed name registration.

Regarding the beneficiary, the director requested copies of the following documentation:

- Documentation concerning the beneficiary's education, degrees, transcripts, training certificates according to the regulation at 8 CFR § 204.5(l)(3)(ii).
- A foreign language letter with English translation.
- Social security card.
- Passport biographic pages, all visas, biometric information, validity dates.
- Arrival/departure card.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, petitioner submitted Articles of Incorporation of ISP of America Inc. originally filed October 6, 1997; Form 941 Employer's Quarterly Federal Tax Returns for 1999 and 2002; a U.S. federal tax return for 2002; a sales and use tax registration; annual food permit for Dunkin Donuts #4496, 7340 W. Commercial Blvd., Lauderhill FL 33319; an Agreement of Sales dated June 8, 1998 between Third Dunkin' Donuts Realty Inc. and [REDACTED] and [REDACTED] for the premises at 7340 W. Commercial Blvd. Lauderhill FL 33319;¹

¹ According to the Agreement at closing the seller shall grant a new franchise agreement for the premises sold with a term of 20 years.

a real estate mortgage for 7340 W. Commercial Blvd. Lauderhill FL 33319; an English language employment verification letter dated October 15, 2001; and, the beneficiary's Pakistan passport pages and its renewal.

The director denied the petition on February 27, 2004, finding that that the petitioner had not submitted documents that have any relationship to the petitioner, documents to show the ability to pay the proffered wage, or, to the location where the alien beneficiary will work.

On appeal, counsel asserts that the director denied the petition rather than issuing a request for additional evidence. Counsel asserts that since the director did not request additional evidence that therefore the petitioner could not prove its ability to pay or the petitioner's address. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. There is no regulatory requirement for CIS to issue or to re-issue such a request. When petitions on their face, do not demonstrate eligibility for the preference visa classification sought, the director may review and act upon the petition as submitted. *See* 8 C.F.R. § 103.2 (b)(8).

Counsel asserts that because the director requested Form 941 Employer's Quarterly Federal Tax Returns for 1999 and 2002 with information to include the names, social security numbers and number of weeks worked for all employees for each quarter, and only received Form 941 Employer's Quarterly Federal Tax Returns without the requested information, that the director unfairly raised this omission. The explanation for the withholding of the employee information in the record of proceeding is that the certified public accountant who has been filing Form 941 for his clients for almost 20 years stated that the form has no attachments. This statement is not a reasonable excuse for the lack of the requested information. 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).

Counsel contends on this issue " ... Further, it is unclear as to the relevance of the request regarding the number of employees as it pertains to the "approvability" of the visa petition. Whether the petitioner employs 2, 5, 9 or 20 employees is not the issue. The only issue is the need for a Baker which the Department of Labor reviewed and approved."

Counsel's assertion is incorrect. 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 Form 941 Employer's Quarterly Federal Tax Returns for 1999 and 2002 with information to include the names, social security numbers and number of weeks worked for all employees for each quarter. It is not the number of employees that is as important as verification through the statements that the employer has a verifiable workforce receiving compensation, although a large payroll would indicate that the employer is able to meet a substantial payroll obligation. The quarterly tax returns would have demonstrated the amount of wages for each employee for its workforce 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).

In determining the respective jurisdictions of the Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. *See Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 214(a)(14) of the Act, 8 U.S.C. 1182(a)(14). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. The CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true.

Although the advisory opinions of other Government agencies are given considerable weight, CIS has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit CIS's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

Further, on the same point, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. Evidence was submitted to show that the petitioner employed the beneficiary as a baker since October 2000 at 1801 West Oakland Park Blvd., Oakland Park Florida, 33311 according to the Form G-235A in the record of proceeding. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If the beneficiary was listed as an employee in information provided then that information is used as mentioned above and in other examinations by the director and AAO to determine the ability to pay based upon the particular facts in each case.

Also, the regulation 8 C.F.R. § 204.5(g)(2) *Ability of prospective employer to pay wage* states in pertinent part: "... 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 the Service* [emphasis added].

Counsel raises another issue based upon the director's findings. Counsel asserts that there is an incorrect finding by the director that the various addresses found in documents in the record of proceeding are a substantive issue. The petition (I-140) states that the corporate address is 1801 West Oakland Park Blvd., Oakland Park Florida, 33311. Part 6 of the petition has a section that is entitled "Address where the person [the beneficiary] will work if different from address in part I. The petitioner left this section blank so the inference is that the beneficiary will work at 1801 West Oakland Park Blvd., Oakland Park Florida, 33311.

The Alien Employment Application in Form 750 Part A in Section 6 requested the address of the employer. The petitioner inserted "1801 West Oakland Park Blvd., Oakland Park Florida, 33311." In Section 7 on that page, the section requested, "Address where the alien will work." The employer, who is the petitioner herein, stated "Same as #6" (i.e. 1801 West Oakland Park Blvd., Oakland Park, Florida, 33311). The location of the work site, not the location of the employer, will determine where the labor certification application must be filed and job posting is accomplished.

Beyond the decision of the director, in applications filed under §§ 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

- (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.
- (ii) If there is no such bargaining representative, *by posted notice to the employer's employees at the facility of location of the employment [emphasis added]*.

Here, the I-140 petition and the Alien Employment Application stated that the beneficiary would be employed at 1801 West Oakland Park Blvd., Oakland Park, Florida, 33311. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). The labor certification states 1801 West Oakland Park Blvd., Oakland Park, Florida, 33311, but not 7340 W. Commercial Blvd., Lauderhill FL 33319. The latter address is not mentioned. Counsel has submitted the following documents to accompany the appeal statement that were not already submitted: several street maps of Lauderhill, Florida, and the street address of the petitioner at 7340 W. Commercial Blvd., Lauderhill FL 33319 that is the address where the beneficiary will work.

Counsel has submitted documents stating that the location of the retail store where the beneficiary will work is 7340 W. Commercial Blvd., Lauderhill FL 33319, and that 1801 West Oakland Park Blvd., Oakland Park, Florida, 33311 is the corporate business address. This is an admission against the petitioner's interest. As already stated by the director, "The documents in evidence do not appear to have any relationship to the petitioner, or to the location where the alien will work."

Counsel raises another issue based upon the director's findings. Counsel contends that that the director "... erred in determining that a reference letter from Pakistan is invalid because it is written in English rather than Urdu." The only evidence in the record of proceeding that states the beneficiary's prior employment experience as a baker is a photocopy of a un-notarized job verification in English dated October 15, 2001 from the Friscu Sweet House, Faisalabad, Pakistan stating that the beneficiary was employed full time as a baker from June 1995 to May 1999.

According to the request for evidence the petitioner was asked to submit a copy of the foreign language letter with certified English translation. The petitioner did not submit the requested evidence, and upon appeal, states that the letter was written in English.

The AAO's concern concerning the beneficiary's prior employment history is that the employment letter is not verified by notarization, and, not that it is in English rather than a foreign language of the country from where it was made. There is no independent objective evidence such as supporting letters from the business or the beneficiary's associates there, cancelled checks, cash disbursements receipts, government occupational permits or licenses, or any other evidence whatsoever except this unsigned letter photocopy to demonstrate the three years of prior job experience as a baker in Pakistan. Notwithstanding the above, we find the job verification from Friscu Sweet House to be credible.

Counsel raises another issue based upon the director's findings. The director denied the petition on February 27, 2004, finding that that the petitioner had not submitted documents to show the ability to pay the proffered wage. While the petitioner has submitted U.S. federal tax returns, the returns state taxable income for the petitioner's business at 7340 W. Commercial Blvd., Lauderhill FL 33319, and not the business location

designated in both the petition and certified Alien Employment Application located at 1801 West Oakland Park Blvd., Oakland Park, Florida, 33311.

As more fully above explained, the petitioner had not submitted documents relating the petitioner located at 1801 West Oakland Park Blvd., Oakland Park, Florida, 33311, documents to show the ability to pay the proffered wage from a business located at 1801 West Oakland Park Blvd., Oakland Park, Florida, 33311, or, to the location where the alien the petition and certified Alien Employment Application state he will work, that is 1801 West Oakland Park Blvd., Oakland Park, Florida, 33311.²

ORDER: The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. The appeal is dismissed

² According to the Form G-235A, the beneficiary was working as a baker since October 2000 at 1801 West Oakland Park Blvd., Oakland Park, Florida, 33311. The job offer letter dated September 10, 2002, from the petitioner to the beneficiary is on letterhead with an address of 1801 West Oakland Park Blvd., Oakland Park, Florida, 33311.