



U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: APR 11 2007

EAC-03-125-53332

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (Director), Vermont Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and/or reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a technical services business. It seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker in a permanent position of an electrician in the United States. 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 and denied the petition on November 4, 2003. The petitioner through its counsel filed an appeal to the AAO. On June 22, 2005 the AAO dismissed the appeal finding that counsel's assertions cannot be concluded to outweigh the evidence presented by the petitioner the petitioner's corporate tax returns as submitted by the petitioner that demonstrate that the petitioner could not pay the proffered wage from the priority date of April 20, 2001.

Counsel filed the instant motion on July 22, 2005. In the motion counsel claims that: "[o]n or about 12/08/04, [the petitioner] submitted additional evidence establishing the employer's ability to pay the beneficiary's salary, along with extensive explanation establishing that [the petitioner] has satisfied the regulatory requirements referring to employer's ability to pay. Exhibit 4. On or about 06/22/05, US CIS denied the appeal, without any consideration given to the employer's additional submission(s). Apparently, US CIS simply never forwarded the submissions into the file. Since the documents were timely submitted for US CIS consideration, please reopen and reconsider the above captioned mater, as the petitioning employer has clearly demonstrated the ability to pay the proffered wage or salary as of the date of filing and continuing to the present."

The record of proceeding does not contain the additional evidence allegedly submitted on or about December 8, 2004. The materials dated December 8, 2004 were submitted with the instant motion. Counsel asserts the AAO did not give the evidence dated December 8, 2004 a full consideration before its June 22, 2005 decision. The record also shows that the director denied the petition on November 4, 2003 and the petitioner through its counsel filed an appeal timely on November 20, 2003. The Form I-290B indicated that counsel was submitting a separate brief and/or evidence with the appeal and the appeal was filed with a brief from counsel and additional evidence. All the additional evidence submitted with the appeal on November 20, 2003 was given a full consideration in the AAO's June 22, 2005 decision. The instant motion claims that the AAO did not consider the evidence submitted by the petitioner on or about December 8, 2004.

The AAO does not concur with counsel's assertion that the failure to consider the evidence submitted on December 8, 2004 constitutes a ground for the petitioner to file a motion to reopen. First of all, the December 8, 2004 additional evidence was not submitted timely and properly. The regulations do not allow an applicant or petitioner an open-ended or indefinite period in which to supplement an appeal once it has been filed. The Form I-290B usually requires a separate brief and/or evidence be submitted to the AAO within 30 days. In the instant case, counsel submitted the additional evidence to supplement the appeal on December 8, 2004, more than one year after filing the appeal. It is most unlikely to conclude that the additional evidence was submitted timely and therefore, should be given a full consideration. Secondly, the Form I-290B instructions indicate that an extension of the period to submit a brief and/or evidence to the AAO of more than 30 days may be granted only for good cause and the reason should be explained in a separate letter. However, in the instant case, counsel did not request for any extension, nor did he explain any good cause to submit the additional evidence more than one year after filing of the appeal. Therefore, submission of additional evidence more than one year after filing the appeal will not be granted by the AAO. Third, counsel claims that the December 8, 2004 documents contain evidence establishing the petitioner's ability to pay the

beneficiary's salary and extensive explanation establishing that the petitioner has satisfied the regulatory requirements referring to its ability to pay. However, the petitioner had opportunities to provide such evidence with its initial filing on January 13, 2003,¹ its response to the director's request for evidence (RFE) dated April 15, 2003² and its filing of the appeal.³ The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the motion to reopen will be dismissed. Moreover, the December 8, 2004 documents contain the petitioner's 2001 tax return as Exhibit 1, documentation as of Mr. Friedman's company's and personal funds available to pay the beneficiary's salary in the year of 2001 as Exhibit 2, the petitioner's 2002 tax return as Exhibit 3, bank statements of the petitioner's account for 2002 as Exhibit 3A, the petitioner's 2003 tax return as Exhibit 4 and bank statements of the petitioner's account for 2003 as Exhibit 4A. In fact, these documents had already been submitted with the initial filing, response to the RFE or the appeal and a complete review of the AAO June 22, 2005 decision reveals that the AAO gave all these documents a full consideration in its decision. Counsel's assertion that the AAO did not consider all the submitted evidence is misplaced. Counsel's motion with resubmission of the December 8, 2004 documents does not qualify for consideration as a motion to reopen under 8 C.F.R. § 103.5(a)(2) because the petitioner is not providing new facts not previously submitted.

The motion does not qualify for consideration as a motion to reconsider under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel does not assert that the director and the AAO made an erroneous decision through misapplication of law or policy.

Counsel here has not even expressed disagreement with the AAO's decision. The motion does not qualify for motion to reopen nor for motion to reconsider, therefore, must be dismissed.

ORDER: The motion is granted, the previous decision of the AAO dated June 22, 2005 is affirmed, and the petition remains denied.

¹ In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

² In the April 15, 2003 RFE, the director expressly requested the petitioner to submit additional evidence to establish that it had the ability to pay the proffered wage as of April 20, 2001 and continuing to the present in the forms of corporate tax returns, annual reports or the beneficiary's W-2 forms, etc.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).