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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090



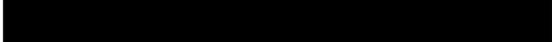
U.S. Citizenship
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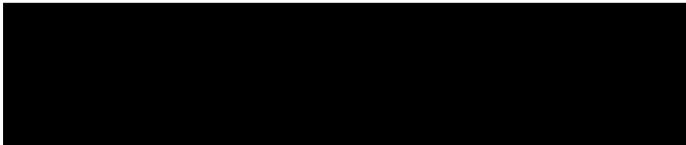
File:  Office: TEXAS SERVICE CENTER Date:

NOV 19 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be dismissed, and the petition will remain denied

The petitioner is a woodworking shop. The petitioner seeks to classify the beneficiary pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A) as a cabinet maker.¹ As required by statute, an ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (the DOL), accompanied the petition. The director determined that the petitioner failed to demonstrate a continuing ability to pay the proffered wage beginning on the priority date.² The AAO affirmed the director's decision.

With the petition filed August 11, 2007, counsel had submitted, [REDACTED] Schedules C (from Forms 1040) for 2003, 2004, 2005, naming [REDACTED] doing business as [REDACTED]

On July 2, 2008, the director issued a request for evidence (RFE), instructing the petitioner to submit, [REDACTED] additional evidence of its ability to pay the proffered wage from the December 15, 2003, priority date, including the yearly tax return(s) of the owner(s) of [REDACTED] for 2004, 2005, 2006, and 2007. Additionally, the director requested yearly tax return(s) "including all schedules" for [REDACTED] for 2006 and 2007.

In a response dated July 31, 2008, counsel submitted, [REDACTED] Schedules C (from Forms 1040) for [REDACTED] doing business as [REDACTED] for 2003, 2004, 2005 and 2006.

¹ In the Form I-140, Immigrant Petition for alien Worker, the petitioner requested the visa preference classification for first preference, priority workers, i.e. "an alien of extraordinary ability" by checking box (a) in Part 2. However, the petition was accompanied by an ETA Form 750 Part A which requires only two years of experience. Accordingly, the director interpreted the "extraordinary ability" request as an inadvertent error and proceeded to adjudicate the petition as one seeking a third preference classification as a skilled worker. The petitioner has not objected to the director's use of discretion in this manner, and the AAO will consider the appeal as one pertaining to classify the beneficiary pursuant to Section 203(b)(3)(A)(i) of the Act. That being said, the AAO notes that, even if the director's decision was withdrawn in this matter, the appeal could not be sustained for this reason and the motion will be dismissed. Also for this reason, it is impossible to prevail. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

² According to the director's decision dated August 26, 2008, the director noted that the record did not contain complete federal Form 1040 tax returns for 2004, 2005, 2006, and 2007, and therefore the petitioner had not demonstrated by sufficient evidence, according to the regulation at 8 C.F.R. § 204.5(g)(2), its ability to pay the proffered wage.

The director denied the petition on August 26, 2008. The petitioner appealed and contended that the director had “denied the case for failure to submit the [Forms] I-140 of the owner.” Counsel contended that the petitioner is a limited liability company and it was “legal error” for the director to request the “personal 1040 tax return [sic] of the member of the [redacted],”³ Therefore, on appeal, counsel resubmitted [redacted] Schedules C (from Forms 1040) for [redacted] doing business as [redacted] for 2003, 2004, 2005 and 2006, but not the complete Forms 1040 tax returns as filed with the IRS. The AAO affirmed the director’s decision.

Counsel filed a motion to reopen/reconsider on December 18, 2009. On Part 3 of Form I-290B, Notice of Appeal or Motion, counsel states the following, *inter alia*, as the primary basis for the appeal:

Enclosed are personal 1040 IRS tax forms for the owner of the company, as well as [an] additional brief.

With the appeal and legal brief in the matter, counsel submitted pages one and two of Forms 1040 federal income tax returns for 2008 and 2007 filed by [redacted] and pages one and two of federal income tax returns for 2003 through 2006, filed by [redacted] and his spouse.

The regulation concerning evidence necessary to show the ability to pay the proffered wage states at 8 C.F.R. § 204.5(g)(2), 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner failed to provide complete, signed and dated income tax returns, or to substantiate the existence and form of organization for tax reporting of the LLC. Clearly, unsigned, undated and incomplete tax returns were not submitted to the IRS. Counsel makes a statement on motion that he is incorporating by reference prior tax return documentation already submitted in this case. Counsel is implying that, with his present submission, the AAO has complete Forms 1040 for years 2003 through 2008 as filed with the IRS. Counsel is incorrect.⁴

³ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. See 26 C.F.R. § 301.7701-3. No election is present in the record.

⁴ Missing from the submissions are Forms 1040, Schedules SE, W-2 or 1099-MISC Statements, and

The probative value of the incomplete documents as evidence is diminished substantially. The petitioner had an additional time to submit more complete and persuasive evidence but neglected to do so. To date, the petitioner has not submitted the complete yearly tax return(s) of the member of [REDACTED] for 2004, 2005, 2006, and 2007, or yearly tax return(s) "including all schedules" for [REDACTED] for 2006 and 2007.

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 motion. 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 request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on motion even if it were complete.⁵

Counsel submitted copies of the business' bank statements, which according to counsel demonstrate a high monthly closing balance. Counsel asserts that the bank balances are liquid corporate assets that demonstrate the petitioner's ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2)

the like. Presumably, the member's tax returns as filed with the IRS were not composed of the first two pages of Forms 1040 and only Schedules C.

⁵ Even if the evidence submitted on appeal was for the sake of argument considered, the motion still would have been dismissed. The record is devoid of information concerning the LLC such as an operating agreement or state registration document. To date, despite four opportunities to submit the tax return evidence required by regulation and the director's RFE, the petitioner's has failed to do so. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, assuming the submissions of Schedule C would be sufficient in this matter to identify the entity and to demonstrate the ability to pay the proffered wage, the LLC only stated net income of \$9,419.00 in 2005 which is less than the proffered wage of \$10.12 per hour (\$21,049.60 per year). The petitioner did not employ the beneficiary in 2005. Furthermore, in 2006 and 2007, the petitioner's sole member reported income only from the Schedule C. It is not credible that the petitioner could have allocated a majority of its income in those years to the beneficiary's salary when its sole member was more likely than not dependent on this income to support his household.

is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not already reflected on the petitioner's tax returns. Documentary evidence, such as a detailed business plan and audited cash flow statements can demonstrate the petitioner's overall financial position. See [REDACTED] accessed November 2, 2009. However audited financial statements and a business plan were not submitted. The bank statements without substantiation do not demonstrate the cash flow of the petitioner.

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. The petitioner has not met this burden.

ORDER: The motion is dismissed and the petition remains denied