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U.S. Citizenship
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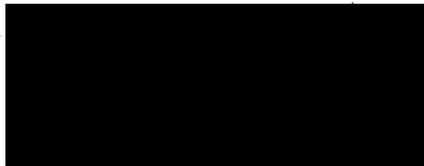
APR 13 2005

FILE: WAC 03 072 54163 Office: CALIFORNIA SERVICE CENTER Date:

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

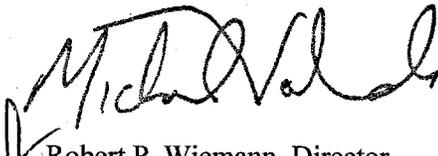
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director
Administrative Appeals Office

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

The petitioner is a dry cleaner. It seeks to employ the beneficiary permanently in the United States as a clothes presser-supervisor. 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.

On appeal, counsel submits a statement.

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 granting 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:

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 the Service.

Eligibility in this matter hinges on the petitioner demonstrating 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). The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d).

Here, the Form ETA 750 was accepted for processing on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$22.75 per hour, which equals \$47,320 per year. The Form ETA 750 also states that the proffered position requires two years experience in the proffered position or two years experience in the related occupation of Laundry Department Assistant Supervisor.

On the petition, the petitioner stated that it was established during 1969 and that it employs 230 workers. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Los Angeles, California.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for Fazio Cleaners, of Los Angeles, California as an Assistant Dry Presser and Fitter Supervisor from February 1988 to July 1990 and for the petitioner, also in Los Angeles, as a Dry Presser and Fitter Supervisor, from August 1990 to "Present."¹

In support of the petition, counsel provided no evidence of the petitioner's ability to pay the proffered wage. Counsel submitted a letter, dated April 25, 2002, which he had written to the petitioner. In that letter counsel requested that the petitioner provide a copy of its most current tax return. In that letter counsel also assured the petitioner that its tax return would remain confidential and be used for no purpose other than to determine whether or not the instant petition should be approved.

Counsel also provided a letter from the petitioner, dated June 5, 2002, written in response to counsel's letter. That letter states that the petitioner has over 230 employees and that it is, therefore, exempt from the requirement of 8 C.F.R. § 204.5(g)(2) that it provide copies of annual reports, federal tax returns, or audited financial statements to show its continuing ability to pay the proffered wage beginning on the priority date. That letter does not, however, state whether or not the petitioner has the ability to pay the proffered wage.

As to the beneficiary's experience counsel provided an undated letter on the letterhead of [REDACTED]. That letter lists the five location [REDACTED]. That letter is signed by [REDACTED] Human Resource Director and states Bertha Angeles, presumably the beneficiary, "was employed by Flair, Inc. from February 1988 to July 1990. She was employed in our Laundry Department." Apparently that letter asserts, or at least implies, that Flair, Inc. and Fazio Cleaners are identical.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to demonstrate that the beneficiary has the requisite experience, the California Service Center, on May 5, 2003, requested, *inter alia*, additional evidence pertinent to both issues.

Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Consistent with the requirements of 8 C.F.R. § 204.5 (l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of 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.

¹ As the beneficiary signed that form on January 10, 1998 the beneficiary was claiming employment for the petitioner from August 1990 until at least January 10, 1998.

In response, counsel submitted a letter, dated August 20, 2003, from the petitioner. That letter is signed by [REDACTED] of the petitioner's Human Resources department. That letter states that the petitioner has been in operation for over 40 years,² employs about 250 workers, and has the ability to pay the proffered wage. Counsel provided no other evidence in response to the May 5, 2003 Request for Evidence. As to the beneficiary's experience, that letter states that the beneficiary has worked for the petitioner as a shirt assembler since July 23, 1989.³

That letter is on the letterhead of Flair Cleaners, the petitioner. It lists eight locations in addition to the petitioner's corporate offices. None of those eight locations is the same as any of the five locations on the letterhead of Fazio Cleaners, described above. Because the evidence in the record suggests that Fazio and Flair are not the same entity, the assertions by the Human Resource Director at Fazio Cleaners that the beneficiary "was employed by Flair, Inc. from February 1988 to July 1990" and that "she was employed in our Laundry Department," are suspect.

On October 9, 2003 the Director, California Service Center, issued a Notice of Intent to Deny in this matter. The Service Center requested, notwithstanding the August 20, 2003 letter, that the petitioner provide evidence, in the form of copies of annual reports, federal tax returns, or audited financial statements, that it had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel submitted an undated response to the Notice of Intent to Deny. Counsel stated that the petitioner has eight locations and over 250 employees and has been in business since 1993.⁴ Counsel further states that the petitioner is listed in Dun & Bradstreet and is rated excellent, though counsel provides no evidence of that assertion. Counsel states, "Due to concerns from competitors and Privacy issues, the petitioner cannot supply its voluminous tax returns from 1998 - 2002."

Finally, counsel provided a list from Colleen McCormick, dated October 30, 2002, stating the name of a bank with which the petitioner claims to have an account, and the names of four companies with which the petitioner apparently claims to engage in business. Counsel states, "This alone should well be enough to establish 'ability to pay.'"

Finally, counsel stated that CIS is required to find that the petitioner has sufficiently demonstrated its continuing ability to pay the proffered wage beginning on the priority date according to the "100 employee rule."

² The assertion that the petitioner has been in business for over 40 years appears to be contradicted by the assertion on the Form I-140 petition that it was founded during 1969.

³ This letter conflicts with the beneficiary's version of her employment history in two respects. First, it indicates that she began her employment with the petitioner on July 23, 1989, whereas the beneficiary claims, on the Form ETA 750B, to have begun that employment during August of 1990. Second, the employment verification letter states that the beneficiary was employed as a shirt assembler, whereas the beneficiary claimed to have worked as the petitioner's Dry Presser and Fitter Supervisor.

⁴ Counsel's assertion appears to conflict both with the assertion on the Form I-140 petition that the petitioner was founded during 1969 and with the assertion, made in the letter of August 20, 2003, that the petitioner has been in business for over 40 years.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on November 19, 2003, denied the petition.

On appeal, counsel again urges that the petitioner has satisfied its burden of proving its continuing ability to pay the proffered wage beginning on the priority date pursuant to the "100 employees rule." Counsel also apparently urges that CIS could easily have verified that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date through its bank reference.

Initially, this office notes that information pertinent to a petitioner's bank balances are not ordinarily available to others, including CIS. Further, bank balances are not generally competent to show a petitioner's continuing ability to pay the proffered wage beginning on the priority date. Finally, the petitioner and counsel are obliged to present evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, rather than requiring CIS to research the issue.

The petitioner did not provide copies of annual reports, federal tax returns, or audited financial statements, as 8 C.F.R. § 204.5(g)(2) generally requires. That the petitioner may be listed in [REDACTED] as counsel asserts but does not demonstrate, does nothing to satisfy that requirement. Counsel's implicit assertion that the petitioner does business with four companies and has a bank account is likewise insufficient. The petitioner's obligation to demonstrate its ability to pay the proffered wage is not obviated or excused by the petitioner's privacy concerns. The only remaining issues in this case, pertinent to the petitioner's ability to pay the proffered wage, are whether the petitioner has demonstrated the ability to pay the proffered wage pursuant to the "100 employees rule," and whether the Service Center was free, without citing any reason, to require additional evidence.

The regulation at 8 C.F.R. § 204.5(g)(2), set out above, states that "[if the petitioner] 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." [Emphasis provided.]

The only submission by the beneficiary in which one of the beneficiary's officers or employees stated that the petitioner has the ability to pay the proffered wage is the August 20, 2003 letter. That letter is signed by [REDACTED] Human Resources." Because no evidence in the record indicates that [REDACTED] is a financial officer of the petitioner, that letter is insufficient to satisfy the requirements of the "100 employees rule" at 8 C.F.R. § 204.5(g)(2).

Under these circumstances, this office need not address whether, had the petitioner provided a letter that conformed to the requirements of 8 C.F.R. § 204.5(g)(2), the Service Center would have erred in requiring additional evidence without enunciating a reason.

The petitioner failed to submit evidence sufficient to demonstrate that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition may not, therefore, be approved.

An additional issue exists in this case that was not addressed in the decision of denial. The Form ETA 750 states that the proffered position requires two years of experience in the proffered position (Clothes Presser-Supervisor) or two years experience as a Laundry Department Assistant Supervisor.

The undated letter submitted with the petition merely stated that the beneficiary worked in the Laundry Department. It gives no indication that the petitioner worked in any capacity that would qualify her for the proffered position. Further, that letter appears to contradict itself as to whether the petitioner was then working for [REDACTED] or for the petitioner. That internal contradiction renders the letter suspect and of little evidentiary value. Further, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition, and the petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The August 20, 2003 letter from [REDACTED] of the petitioner's human resources department states that the beneficiary worked for the petitioner as a shirt assembler, rather than in any capacity that would qualify her for the proffered position. Further, the starting date stated in that letter conflicts with the beneficiary's own version of her employment history, and renders both suspect.

The various factors cited render the beneficiary's employment documentation suspect and of questionable evidentiary value. Further, even if believed, they do not support the proposition that the beneficiary has the requisite two years of experience in the proffered position or as a Laundry Department Assistant Supervisor.

The evidence submitted does not demonstrate that the beneficiary is qualified for the proffered position pursuant to the terms of the approved Form ETA 750. For this additional reason the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.