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FILE: WAC 02 191 50513 Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:



AUG 30 2005

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 immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) affirmed the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen/reconsider. The motion will be denied.

The petitioner is a garment manufacturer and wholesaler company. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and, it seeks to employ the beneficiary permanently in the United States as a garment sample maker. The director determined that the petitioner had not established that petitioner had the ability to pay the beneficiary on the priority date of the visa petition and denied the petition accordingly. The AAO affirmed that decision, dismissing petitioner's appeal of the director's decision.

The regulation at 8 C.F.R. § 103.5(A)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion does not qualify as a motion to reopen. There are no new facts presented here by counsel that related to his initial evidence accompanying the petition, or to the issue of whether or not on the priority date of the alien labor application the petitioner had the ability to pay the beneficiary the proffered wage.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion does not qualify as a motion to reconsider because counsel fails to identify any erroneous conclusion of law or statement of fact for the appeal not already examined in the record of proceedings, and, he asserts no new or additional precedent decisions for any position. Counsel is re-arguing the case based upon the record of proceedings based upon the same issues decided by the director and AAO.

In each instance in the current brief, counsel references six exhibits each of which was already in the record of proceedings, and he simply argues the contrary position to that held by the director and as found in the AAO decision of March 31, 2004. The AAO decision of March 31, 2004 expressly references the case of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The director and the AAO had the entire record of proceedings before them, and, both the director and AAO based their decisions on that record. By counsel now asserting that the record was ignored in whole or in part is not supported by the decisions that state clearly the facts of the case and applications of law and policy. By simply asserting there was error without proof is not probative. The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

Additionally, a serious question remains un-addressed. There was a submission to the Service of tax returns filed for the tax years 1999, 2000 and 2001 but later found to have been not the true returns filed with the Internal Revenue Service (IRS). It is evident throughout this case, and now more so, in this motion, that counsel has made no effort to explain the submission of tax returns that were not in fact filed with the IRS, and were not, in fact, true representations of the data actually submitted to the IRS for the tax years in question.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) also states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not come forward with necessary evidence to explain the above, nor met the burden of proof to demonstrate the ability to pay the proffered wage upon the priority date. Accordingly, the motion will be denied, the decision of the director will be affirmed, and the petition will remain denied

ORDER: The motion will be denied, and the petition will remain denied.