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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 03 161 50247 Office: VERMONT SERVICE CENTER Date: DEC 15 2005

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:

SELF-REPRESENTED

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The petition will be remanded to the director for entry of a new decision.

The petitioner is a general contracting and roofing corporation / limited liability company. It seeks to employ the beneficiary permanently in the United States as a roofing foreman. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the petitioner submits a letter.

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 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 11, 2001. The proffered wage as stated on the Form ETA 750 is \$19.57 per hour (\$40,705.60 per year). The Form ETA 750 states that the position requires three years experience.

The Director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested the petitioner's U.S. Internal Revenue Service (IRS) tax return for year 2001, and, an itemized listing of the petitioner's monthly expenses for 2001.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, the petitioner submitted the beneficiary's monthly expenses; the beneficiary's and spouse's U.S. Internal Revenue Service (IRS) Form 1040 tax return for year 2001 with W-2 and lottery winnings statements as well as other documents. The petitioner failed to submit its tax return.

The director denied the petition on July 29, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director made this determination based upon an error of fact. The director stated that the petitioner had submitted its 2001 tax return and personal expenses, when in fact, the tax return and personal expenses mentioned were the beneficiary's documents.

The Administrative Appeals Office is never bound by a decision of a service center or district director. See *Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In the subject case, the petitioner failed to submit evidence, when requested by the director, of the petitioner's ability to pay the proffered wage on the priority date.<sup>1</sup> 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 copies of its tax return for 2001. The tax return would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit this document 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).

On appeal, the petitioner make no statement but attaches a letter in which he states that in his business he only pays the beneficiary for days he works, less bad weather days. He states, "... If there is rain and other weather problems in construction, we can't work. I didn't [the petitioner] know that the employee should pay just to fulfill offering in this situations \$40,705.60 per year...." The petitioner has therefore evidenced its intent not to pay the proffered wage unless work is available for the beneficiary. Based upon the lack of any evidence submitted by petitioner concerning its income and financial assets, it is possible that the petitioner believed that the director's request for evidence pertained only to the beneficiary. Petitioner has been unrepresented in this matter.

The petitioner's statement on appeal contains no specific assignment of error, however, the director did commit error in stating that the petitioner had submitted evidence, since there was no submission.

The AAO determines that error has been committed by both the petitioner and the director in this case. Therefore, the director should reexamine the instant petition, and seek financial information pertaining to the petitioner. . Thus, the AAO will remand the case to the director and the director can undertake any procedural mechanisms or request any additional information or evidence necessary to make an additional determination.

**ORDER:** The petition is remanded to the director for entry of a new decision.

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<sup>1</sup> Although the petitioner has submitted evidence that the beneficiary had received wages, the two statements from December 2002 and August 2003 submitted are from the Shawnlee Construction Inc. of Plainville, Massachusetts (pay statements [REDACTED]). There are W-2 Wage and Tax Statements submitted in the record of proceeding for the beneficiary and his wife, but no data from the petitioner. There is no explanation why these statements were not submitted or what relationship the Shawnlee Construction Inc. has to the petitioner. There is no explanation for the relationship between the [REDACTED] noted as petitioner, or information concerning their organization or ownership.