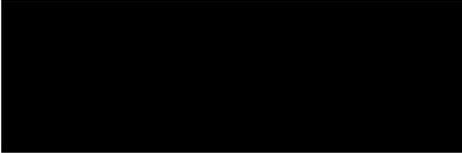




U.S. Citizenship
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Services

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prevent clearly unwarranted
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FILE: [Redacted]
SRC 03 161 52164

Office: TEXAS SERVICE CENTER Date: OCT 26 2005

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:
[Redacted]

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, Texas 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 an individual. He seeks to employ the beneficiary permanently in the United States as a butler. 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, 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, 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 August 12, 2002. The proffered wage as stated on the Form ETA 750 is \$13.56 per hour, which equals \$28,204.80 per year.

The petition did not state the petitioner's gross annual income and net annual income in the spaces provided for those figures. On the Form ETA 750B, signed by the beneficiary on July 8, 2002, the beneficiary did not claim to have worked for the petitioner. The beneficiary claimed that he had been unemployed from February 2001 to June 2002. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Naples, Florida.

In support of the petition, counsel submitted no evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, on September 18, 2004, the Director, Texas Service Center issued a Request for Evidence in this matter. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the

continuing ability to pay the proffered wage beginning on the priority date.¹ The Request for Evidence also noted that a petitioner might demonstrate the ability to pay the proffered wage “by demonstrating that the petitioner paid the beneficiary a salary equal to or greater than the proffered wage in all years under consideration.”

In response, counsel submitted copies of the petitioner’s 2001, 2002, and 2003 Form 1040 U.S. Individual Income Tax Returns. Those returns show adjusted gross income of \$12,903, \$13,982, and \$12,097, respectively. Because the priority date in this matter is August 12, 2002, however, evidence pertinent to the petitioner’s finances during 2001 and previous years is not directly relevant to his continuing ability to pay the proffered wage beginning on the priority date.

Counsel also submitted ten weekly checks, drawn by the petitioner to the order of the beneficiary, dated October 1, 2004 through December 3, 2004, in the amount of \$542.40, for a total of 5,424.

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 March 31, 2005, denied the petition.

On appeal, counsel provides copies of the evidence previously provided. Counsel also provides a copy of the petitioner’s 2003 Form 1040 U.S. Individual Income Tax Return. That return shows that the petitioner had business income of \$10,833. That return shows that the petitioner earned Line 7 Wages, Salaries, Tips, etc. of \$2,030. The requisite Form W-2 that would have demonstrated the source of that income was not provided.

Counsel asserts that, as the information requested in the September 18, 2004 Request for Evidence was provided, the appeal should be approved.

Initially, this office notes that the evidence was requested to clarify whether the petitioner was able to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Approval of the petition is not contingent merely upon counsel’s submission of the requested evidence, but upon that evidence demonstrating that the petition is approvable.

The petitioner is seeking to hire the beneficiary to work in his household as a butler. As such, the beneficiary is not expected to generate any income for the petitioner. No evidence has been submitted to show that hiring the beneficiary will obviate any expenses. Only three avenues remain available to petitioner, therefore, to demonstrate his continuing ability to pay the proffered wage beginning on the priority date.

The petitioner may demonstrate (1) that his adjusted gross income during each of the salient years was sufficient that he could have paid the proffered wage out of it and retained sufficient funds to maintain his household, (2) the petitioner may demonstrate that, during each of the salient years, he paid the beneficiary, for the performance of the duties of the proffered position, an amount equal to or greater than the proffered wage, or (3) that, during each of the salient years, the amount he paid to the beneficiary, added to the amount he could have spared from his adjusted gross income, was sufficient to pay the proffered wage.

¹ Because individuals do not ordinarily have annual reports or audited financial statements produced for them, the request of the Service Center may be read as a request for the petitioner’s tax returns.

The proffered wage is \$28,204.80 per year. The priority date is August 12, 2002. The petitioner established that he paid the beneficiary a total of \$5,424 during 2004, but did not show that he paid any wages to the beneficiary during either of the other salient years. During 2002 and 2003, therefore, the petitioner must show the ability to pay the entire \$28,204.80 out of his adjusted gross income while still retaining sufficient funds to support his household.

During 2002 the petitioner had adjusted gross income of \$13,982. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to him during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner had adjusted gross income of \$12,907. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to him during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner paid the beneficiary \$5,424. The petitioner would ordinarily be obliged to show the ability to pay the \$22,704.80 balance of the proffered wage. The petitioner submitted no evidence pertinent to its finances during that year. This office notes, however, that the Request for Evidence in this case was issued on September 18, 2004. On that date, the petitioner's 2004 tax returns were clearly unavailable. The petitioner is excused from providing further evidence of its ability to pay the proffered wage during 2004.

The petitioner failed to submit evidence sufficient to demonstrate that he had the ability to pay the proffered wage during 2002 and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.