



U.S. Citizenship
and Immigration
Services

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PUBLIC COPY

[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: APR 04 2006

EAC 04 065 53889

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker 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 preference visa petition was denied by the Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is private householder. She seeks to employ the beneficiary permanently in the United States as a live-in nanny. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to establish that the beneficiary possessed the requisite qualifying work experience as of the visa priority date.

The appeal was filed on September 7, 2004. With the appeal, counsel submits additional evidence pertinent to the beneficiary's qualifying work experience and in support of the petitioner's ability to pay the proffered wage. Counsel asserts that the director erred in denying the petition on the grounds that she failed to provide the requested evidence in response to the director's March 1, 2004, request for additional evidence. Counsel notes that the petitioner had requested sixty additional days from the director in order to supplement her response to the director's request and adds that the requested information accompanies the appeal.

On Part 2 of the notice of appeal, counsel further requests an additional thirty (30) days in which to provide a brief and/or evidence to the AAO. As nothing further has been received,¹ this decision will be rendered on the record as it currently stands.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) provides in pertinent part:

(ii) *Other documentation—*

- (A) **General.** Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by 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.
- (D) **Other workers.** If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The regulation at 8 C.F.R. § 204.5(g)(2) also 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

¹ Nothing was received in response to a recent facsimile inquiry.

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 establish that the beneficiary has all the education, training, and experience specified on the labor certification as of the petition's priority date. 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); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the Form ETA 750 was accepted for processing on April 30, 2001. On the ETA 750B, signed by the beneficiary on February 6, 2003, the beneficiary claims to have worked for the petitioner since January 2000.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed on January 6, 2004. Item 14 of the ETA 750A, requires only that an applicant for the position of a live-in nanny have six months of experience in the job offered. As described in item 13, the position requires housekeeping and child care responsibilities.

As the record shows that the I-140 was initially filed with insufficient evidence supporting the beneficiary's qualifying work experience, on March 1, 2004, the director instructed the petitioner to submit documentation establishing the pertinent evidence as of the priority date of April 30, 2001. The director specifically instructed the petitioner to provide this evidence in the form of a letter(s) from a current or former employer or trainer, which includes the writer's name, title and address and a specific description of the duties performed by the alien or of the training provided. If such evidence is not available, the director advised the petitioner that other documentation would be considered.

The director also requested additional evidence from the petitioner demonstrating its continuing ability to pay the certified salary of \$7.86 per hour or \$16,348.80 per year as of the priority date. With the petition, the petitioner had provided a copy of her individual tax return for 2002 showing that she filed jointly with her spouse, declared two dependents, and reported \$79,681 as adjusted gross income. She had also provided a letter from her bank claiming that the petitioner had \$6,673 in three checking and savings accounts, as of the date of the letter, August 6, 2003.

Within the director's March 1, 2004, request for additional evidence, she specifically instructed the petitioner to provide a copy of her 2001 federal tax return with all schedules and attachments, a copy of the beneficiary's Wage and Tax Statement (W-2) if the petitioner employed her in 2001, and an itemized list of all monthly household expenses including rent or mortgage payments, food, utility, clothing and transportation expenses, as well as insurance and medical costs for 2001.

It is noted that as a private householder, unlike a corporate employer, the petitioner's adjusted gross income, personal assets and personal liabilities are all considered in reviewing her ability to pay the proffered wage of \$16,348.80 per year. Individuals or sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. Any business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return (line 12). Individuals must show that they can sustain themselves and their dependents based on their reported adjusted gross incomes or other demonstrated additional resources in addition to paying the proffered wage. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill.

1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).² That is the reason that the director requested a summary of the petitioner's household expenses. After the payment of such expenses, the remaining adjusted gross income and/or other additional cash resources must show that the petitioner can pay the proffered wage.

On the notice requesting additional evidence, the director specifically advised the petitioner that the response must be received on or before May 28, 2004, that the regulations provide for twelve weeks in which to submit a response to such a request, that submissions received after that date would not be accepted, and that the petitioner would not receive an extension of time in order to submit the requested documentation.

In response, the petitioner, through counsel, provided an incomplete copy of the petitioner's 2001 individual tax return³ and a copy of a "motion for leave to file partial response to request for additional evidence and for enlargement of time." Counsel explains that the petitioner had been unable to obtain W-2 forms but is in the process of gathering payroll information.

On August 5, 2004, the director denied the petition because the requested evidence establishing that the beneficiary possesses six months of qualifying work experience as a live-in nanny, as required by the terms of the labor certification, was not provided. The director also noted that the petitioner's response failed to include an itemized list of the petitioner's household expenses.

On appeal, counsel provides a list of the petitioner's monthly expenses, a copy of the previously submitted motion for an enlargement of time, and a copy of a letter, dated August 27, 2004, from [REDACTED] claiming that the beneficiary was a live-in nanny from 1989 to 1999.

In reviewing an employment-based petition, CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In this case, following a careful review of the record, the AAO finds that the failure to provide the requested employment verification letter(s) to the director when she specifically requested such evidence on March 1, 2004, cannot be excused and will not be considered for the first time on appeal. The purpose of the request for evidence 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. §

² In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

³ This tax return shows that the petitioner's adjusted gross income was \$56,332. Like the 2001 return, this return included none of the indicated schedules or attachments.

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 appeal. *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 document(s) in response to the director's request for evidence on March 1, 2004. Additionally, the petitioner was specifically advised that no further time to submit such evidence, beyond the twelve weeks provided by regulation, would be granted. Under the circumstances, the AAO need not and does not consider the sufficiency of this evidence. As insufficient documentation was submitted to the director that established the beneficiary's qualifying employment experience pursuant to 8 C.F.R. § 204.5(l)(3)(iii)(A), the director did not err in denying the petition on this issue. Even if we did accept the letter, it doesn't comply with the regulations.

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

ORDER: The appeal is dismissed.