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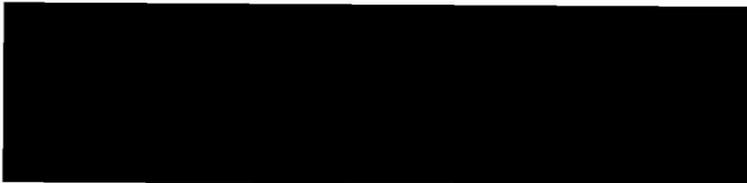
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

D6

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FILE: SRC 05 050 50432 Office: TEXAS SERVICE CENTER Date: JUN 29 2006

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

PETITION: Immigrant petition for Alien Worker as an Other, 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:

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a horse farm. It seeks to employ the beneficiary permanently in the United States as a groom. 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, the petitioner submits federal income tax returns.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$395 per week (\$20,540 per year). On the Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

In support of the petition, the petitioner submitted an original ETA 750 and no other documents in support of its ability to pay the proffered wage. The record indicates that until 2002, the petitioner was a sole proprietor, filing its tax returns on Form 1040, but since July 1, 2002, has been structured as a limited liability company, filing its tax returns on Form 1065. For all relevant years, the petitioner's fiscal year extends from January 1 to December 31.

The director stated that on May 10, 2005, she requested copies of the petitioner's federal tax returns for the years 2001–2004, but stated that as of September 13, 2005, the petitioner had not responded.¹

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 September 13, 2005, denied the petition. The director cited the petitioner's failure to respond to her May 10, 2005 request for the petitioner's federal tax returns.

On appeal, the petitioner submits Form 1040 for 2001 and 2004, and Form 1065 for 2002–2004.² The petitioner asserts that she has never received a request from the director seeking the petitioner's tax returns or other information.

¹ We note the record contains a copy of the director's May 10, 2005 Request for Evidence (RFE) addressed to the petitioner.

On appeal, the petitioner states on the Form I-290B that it did not receive the previous request for its federal tax returns.³

The petitioner proffers additional evidence on appeal. Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, this Board will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Under the circumstances, we need not and do not comment on the sufficiency of the evidence offered on appeal.

The evidence submitted prior to the appeal does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

ORDER: The appeal is dismissed.

² The Form 1065 states the business (as LLC) started on July 1, 2002.

³ The petitioner's Form 1040 for 2001, submitted on appeal, reflects \$343,429 adjusted gross income. The returns for each of the following years, however, reflect net losses of at least \$355,042 each year.