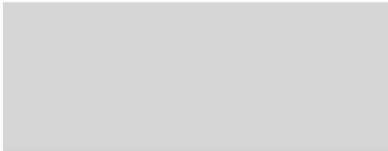




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 17 2015**

FILE #: [REDACTED]
PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or a Professional pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

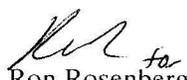
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It was reopened and denied again by the Director. The petitioner filed a motion to reopen and reconsider, which was dismissed by the Director. The petitioner filed another motion to reopen and reconsider, which the Director found met the requirements for a motion but did not overcome the grounds for denial. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as an environmental health corporation. It seeks to employ the beneficiary permanently in the United States as an air conditioning mechanic pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor that requires at least two years training or experience, is not of a temporary nature, and for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on October 12, 2007. As required by statute, the petition was accompanied by a labor certification application (Form ETA 750, Application for Alien Employment Certification), which was filed at the U.S. Department of Labor (DOL) on April 30, 2001, and certified by the DOL (labor certification) on May 20, 2004.

Section 14 of the Form ETA 750 specifies that a minimum of two years of experience in the job offered is required to qualify for the proffered position. No education or training is required by the labor certification. Thus, the petition seeks classification of the beneficiary as a skilled worker.

Section 12 of the Form ETA 750 ("Rate of Pay") originally contained the entries of \$21.50 per hour for basic pay and \$32.25 per hour for overtime pay. However, the basic pay figure was crossed out and replaced by \$21.51 per hour on February 22, 2004, in a change endorsed by the DOL with a stamp reading "Correction Approved by Regional Office." Thus, the proffered basic wage certified by the DOL on May 20, 2004 was \$21.51 per hour.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part, as follows:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Thus, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the Form ETA 750 was accepted for processing by the DOL on April 30, 2001.

On July 21, 2008 the Director issued a Request for Evidence (RFE) in which the petitioner was requested to submit additional evidence of its ability to pay the proffered wage of the job offered. In particular, the petitioner was requested to submit complete copies of its federal income tax returns for the years 2001-2007 and/or the Forms W-2 (Wage and Tax Statements) it issued to the beneficiary for the years 2001-2007.

The petitioner responded to the RFE on August 27, 2008, but the record is unclear as to what evidence was included with the response.

On July 23, 2012 the Director denied the petition on the ground that the petitioner did not submit all of the evidence requested in the RFE of July 21, 2008, and thus did not establish its continuing ability to pay the proffered wage from the priority date up to the present. The Director initially cited the proffered wage incorrectly as \$27.01 per hour, which amounts to \$56,180.80 per year (based on a standard work year of 2,080 hours). The Director subsequently quoted the RFE from 2008, which also cited the proffered wage incorrectly (as \$21.50 per hour instead of the revised \$21.51 per hour), but then cited the annualized proffered wage correctly as \$44,740.80 (based on a standard work year of 2,080 hours).

The petitioner filed a timely motion to reconsider accompanied by documentary evidence that included copies of its federal income tax returns (Forms 1120) for the years 2001-2006 and the Forms W-2 it issued to the beneficiary for the years 2001-2007.¹ According to the petitioner, all of the tax returns and W-2 forms were previously submitted in response to the RFE in 2008.

On October 15, 2012 the Director issued a decision reopening the petition to consider the evidence submitted with the motion to reconsider. On the same date the Director issued a new RFE requesting that the petitioner supplement its previously submitted evidence with additional evidence of its ability to pay the proffered wage from 2007 up to the present. Specifically, the Director requested the submission of at least one of the three types of evidence required in the regulation – a federal income tax return, an annual report, or an audited financial statement – for each year at issue. In addition, the petitioner was requested to submit the Forms W-2 it had issued to the beneficiary for the years in question

¹ The Forms W-2 show that the beneficiary's gross pay was below the proffered wage in each of the years 2001-2007. The Forms 1120 show that the petitioner's net current assets were sufficient to pay the proffered wage in the years 2001-2004 and 2006, but not in 2005.

The petitioner responded to the RFE on January 10, 2013, with a letter referring to its previously submitted tax returns and W-2 forms for the years 2001-2007, and suggested that this documentation should be sufficient to render a favorable decision on the petition. No further tax returns or W-2s were submitted.

On July 10, 2013 the Director issued another RFE, specifically requesting that the petitioner submit copies of its federal income tax returns for the years 2008-2012 and the Forms W-2 it issued to the beneficiary for the years 2008-2012.

On October 3, 2013 the petitioner responded to the RFE, once again referring to its previously submitted evidence for the years 2001-2007 and requesting that the petition be approved based on that evidence.

On January 7, 2014 the Director issued a Notice of Intent to Deny the petition (NOID). As in the previous RFE, the Director repeated the request for copies of the petitioner's federal income tax returns for the years 2008-2012 and the Forms W-2 it issued to the beneficiary for those years. In addition to the issue of the petitioner's continuing ability to pay the proffered wage, the Director raised the issue of whether the beneficiary had the requisite experience to qualify for the job offered under the terms of the labor certification. After listing the job duties of the air conditioning mechanic as they were set forth in box 13 of the Form ETA 750, the Director noted that the employment letter dated April 26, 2001 from [REDACTED] – the company in [REDACTED] Poland, where the beneficiary assertedly worked from January 1998 to February 2000 – stated that he was employed as an “installer/mechanic” and did not indicate that he acquired any experience with air conditioners during his two years on the job. Thus, it did not appear that the beneficiary had the requisite experience to qualify for the job of air conditioning mechanic. The petitioner was given 33 days to submit additional evidence that the beneficiary met the experience requirements of the labor certification, as well as the aforementioned documentation related to the petitioner's ability to pay the proffered wage.

On April 21, 2014 the Director denied the petition on the ground of abandonment because no reply to the NOID was received during the 33-day response period, or at any time up to the date of the decision.

On May 21, 2014 the petitioner filed a motion to reopen and a motion to reconsider, asserting that it never received the NOID issued on January 7, 2014, and learned of it only when the Director's denial decision of April 21, 2014 was received. The petitioner requested that the NOID be reissued.

On July 22, 2014 the Director issued a decision denying the motion(s) to reopen and reconsider. The Director noted that the NOID was sent to the petitioner's current address, that the preceding RFE was also sent to that address, and that the petitioner had still not submitted the documentation originally requested in the RFE of July 10, 2013.

On August 25, 2014 the petitioner filed another motion to reopen and motion to reconsider, accompanied by additional documentation. Referring to the RFE of July 10, 2013, the petitioner submitted copies of the Forms W-2 it issued to the beneficiary for the years 2008-2012, as well as for 2013.² However, the petitioner did not submit copies of its federal income tax returns for those years, in compliance with the RFE. Instead, the petitioner submitted copies of its bank account statements for the years 2005, 2008-2012, and 2014, as well as some health insurance statements from 2006, 2013, and 2014. No additional documentation was submitted to demonstrate that the beneficiary had the requisite two years of qualifying experience.

The Director issued a decision on December 17, 2014, finding that the petitioner had met the requirements of a motion to reopen and a motion to reconsider, but that the evidence of record was insufficient to establish its continuing ability to pay the proffered wage from the priority date up to the present or that the beneficiary met the experience requirements of the labor certification. The Director pointed out that the petitioner did not submit copies of its federal income tax returns for the years 2008-2012, as requested in the RFE. While federal income tax returns are among the three types of evidence required in 8 C.F.R. § 204.5(g)(2) to establish a petitioner's ability to pay the proffered wage, bank account statements are not. The Director noted that the regulation allows additional materials such as bank statements to be considered in appropriate cases, but found in this case that the bank statements did not present a complete picture of the petitioner's assets and liabilities and that the petitioner had not demonstrated why they should be considered in lieu of the required income tax returns. The Director affirmed his previous denial of the petition.

The petitioner filed an appeal on January 16, 2015. On the Form I-290B the petitioner indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. However, the petitioner did not provide a statement regarding the basis for the appeal, as required in Part 4 of the Form I-290B. On February 19, 2015 we received a letter from the petitioner, dated February 13, 2015, requesting a 30-day extension to submit a brief. Once again, however, the petitioner neglected to state the basis for the appeal. No brief or additional documentation was submitted in the next 30 days, or at any time up to the date of this decision.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) provides that an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. In this case the petitioner has not identified any erroneous conclusion or law or any erroneous factual findings in the Director's decision of December 17, 2014. The petitioner has not provided any additional evidence to be considered on appeal. Therefore, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

ORDER: The appeal is dismissed.

² The Forms W-2 show that the beneficiary's gross pay was below the proffered wage in each of the years 2008-2012.