U.S. Department of Justice

Immigration and Naturalization Service

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PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 01 254 56776 Office: California Service Center Date: FEB 27 2003

IN RE: Petitioner: [redacted]
Beneficiary:

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

IN BEHALF OF PETITIONER: [redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a board and care facility. It seeks to employ the beneficiary permanently in the United States as a facility manager. As required by statute, the petition is accompanied by a Form ETA 750 approved by the Department of Labor. The Acting Director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief.

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 or seasonal nature, for which qualified workers are not available in the United States.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered beginning on priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 25, 1996. The beneficiary's salary as stated on the labor certification is $1,500 per month which equals $18,000 annually.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, on

November 15, 2001, in a Request for Evidence, the California Service Center requested that the petitioner submit evidence of its ability to pay the proffered wage, including its federal tax returns from 1996, 1997, 1998, and 1999, and the petitioner's quarterly wage reports for the previous four quarters.

In response, counsel submitted a report, dated January 28, 2002, from a certified public accountant. That report indicates that the accompanying financial data was produced pursuant to a compilation, rather than an audit. The accountant stated that, for confidentiality reasons, the petitioner did not wish to provide copies of its tax returns. The accountant indicated that the petitioner had the ability to pay the proffered wage from 1996 to the date of the letter.

In a statement at the bottom of a form letter which accompanied the information from the accountant, counsel stated, "If you require any additional information or documents, please do not hesitate to contact our office."

On March 19, 2002, the Acting Director, California Service Center, denied the petition, finding that the petitioner had failed to demonstrate the ability to pay the proffered wage.

On appeal, counsel states that the petitioner is a "family partnership" exempt from filing partnership tax returns, but provided no documentation to corroborate that statement. Counsel further states that, as such, the petitioner files no tax returns and that the requested tax returns do not exist. Counsel points out that, when the petitioner declined to provide its tax forms, that refusal was accompanied by an offer to submit additional information if requested. Counsel argues that the denial of the petition, in the face of that offer, was fundamentally unfair and an abuse of discretion.

Counsel's unsupported statement that the petitioner is a family partnership, that it is exempt from filing tax returns, and that no such tax returns exist directly contradicts the earlier statement, by the petitioner's accountant, that, for confidentiality reasons, the petitioner chose to withhold its tax returns.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not

suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

Further, counsel's assertion that the petitioner is a family corporation and exempt from filing tax returns is not, in itself, evidence, and is entirely unsupported by the record. An unsupported statement does not sustain the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In any event, 8 C.F.R. § 204.5(g)(2), as was noted above, requires that the petition "must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage." That section further states that the evidence "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." The instant petition was not accompanied by any such evidence.

The California Service Center offered the petitioner a chance to cure that defect. The California Service Center specifically requested the petitioner's tax returns. At that time, the petitioner's accountant did not state that no such tax returns exist but, rather, that the petitioner declined to produce them.

Counsel argues that the petitioner had no way of knowing whether its subsequent submissions would suffice. As such, counsel urges that the offer to cure any perceived defect was proper, and the director should have requested additional evidence.

The submissions in response to the Request for Evidence, however, did not include copies of annual reports, federal tax returns, or audited financial statements. As such, the petitioner did, in fact, have a way to determine whether its submissions were sufficient. The petitioner could have consulted the regulations and found that he had not, either with the petition as required, or subsequently, in response to the Request for Evidence, submitted the evidence specified in the regulations to demonstrate its ability to pay the proffered wage. The director was permitted to provide the petitioner another opportunity to submit evidence to satisfy the requirements of 8 C.F.R. § 204.5(g)(2), but was not obliged to do so.

On appeal, counsel submits additional documents pertinent to the petitioner's finances, including a 2001 balance sheet compiled by the petitioner's accountant from information provided by the petitioner.

That balance sheet states that it was produced pursuant to a compilation, rather than an audit. This indicates that the

accountant compiled information presented by the petitioner and presented it in the form of a financial statement, but did not audit or review the financial statements and expressed no opinion or any other form of assurance pertinent to the accuracy of the information. As such, the unaudited balance sheet merely restates the petitioner's representations, and is not evidence of their veracity.

The petitioner has never submitted a copy of an annual report, a federal tax return, or an audited financial statement. The petitioner failed to submit the required evidence that the petitioner had the ability to pay the proffered wage. 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.