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U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: SRC 01 219 51977 [redacted] LIN 02 267 53375

Office: NEBRASKA SERVICE CENTER

Date: FEB 20 2004

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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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.

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 that 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 Citizenship and Immigration Services (CIS) 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 that 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 Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a promotional firm. It seeks to employ the beneficiary permanently in the United States as a marketing agent. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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 turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Eligibility also depends on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. The petition's priority date in this instance is December 1, 1997. The beneficiary's salary as stated on the labor certification is $33,494 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and qualifications of the beneficiary, as described in Form ETA 750. In a request for evidence (RFE) dated January 2, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's federal income tax returns, annual reports, or audited financial statements.

Counsel responded with 36 of the petitioner's 1999-2001 bank statements. Those of May 28, 1999 and May 31, 2000 reflected balances equal to, or greater than, the proffered wage. Five (5) were overdrafts, and the 27 others, also, were less than the proffered wage.

The petitioner submitted Forms 1120, U.S. Corporation Income Tax Returns for 1998 and 1999. Form 1120 for 1999 reported taxable income before net operating loss deduction and special deductions as a loss, ($32,940), less than the proffered wage. Schedule L showed current assets of $9,772 minus current liabilities of $15,000, as a deficit of net current assets ($5,228) for 1999, less than the proffered wage.

Form 1120 for 1998 reflected a taxable income before net operating loss deduction and special deductions of $34,574 equal to or greater than, the proffered wage. The director misconstrued this income as a loss.

Remarkably, no evidence pertains to the ability to pay the proffered wage at the 1997 priority date. The RFE exacted proof at that date.

Second, the RFE further sought evidence of experience in the job offered, as required by Form ETA 750, block 14. The RFE exacted letters from previous employers with a description of the beneficiary's experience, dates of employment, and duties. In response, a letter of the petitioner's CPA, dated May 1, 2001 (the 2001 VP letter), stated that the CPA, while working with the petitioner, knew that the beneficiary worked for World Class Waters (WCW), a third party, from May 1995 until August 1996.

Another submission was a "memo" sheet from [redacted] Jr. (REG), dated Wednesday, April 10, 2002. It pertained to his experience at [redacted] (BH) from August 1994 until July 1995. This informal note did not state the experience, dates, and duties of the beneficiary's past employment. It only represented that "During that time, I worked with "Seki" who was

employed there." REG does not further identify "Seki."

In addition, [redacted] (PG), a co-worker, furnished a letter, dated March 27, 2001 (PG letter). It recited dates of May 1994 to May 1995 for the beneficiary's employment at BH. The co-worker gave no evidence of her access to the records of BH.

The director considered the lack of 1997 financial information, unfavorable data from Form 1120 for 1999, and bank statements for 1999-2001, determined that the petitioner did not establish the ability to pay the proffered wage at the priority date and continuing to the present, and denied the petition.

The director determined, further, that previous employers failed either to give a letter, to provide specific dates of employment, or to state the beneficiary's duties. The director concluded that the letters and memo did not comply with regulations governing evidentiary requirements for verification of experience, set forth at 8 C.F.R. § 204.5(g)(1).

Finally, the director observed that the copy of a transcript from [redacted] in San Antonio, Texas, did not establish that the beneficiary completed two (2) years of college education in business before the priority date, as required by block 14 of Form ETA 750.

The director denied the petition based on the petitioner's failure to establish both its ability to pay the proffered wage and the beneficiary's qualifications. The appeal raises, first, the issue of the petitioner's ability to pay the proffered wage.

On appeal, counsel argues that compensation to corporate officers shows the petitioner's ability to pay the proffered wage. The Immigrant Petition for Alien Worker (I-140) stated that the beneficiary's position was not a new one. It implied that the petitioner was replacing another employee with the beneficiary. The record does not, however, advise of the name, wages, or full-time employment of any officer whom the beneficiary might replace.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date and continuing to the present. Moreover, there is no evidence that any officer's position involved the same duties

as those set forth in the Form ETA 750. The petitioner has not documented the position and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Counsel insists, in the appeal at pages 4-5, that:

> Petitioner also submitted 1999, 2000 and 2001 bank statements, which evidence that Petitioner, a marketing business entity of NBA basketball superstar, Hakeem Olajuwon, has enough financial capability to [sic] Beneficiary the proffered wage of $33,494.00 per year.

The 1999 Form 1120 did not support the ability to pay the proffered wage. *See, supra*. In 1999, the petitioner's bank balances of $46,452.89 (January 29) and $34,347.38 (May 28) were equal to, or greater than, the proffered wage. The rest ranged from $1,328.34 to $26,831.86.

Bank records in 2001 included overdrafts from ($11,600.35) to the highest balance of $17,433.62, all less than the proffered wage. The petitioner did not offer the Form 1120 for 2001. Even though the petitioner submitted commercial bank statements to demonstrate that it had sufficient cash flow to pay the proffered wage, the amounts are unconvincing. There is no proof that they somehow represented additional funds beyond those that the Form 1120 for 2001 might have. Bank records do not establish the ability to pay the proffered wage for 1999, 2000, or 2001.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel cites responses to the agenda of AILA (August 1, 2002) as precedents to compel the approval of this petition. They are not determinative. The records of those hypothetical cases are not now before the AAO for review. Counsel does not provide the published citation of a case to compel a finding of the credibility of these bank statements. No response states that the mere fact of additional evidence requires approval of this petition. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner's evidence does not establish the ability to pay the proffered wage for 1997, 1999, or 2001. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

After a review of the federal tax returns, bank statements, briefs, and financial documents, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

A second issue arises because the director determined that the petitioner did not establish that the beneficiary meets the petitioner's requirements, as found in Form ETA 750. Counsel contends that the evidence satisfies the requirement of Form ETA 750 for two (2) years of experience in the job offered, before the priority date and states:

> In That both former employers are no longer in operations, the Beneficiary has sought letters of experience from persons with actual knowledge of his previous work. . . . Consistent with the best evidence rule, Beneficiary's former supervisor and co-worker have provided letters documenting that the Beneficiary had obtained the requisite experience prior to the Labor Certification being issued. No legal basis exist [sic] for not recognizing the letters of experience from former co-workers, [sic] these letters should have been accepted.

The credibility of the alleged evidence is doubtful. The REG "memo" claims no supervision of the beneficiary at BH, as counsel claims. Moreover, REG served at BH only from "August 1994." In contradiction, the petitioner asserts that prior experience at BH from May 1994, as declared by the beneficiary on Form ETA 750 in Part B, block 15c.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> 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.

VP's letters, dated May 1, 2001 and March 27, 2002, document neither a connection between WCW, the petitioner, and VP, nor access of VP to employment records. VP claims employment of the beneficiary at WCW from May 1995. That date contradicts the REG memo. It postulated employment at BH until July 1995.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

The PG letter recited dates of the beneficiary's employment at BH as May 1994 to May 1995 but did not resolve the conflict with the REG memo. The co-worker gave no evidence of any access to the records of BH. The record reflects no effort to locate previous employers, the custodian of their records, or even the fact of their cessation of operations. The claimed periods of experience were very close to the requisite two (2) years, the exact dates of employment were important, and the RFE exacted them. Previous employers, the petitioner, and counsel have addresses in the same city. Counsel has not established the unavailability of the evidence.

The additional assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the Form ETA 750, Part A, as of the petition's priority date. 8 C.F.R. § 204.5(d).

The Form ETA 750 indicated that the position of marketing agent required two (2) years of experience in the job offered. The RFE requested the evidence in accord with 8 C.F.R. § 204.5(g)(1). Where the petitioner is notified and has a reasonable opportunity

to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before Citizenship and Immigration Services (CIS), formerly the Service or INS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The petitioner has not established that the beneficiary met requirements for two (2) years of experience in the job offered, set forth by the petitioner on the Form ETA 750 in Part A, block 14, as of the priority date. Therefore, the petitioner has not overcome this portion of the director's decision.

The petitioner has not established either its ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, or the beneficiary's two (2) years of experience in the job offered, as of the priority date. The Form ETA 750, in block 14, also, required two (2) years of college course work in business. The evaluation of college course work is moot in view of conclusions on the ability to pay the proffered wage and on the evidence of experience.

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.