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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: EAC-01-260-51931 Office: VERMONT SERVICE CENTER Date: JAN 21 2004

IN RE: Petitioner:
Beneficiary: [redacted]

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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.

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 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. The petition's priority date in this instance is October 28, 1996. The beneficiary's salary as stated on the labor certification is $577.36 per hour or $30,022.72 per year.

Counsel initially submitted no documentary evidence in support of the I-140, other than the original Form ETA-750. In a request for evidence (RFE) dated January 19, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present and to establish that the beneficiary had the requisite experience as stated in the ETA-750. The RFE requested the following items to be submitted by January 20, 2002.

- Additional evidence to establish that the employer has the ability to pay the proffered wage or salary of "$577.37/week" (sic) as of 10/28/96, the date of filing and continuing to the present.

- The 2000 United States federal income tax return(s), with all schedules and attachments for the petitioner's business.
- If the beneficiary was employed by the petitioner in 2000, copies of the beneficiary's Form W-2 Wage and Tax Statement(s)
- Additional documentation that the beneficiary qualifies for the job offer specified on the petitioner's form ETA-750.

In response to the RFE, counsel submitted a letter dated January 19, 2002 requesting an additional 60-day period of time to submit the required evidence. Counsel stated that the employer's accountant was currently out of town and that therefore the petitioner had been unable to obtain the necessary financial documents.

The director issued a decision dated August 8, 2002 on the petition. Noting that applicable regulations did not permit more than 12 weeks for a response to an RFE, that the RFE in this case had been issued on October 25, 2001, and that the file was being reviewed in July 2002 with the evidence requested in the RFE still not yet received, the director determined that the evidence in the record did not establish that the petitioner had the ability to pay the offered wage at the time of filing and did not establish that the beneficiary had the requisite two years of employment experience. The director then denied the petition.

On appeal, counsel submits the following documents in evidence, submitted with the Form I-290B.

- Letter of Experience of Adam Mendez, dated August 21, 1996 from Peter McCaughey, owner, Cavalier Restaurant.
- Form 1120S federal tax return for 1996 for 64-09 Rest. Corp. DBA Riordans.
- Form NYC400 New York City declaration of estimated tax by general corporations for 1996 for 64-09 Rest Corp.
- Form ST-100 New York State and Local Quarterly Sales and Use Tax Returns for 1996 for 64-09 Rest Corp. DBA Riordans, with attached schedules and attached copies of checks from 64-09 Restaurant Corp payable to NY State Sales Tax.
- Notices of Unclaimed New York State Sales Tax Vendor Collection Credit dated 3/5/96 and 6/3/96 issued to 64-09 Rest. Corp.

Counsel states on appeal, "Evidence as requested in your decision is being submitted for your review and records." Counsel makes no further statements on the Form I-290B and no brief is submitted on appeal.

A review of the record in this case indicates that the evidence submitted for the first time on appeal is precluded from being considered on appeal by an evidentiary ruling in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988). In that case, the BIA stated as follows:

> Where a visa petition is denied based on a deficiency of proof, the petitioner was not put on notice of the deficiency and given a reasonable opportunity to address it before the denial, and the petitioner proffers additional evidence addressing the deficiency with the appeal, then in the ordinary course we will remand the record to allow the district or Regional Service Center director to consider and address the new evidence. A petitioner may be put on notice of evidentiary requirements by various means, such as a requirement in the regulations that a particular document be submitted with the visa petition; a notice of intent to deny, letter, or form noting the deficiency or requesting additional evidence; or an oral statement at an interview that additional evidence is required. Where, however, the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

Matter of Soriano, 19 I & N Dec. 764 (BIA 1988).

In the instant case the petitioner received notice in the RFE dated 10/25/01 that evidence was needed on the issue of the petitioner's ability to pay the proffered wage and on the issue of the beneficiary's experience. The petitioner was given until January 20, 2002 to respond, which was 120 days from the date of the RFE. The petitioner submitted no evidence within that period. The petitioner's counsel submitted only a letter dated January 19, 2002 which was received by the Service Center on January 25, 2002 requesting an additional 60 days to respond to the RFE.

Although counsel stated in his notice of appeal that "[e]vidence as requested in your decision is being submitted for your review and records," in fact the director's decision made no request for evidence. The only request for evidence was that contained in the RFE dated 10/25/01, to which the petitioner failed to respond.

Since the petitioner was put on notice of the required evidence and had a reasonable opportunity to provide it for the record before the denial, the evidence required by the RFE but submitted for the first time on appeal will not be considered for any purpose.

As noted above, the I-140 petition was originally submitted with no supporting documentation other than the original ETA-750. The evidence in the record before the district director therefore failed to establish that the petitioner had the ability to pay the proffered wage at the time of filing and failed to establish that the beneficiary possessed the required two years of experience as stated on the ETA-750. The decision of the director was correct.

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.