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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, D.C. 20536

[redacted]

File: EAC 02 021 52961 Office: VERMONT SERVICE CENTER Date: JAN 27 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 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 employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Administrative Appeals Office (AAO) on appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted. The prior decision of the AAO to dismiss the appeal will be affirmed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The 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.

The AAO affirmed this determination on appeal. The AAO noted that, with the appeal, counsel had submitted a second 2000 Form 1120S for the petitioner which showed an ability to pay the proffered wage; however, there was nothing in the record to establish that this second 1120S had actually been filed with the Internal Revenue Service (IRS).

On motion, counsel argues that:

> The INS denies the petition because it states that since an erroneous tax return was given to us and we submitted it to the INS and then we submitted the correct one, the INS states that they have doubts about the correct submission to the IRS.
>
> However, on those same set of facts in the Vi [sic] Sforza, Roberto Pineda case, the INS accepted our second tax return submission and granted Mr. Pineda's approval and work permit. The results are inconsistent. Enclosed is a document showing that the INS approved the Via Sforza -Roberto Pineda case, which is the companion case to this one.

Counsel's argument is not persuasive. The record still does not contain evidence that the allegedly correct tax return was filed with the IRS. Furthermore, Citizenship and Immigration Services (CIS), through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd,* 248 f.3rd 1139 (5th Cir. 2001), *cert. denied,* 122 S.Ct. 51 (2001).

On motion, counsel has presented no additional evidence that would persuasively demonstrate that the petitioner had the ability to pay the beneficiary 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 sustained that burden.

ORDER: The AAO's decision of February 11, 2003, is affirmed.