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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: [redacted] Office: Vermont Service Center Date: MAR 04 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Vermont Service Center. On the basis of new information received and on further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of intent to revoke the approval of the preference visa petition, and his reasons therefor, and ultimately revoked the approval of the petition. The Associate Commissioner for Examinations (now the Administrative Appeals Office) rejected the petitioner's appeal as untimely filed. The matter is now before the Administrative Appeals Office (AAO) on a motion to reconsider. The motion will be denied; however, in view of misinformation given by the director, the AAO will reopen on its own motion. The previous decisions of the director and Associate Commissioner for Examinations will be withdrawn, and the petition will be remanded to the director for further action and consideration.

The petitioner is a roofing, masonry restoration, and waterproofing company which seeks to employ the beneficiary permanently in the United States as a roofer. The director determined that the petitioner was either unwilling or unable to pay the proffered wage, and revoked the petition accordingly. The Associate for Examinations rejected the appeal as untimely filed.

On motion, counsel submits a brief. Counsel puts forth various arguments pertinent to the petitioner's ability to pay the proffered wage and presents additional documentary evidence pertinent to that point. Counsel did not, however, submit any new evidence pertinent to the tardiness of the appeal or cite any authority for the proposition that the appeal was timely.

8 C.F.R. § 103.5(a) states, in pertinent part:

> (2) *Requirements for a motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.
>
> (3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the

evidence of record at the time of the initial decision.

> (4) *Processing motions in proceedings before the Service.* A motion that does not meet applicable requirements shall be dismissed.

In this instance, counsel states no new facts pertinent to the finding that the appeal was untimely filed. As such, the motion does not meet the requirements applicable to a motion to reopen.

Counsel cites no precedent decisions to establish that finding that the appeal was late was based on an incorrect application of law or CIS policy or that the decision was incorrect based on the evidence of record at the time that decision was rendered. As such, the motion does not meet the requirements applicable to a motion to reconsider.

The motion does not meet applicable requirements, and might be correctly dismissed on that basis pursuant to 8 C.F.R. § 103.5(a)(4).

However, in view of the fact that the director incorrectly gave the petitioner thirty days in which to file an appeal in this matter, the AAO will reopen the matter on its own motion.

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 whether or not the petitioner is still offering a job to the beneficiary, and on the petitioner's continuing ability to pay the wage offered beginning on the 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. Here, the request for labor certification was accepted for processing on January 13, 1998. The proffered salary as stated on the labor certification is $13.07 per hour which equals $27,185.60 annually.

With the petition, counsel submitted an accountant's review report, and the petitioner's balance sheet for 1995 and 1996. That accountant's report makes clear that the report was produced pursuant to a review, rather than an audit. Counsel also provided a letter from the petitioner's superintendent, dated October 7, 1998, stating that the petitioner had employed the beneficiary since August 1996.

Although counsel submitted no other evidence of the petitioner's ability to pay the proffered wage, the petition was approved on January 13, 1999.

An undated memorandum to the file states that, on February 5, 2001, the beneficiary appeared for a CIS interview and stated that he had stopped working for the petitioner during October of 2000 because he was not being paid enough, and that he had taken a job with another company.

On July 24, 2001, the director issued a notice of intent to revoke, finding that beneficiary's statement suggested that the petitioner was either unable or unwilling to pay the beneficiary the proffered wage. Because the file contained no response to that notice, the director revoked approval of the petition on December 3, 2001.

On appeal, counsel provided a letter from the petitioner's superintendent, dated August 3, 2000, reiterating that the petitioner had employed the beneficiary since August of 1996. Counsel provided a copy of the beneficiary's 1999 Form 1040 tax return. Counsel also provided a copy of the 1999 Form W-2 showing that the petitioner paid $20,092.42 to the beneficiary during that year. In further support of the proposition that the petitioner had employed the beneficiary, counsel provided copies of paycheck stubs, dated during July and August of 2000, from the petitioner to the beneficiary.

Counsel also provided copies of two more letters from the petitioner's superintendent. The first, dated July 31, 2001,

states that the beneficiary was then the petitioner's full-time employee. It adds that "The company is back on its feet and (the beneficiary) is being paid $16.00 per hour." The second letter, dated December 7, 2001, states that the petitioner had employed the beneficiary for five years, that the beneficiary averaged 1,700 hours of work per year, and was paid $16.50 per hour. In support of the contention that the beneficiary still worked for the petitioner, counsel provided more check stubs, dated during April, June, July, October, November, and December of 2001.

Later still, counsel submitted another letter from the petitioner's superintendent, dated July 1, 2002. That letter states that the beneficiary worked for the petitioner for four years until October 2000, was then laid off due to lack of available work until April 2001, when he returned to work, and that he continued to work for the petitioner.

The Associate Commissioner rejected the petitioner's appeal as being untimely filed, noting that, in accordance with 8 C.F.R. § 205.2(d), it should have been filed within fifteen (15) days after receipt of the notice. The notice was mailed on December 3, 2001; the appeal was received on December 26, 2001.

With the instant motion, counsel provides a copy of yet another letter from the petitioner's superintendent, dated July 18, 2001. That letter states that the petitioner had employed the beneficiary for five years, an average of 1,700 hours per year, and that the beneficiary earns $16.50 per hour. Counsel states that he had mailed that letter to the Arlington, Virginia, District Office on July 20, 2001, and that it was received on July 23, 2001.

Counsel also provides a copy of the July 31, 2001, letter from the superintendent, described above, and indicates that he had sent that letter to the Vermont Service Center on August 6, 2001.

On appeal, counsel had argued that the revocation of the petition was unjust because a timely response had been provided to the director's notice of intent to revoke, and because the beneficiary was working and continues to work for the petitioner.

A copy of U.S Postal Service Certified Mail Receipt supplied by counsel indicates that the Director, Vermont Service Center, received correspondence in this matter on August 6, 2001. The thrust of that correspondence was that the petitioner's offer of permanent employment was still open to the beneficiary.

As noted above, the beneficiary indicated at his February 5, 2001,

interview for permanent residence that he was no longer working for the petitioner, having been laid off in October of 2000. Correspondence in the record from the petitioner confirms that he was indeed laid off in October of 2000, but that he was rehired in April of 2001.

As was stated above, 8 C.F.R. § 204.5(g)(2) requires that the prospective United States employer have the ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence. In the letter dated July 1, 2002, the petitioner's superintendent stated that the petitioner was laid off due to lack of work. The action of the petitioner indicates that, during that period, the petitioner may have been unable to pay the proffered wage.

The record appears to indicate that the director should have received and then considered the response from counsel with respect to his notice of intent to revoke. In reviewing that response, the director would have determined whether the job was still open to the beneficiary and whether the petitioner had the continuing ability to pay the proffered wage during the period the beneficiary was laid off by the petitioner.

Accordingly, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The prior decisions of the director and the Associate Commissioner for Examinations are withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and the entry of new decision which, if adverse to the petitioner, is to be certified to the AAO for review.