

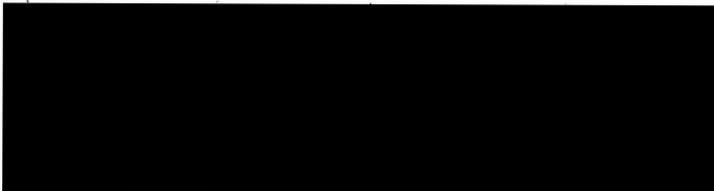
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY

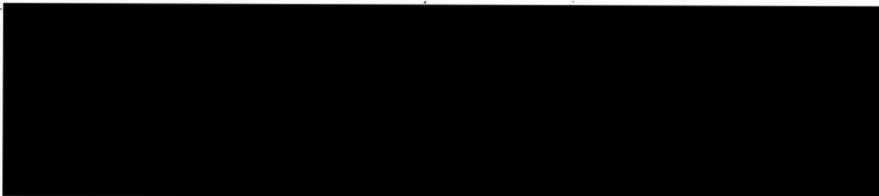


File: WAC-04-151-52856 Office: CALIFORNIA SERVICE CENTER Date: FEB 20 2007

In re: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electrical contractor and seeks to employ the beneficiary permanently in the United States as a Maintenance Electrician. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's December 11, 2004, denial, the case was denied based on the petitioner's failure to timely respond to the director's Notice of Intent to Deny.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 nature, for which qualified workers are not available in the United States.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, where a petitioner has been put on notice of a deficiency in the evidence, and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

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

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on October 24, 2001.² The proffered wage as stated on Form ETA 750 for the position of a Maintenance Electrician is \$20.41 per hour, 40 hours per week, which is equivalent to \$42,452.80 per year. The labor certification was approved on December 30, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on May 3, 2004.

Counsel listed the following information related the petitioning entity: established 1994; gross annual income: \$5,938,421.36; net annual income: \$74,461.27; and current number of employees: 85; beneficiary's salary: \$20.47 per hour.

On July 20, 2004, the director issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding the petitioner's ability to pay, specifically, the petitioner's 2002 and 2003 Federal Tax Returns, along with the beneficiary's W-2 forms for the years 2001 to 2003. Additionally, the RFE requested that copies of the petitioner's business licenses be submitted, that the beneficiary's address be clarified, that the petitioner confirm the beneficiary's current employment with the petitioner, and that counsel provide clarification regarding a conflict in the beneficiary's experience between an experience letter provided and conflicting dates listed on the beneficiary's ETA 750B Form. Counsel submitted a response to the RFE.

The director then issued a Notice of Intent to Deny ("NOID") on September 21, 2004, requesting further evidence related to the petitioner's ability to pay for the years 2002 and 2003, including that the petitioner submit its 2003 tax return. Further, the NOID noted that the petitioner failed to explain the discrepancy in the beneficiary's prior work experience. Also, the letter provided with the RFE response to confirm the beneficiary's current employment raised an additional conflict in the evidence: the letter listed that the beneficiary was employed as a "Residential Electrical Foreman," rather than in the certified position as a "Maintenance Engineer." The petitioner was afforded a thirty day time period to respond. On December 11, 2004, the Director denied the case based on the lack of response received to the Notice of Intent to Deny.

On appeal, counsel claims that she did submit a response to the Notice of Intent to Deny. Counsel enclosed a copy of the certified mail slip, dated October 21, 2004, requesting return receipt from the recipient. No signed return receipt copy was enclosed, which would have been more compelling evidence. We note that she sent the return receipt and certified mail by U.S. Postal Service to the CSC's P.O. Box address. The record contains a copy of the envelope used to submit the response to CIS. The envelope is date stamped that the petitioner's response was received on October 28, 2004, a week beyond the thirty-day time period allowed to respond to the NOID. We note that mailing the response on the date due is insufficient to show delivery on the date that the response is due.

The purpose of both an RFE and a NOID is to obtain further information to clarify whether the beneficiary is eligible for the benefit sought. Eligibility must be established as of the time that the petition was filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). A petitioner's failure to submit requested evidence, which would preclude a material line of inquiry, serves as a ground to deny a petition. 8 C.F.R. § 103.2(b)(14). Where a petitioner

² It appears that counsel had earlier submitted the labor certification to the California State Workforce Agency, but that the local office must have returned the forms to petitioner, and has listed a later priority date of October 24, 2001 (the original filing date of January 31, 2001 is crossed out).

has been put on notice of a deficiency in the evidence, and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered to establish eligibility, the petitioner should have timely submitted the documents in response to the director's NOID. *Id.* Under the circumstances, the AAO need not, and does not, consider the evidence submitted on appeal sufficient. Consequently, the appeal will be dismissed.

Accordingly, the petition was properly denied for the untimely response to the director's Notice of Intent to Deny.

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.