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U.S. Department of Homeland Security
Citizenship Services and Immigration Services

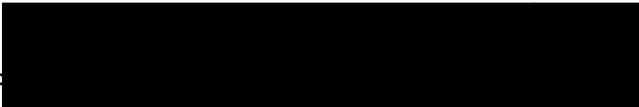
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536



File: EAC-01-233-51537 Office: Vermont Service Center

Date: **DEC 18 2003**

IN RE: Petitioner:
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



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. An appeal was dismissed by the Administrative Appeals Office (AAO). The matter is again before the AAO on a motion to reconsider. The motion will be dismissed.

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 a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

The petitioner, by and through counsel, filed an appeal from the decision with an appellate brief and additional evidence. The Administrative Appeals Office reviewed the record and dismissed the appeal finding that the petitioner had failed to overcome the grounds for denial. The AAO further noted that the petitioner had not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to the present.

On motion, counsel for the petitioner requested reconsideration of the decision. Counsel argued, in pertinent part, that CIS failed to consider the petitioner's gross profits for 1997 and 2000. Counsel further stated that deductions during those years were simply "paper deductions" that accurately reflected the petitioner's ability to pay the offered wage. Counsel noted that the petitioner could have paid the proffered wage from a loan of \$50,000 obtained in 1977. Counsel also furnished copies of the beneficiary's tax return and W-2 for 2001.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. In order to prevail on a motion to reopen, the petitioner must establish that the new facts and/or evidence presented were unavailable at the time the prior decision was issued. Id.

According to 8 C.F.R. § 103.5(a)(3), 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. In order to prevail on a motion for reconsideration, a petitioner must establish that the prior decision rests on an incorrect application of law, so that the decision "was incorrect based on

the evidence of record at the time of the initial decision." Id.

According to 8 C.F.R. § 103.5(a)(4), a motion that does not meet applicable requirements shall be dismissed.

The issue of the petitioner's gross income and sales in 1997 and 2000 was discussed in the previous AAO decision. There is nothing in counsel's motion that would change the previous decision to dismiss the appeal.

Counsel's argument that the petitioner could have paid the proffered wage in 1997 from a \$50,000 loan is without merit. Nowhere in the record is there an indication of what the loan was for or whether those monies were available to pay the beneficiary. The 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).

Counsel has furnished an unsigned Form 1040 U.S. Individual Income Tax Return for the year 2001 indicating that the beneficiary earned \$28,600 during 2001. Counsel also submitted the beneficiary's Form W-2 Wage and Tax Statements indicating earnings in 2001 of \$19,000, and \$9,600. It is significant that the W-2 attributed to the petitioner reflects that the beneficiary earned only \$9,600 during 2001. The other W-2 is from another tavern/restaurant in Mahopac, New York, which apparently has the same owner as the petitioning restaurant. Taken together or apart, both earnings are considerably below the proffered wage of \$17.43 per hour or \$36,254 per year.

It must be concluded that the petitioner has failed to establish that this action meets the applicable requirements of a motion and it must be dismissed.

ORDER: The motion is dismissed.