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U.S. Citizenship
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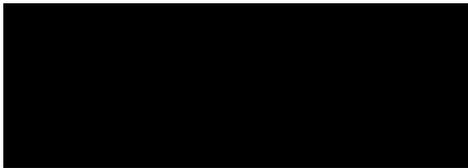
FILE: EAC 02 042 51734 Office: VERMONT SERVICE CENTER Date:

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 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, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 remanded to the director to request additional evidence and entry of a new decision.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), as a skilled worker. The petitioner is a private household. She seeks to employ the beneficiary permanently in the United States as a live-out 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 she had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel asserts that the director misinterpreted the petitioner's financial information and that the petitioner's evidence established her ability to pay the proffered wage.

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 other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this case rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is November 2, 2000. The beneficiary's salary as stated on the labor certification is \$18.89 per hour or \$39,291.20 per year based on a 40-hour week.

The petitioner, through counsel, initially submitted evidence of her ability to pay the proffered wage in the form of a copy of the petitioner's Form 1040, U.S. Individual Income Tax Return for the year 1998, and a copy of a child support order, dated May 10, 2000, issued by a New York family court, indicating that the petitioner's spouse owed her \$314 per week for the support of two children.

On March 5, 2002, the director requested additional evidence from the petitioner to support her continuing financial ability to pay the beneficiary's wage offer of \$39,291.20. The director requested the petitioner's 2000 federal tax return and an itemized list of the petitioner's monthly expenses. Included in counsel's response is a copy of the petitioner's 2000 individual federal tax return. It shows that she received wages of \$44,529 and declared an adjusted gross income of \$44,529. Counsel also submitted a copy of the petitioner's two pay stubs

for March 2002. They indicate that the petitioner works for the City of New York and was earning approximately \$3,666 per month at that time. A copy of another child support order, dated October 2, 2001, was also offered indicating that the petitioner's spouse's child support obligation was amended to \$367.50 per week and that he owed her arrears of \$2,118. A bank statement included in counsel's response reflects that the petitioner had \$1,614.85 in the bank as of March 20, 2002. Finally, the petitioner included a statement of her living expenses. She asserts that her "rent and utilities are paid as a divorce settlement" and that her children's expenses are paid "as a result of a divorce settlement through child support." As set forth on her statement, the petitioner apparently maintains that her individual living expenses amount to \$6,792 per year.

The director noted that the petitioner's adjusted gross income of \$44,529, less her annual living expenses of \$6,792, yields \$37,737 with which to pay the proffered wage of \$39,291.20, and denied the petition accordingly. The director did not include the petitioner's child support income in his calculation because he determined that the spouse's obligation did not arise until October 2001.

On appeal, counsel submits a copy of the petitioner's final divorce decree, dated January 31, 2001, which incorporated the parties' final property settlement. Counsel asserts that the \$6,151.14 owed to the petitioner by her spouse should be added to the petitioner's income.

It is noted that while counsel is correct in asserting that the petitioner's existing and potential child support income originally arose prior to the divorce, the AAO does not agree that child support income can be considered where the petitioner has failed to provide a credible statement of her dependent children's living expenses. While many personal current assets and liabilities of an individual petitioner can be considered as part of the determination of her financial ability to pay the proffered wage, she must also show that she can sustain herself and her dependents. It is not reasonable in the instant case to combine the petitioner's wages as well as child support income without also considering the combined living expenses of the petitioner and her children.

That said, it is also noted that the director requested financial information from the petitioner related only to the year 2000 without asking for copies of pay stubs or W-2s or other evidence of income and expenses beyond 2000. Although the petitioner provided some evidence related to 2002, there is little evidence reflecting her situation in 2001. This information should be requested before a final decision is rendered.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request additional updated financial evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.