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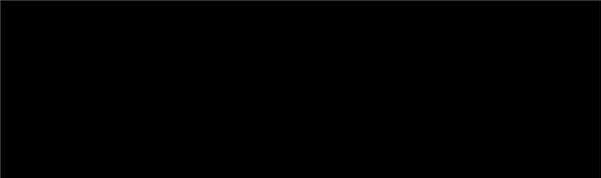
U.S. Department of Homeland Security  
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**U.S. Citizenship  
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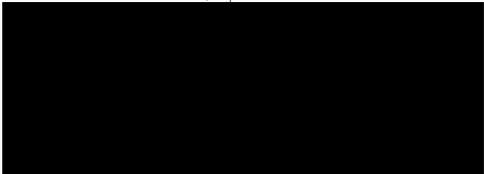


FILE: EAC-02-002-51689 Office: VERMONT SERVICE CENTER Date: **MAY 17 2004**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: 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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and came before the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed by the AAO in a decision dated January 31, 2003. The case is again before the AAO on the petitioner's motion to reopen and reconsider. The motion will be granted. The prior decision of the AAO will be affirmed and the petition will remain denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian style cook. The proffered wage is \$12.59 per hour for a 35 hour week, which equals \$22,913.80 per year. The priority date for this petition is March 26, 2001.

In his decision the director found that the petitioner had not established its continuing ability to pay the proffered wage at the time of filing. On appeal the AAO also found that the petitioner had not established its continuing ability to pay the proffered wage at the time of filing.

In the petitioner's motion to reopen and reconsider counsel asserts that the evidence before the AAO contained information sufficient to establish the petitioner's ability to pay the proffered wage at the time of filing. With the motion the petitioner also submits additional evidence.

The regulation at 8 C.F.R. § 103.5(a)(1) states in part as follows:

Any motion to reconsider an action by [CIS] filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before [CIS] filed by an applicant or petitioner, 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 [CIS] where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

Three days are added to the permissible period when the notice of the decision is by mail. 8 C.F.R. § 103.5a(b).

The regulation at 8 C.F.R. § 103.5(a)(2) states as follows:

*Requirements for 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. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decisions was in error because:

- (i) The requested evidence was not material to the issue of eligibility;
- (ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- (iii) The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

The regulation at 8 C.F.R. § 103.5(a)(3) states as follows:

*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 or law or [CIS] 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.

The motion to reopen and reconsider was received by the director on February 22, 2003. This date was within the thirty-three deadline for both motions to reconsider and motions to reopen. The motion is timely. The AAO will therefore consider the merits of the motion, first as a motion to reconsider, based on the evidence in the record as of the AAO's decision, and then as a motion to reopen, based on the evidence newly submitted with the motion.

The evidence before the director and before the AAO on appeal included a letter from one of the owners of the petitioner who stated that he was presently serving as a cook for the petitioner, earning \$14,000 per year, but that upon hiring the beneficiary the owner would leave that position. The salary being paid to the owner would then be available to help pay the proffered wage to the beneficiary. In its decision for purposes of analysis the AAO assumed that the \$14,000 would be available, but the AAO found that the evidence failed to establish the petitioner would obtain the balance of \$8,913.80 difference between that amount and the proffered wage of \$22,913.80.

The AAO noted that the petitioner's tax returns for 1999 and 2000, the only returns then in evidence, each showed a loss. The AAO therefore found that none of the proffered wages could have come from the petitioner's net income.

The AAO also stated that the petitioner's net current assets "during 1999" were \$3,062. It appears that the AAO made an error in calculating that figure. The decision does not specify whether the calculation of net current assets was based on the beginning of the 1999 tax year or on the end of the 1999 tax year. Calculations based on the petitioner's Schedule L, current assets on lines 1-6 minus current liabilities on lines 16-18, yield a figure for net current assets for the beginning of the 1999 tax year (August 1, 1999) as \$1,960 and for the end of the 1999 tax year (July 31, 2000) as \$3,332. Therefore the apparent error in calculation did not significantly affect the AAO's analysis, since net current assets at both the beginning and the end of that tax year were insufficient to cover the needed balance between the \$14,000 salary for the current cook and the proffered wage of \$22,913.80.

The petitioner's motion does not specifically address the analysis of the AAO based on the evidence then in the record. The motion relies partially on a copy of the petitioner's Schedule L for the tax year 2000, which was purportedly in evidence before the AAO. But, as discussed in more detail below, that Schedule L was not in the record before the AAO. While the petitioner's motion qualifies for consideration under 8 C.F.R. § 103.5(a)(3), it fails to establish that the decision of the AAO was based on an incorrect application of law or [CIS] policy, or to establish that the decision was incorrect based on the evidence of record at the time of that decision.

The petitioner's motion also relies on new evidence submitted with the motion. Therefore the AAO will also consider the motion as a motion to reopen.

The evidence submitted with the motion consists of complete copies of the petitioner's Form 1120 U.S. corporation tax returns for the tax years 2000 and 2001 and a copy of Form W-2 for the year 2002 issued by the petitioner to the beneficiary. A copy of the tax return for the year 2000 was previously submitted in evidence, but it was incomplete, lacking a Schedule L. Counsel states that a copy of the Schedule L for the 2000 tax return was included with the petitioner's previous evidence. However, no Schedule L is among the attachments to the copy of that return which was submitted in evidence prior to the decision of the AAO. Therefore the Schedule L attached to the return for 2000 is newly submitted with the motion. No tax return for the tax year 2001 was submitted previously, therefore the entire 2001 tax return is newly submitted with the motion. The Form W-2 for the year 2002 is also newly submitted with the motion.

The AAO discussed the standards to be used regarding evidence submitted with motions to reopen in a decision issued in July 2002 which stated as follows:

Pursuant to 8 C.F.R. 103.5(a)(2), a motion to reopen must state the new facts to be proved at the reopened proceedings and be supported by affidavits or other documentary evidence. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. 103.5(a)(4).

Based on the plain meaning of "new," a new fact is held to be evidence that was not available and could not have been discovered or presented in the previous proceeding. [FN1]

...

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, supra, at 323 (citing *INS v. Abudu*, 485 U.S. at 107-108). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, supra, at 110.

...

FN1. The word "new" is defined as "1. having existed or been made for only a short time.... 3. Just discovered, found, or learned <new evidence> ...." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984) (emphasis in original).

IN RE: Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY], File No. LIN 00 012 52064, , 2002 WL 32079474 (AAO, July 2, 2002).

As discussed above, counsel's assertion that the Schedule L for the tax year 2000 was previously submitted is not supported by the record. Counsel makes no claim that the Schedule L for the tax year 2000 was previously unavailable. Therefore the Schedule L for the tax year 2000 is found not to be "new" evidence, under 8 C.F.R. § 103.5(a)(2).

The petitioner's tax return for the tax year 2001 covers the period August 1, 2001 until July 31, 2002. That return was not due for submission until November 15, 2002, a date well after the June 5, 2002 date on which the petitioner submitted its notice of appeal. Similarly, the beneficiary's Form W-2 for calendar year 2002 was not due until January 2003, a date well after the date of the petitioner's notice of appeal. Both of these pieces of evidence, therefore, were unavailable prior to the decision of the AAO, and are found to be new evidence within the meaning of 8 C.F.R. § 103.5(a)(2).

Nonetheless, the petitioner's tax return for the tax year 2001 and the beneficiary's Form W-2 for the year 2002 contain no information relevant to the ability of the petitioner to pay the proffered wage as of the March 26, 2001 priority date. Therefore the new evidence fails to establish any facts which would support a decision to reopen the case.

Moreover, even if the Schedule L for the tax year 2000 were considered as acceptable evidence, it fails to establish the petitioner's ability to pay the proffered wage as of the priority date.

In the motion to reopen and reconsider counsel asserts that the petitioner's ability to pay the proffered wage as of the priority date is established by the combination of the current assets of the petitioner with the salary paid to the beneficiary, plus the compensation paid to the owner whose position will be taken by the beneficiary.

Counsel's reasoning is not persuasive. Counsel states that the current assets of the petitioner as of July 31, 2001 were \$4,358. That is a correct calculation, based on the figures in the Schedule L for the tax year 2000. But counsel's calculation fails to consider the petitioner's current liabilities as of that same date, which were \$1,336. Therefore the net current assets as of July 31, 2001 were \$3,022. Moreover, counsel asserts that the wages actually paid to the beneficiary during 2001 should be included in the calculation along with the wages paid by the owner who is currently serving as a cook.

Counsel's suggested approach, however, fails to establish how the work for which the beneficiary was paid during 2001 would be done in the future, since the beneficiary purportedly is to take over the position of cook currently filled by one of the owners. Moreover, counsel's approach combines items from the income and expense portions of the petitioner's tax returns with items from the balance sheet portions. The AAO does not allow combinations of net income with net current assets to establish a petitioner's ability to pay the proffered wage, because to do so is a form of double counting. Net income may be one of the sources of a petitioner's assets, or it may be a factor in reducing a petitioner's liabilities. Similarly, a net loss may reduce a petitioner's assets or increase a petitioner's liabilities.

For the above reasons, the petitioner's motion fails to establish grounds to reconsider the decision of the AAO or to reopen the case.

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 motion is granted. The prior decision of the AAO, dated January 31, 2003, is affirmed. The petition is denied.