



U.S. Citizenship
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File: WAC 02 198 52686 Office: CALIFORNIA SERVICE CENTER

Date: DEC 19 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted and sustained. The previous decisions of the director and AAO will be withdrawn. The petition will be approved.

The petitioner is a restaurant and seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. 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.

On the motion, counsel submits a brief and additional evidence.

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

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on September 20, 2000. The proffered wage as stated on the Form ETA 750 is \$36,650 per year.

The decision dismissing the appeal in this matter contained a survey of the evidence provided. The discussion of that evidence is incorporated herein by reference and will not be repeated. On the motion, counsel takes exception to only one part of that dismissal.¹ In that part of the decision the director declined to consider the salary paid to the petitioner's officers as a fund available to pay additional wages. The decision dismissing the

¹ The original decision dismissing the appeal also commented on a discrepancy between the petitioner's name as shown on the Form I-140 petition and the name shown on the tax returns submitted. The decision of dismissal noted that such a name discrepancy might indicate that the petitioner had changed ownership. Although this issue did not form any part of the basis for denial of the petition or dismissal of the appeal, counsel has submitted additional evidence that adequately addresses that issue. Counsel also addressed an arguable discrepancy between the various names given for the petitioner's owner. Counsel has satisfied this office on both of those issues. Because they formed no part of the basis of this office's previous decision, they shall not be addressed further.

appeal found that the petitioner had shown the ability to pay the proffered wage during each of the salient years except 2001. Counsel asserts that the evidence submitted was sufficient to show that those salaries were available to pay additional wages and, further, submits additional evidence.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "*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."

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

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.

The instant motion qualifies as a motion to reopen because counsel has submitted new evidence. The instant motion qualifies as a motion to reconsider because counsel also asserts that, based on the evidence previously provided, the decision of denial was incorrect.

Counsel notes, correctly, that the previous decision of denial did not comment on a March 10, 2003 letter from the petitioner's accountant. That letter states that the petitioner's owner was able to adjust his salary as necessary to pay the proffered wage.

The new evidence submitted is a letter, dated May 13, 2004, from the petitioner's owner. That letter states, ". . . given the fact that my wife and I are the sole shareholders of the corporation and therefore the restaurant, the amount of officer's salary's, [sic] which I pay, are at my total discretion."

The only portion of the dismissal decision with which the petitioner takes exception is that this office declined to include the petitioner's owner's officer compensation, or any part of it, in the calculations pertinent to the petitioner's ability to pay the proffered wage during 2001. The sole issue before this office is whether the accountant's letter, together with the new evidence submitted on appeal, is sufficient to show that the petitioner's owner was, in fact, able to adjust that compensation during that year in an amount sufficient to pay the additional wages represented by the annual amount of the proffered wage.

The proffered wage is \$36,650 per year. During 2000 the petitioner's owner paid himself and his wife salaries totaling \$67,000. During 2001 the petitioner paid himself and his wife salaries totaling \$134,000. The difference between those two amounts is \$67,000. The petitioner's position is that it could have reduced that payment by at least \$36,650, the amount needed to pay the annual amount of the proffered wage.

In the instant case where the petitioner's owners' compensation doubled, an increase of \$67,000 during a single year, this office is convinced that the petitioner's owner was able to forego at least \$36,650 of that additional compensation and able, therefore, to pay the proffered wage during 2001.

This office is not examining the personal assets of the petitioner's owners, but, rather, the financial flexibility that the petitioner's owner has in setting his own salary based on the profitability of his corporation. We concur with the argument presented by counsel on appeal.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

The petitioner has demonstrated the ability to pay the proffered wage during each of the salient years. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

ORDER: The motion is sustained. The petition is approved.