



U.S. Citizenship  
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File: [REDACTED] Office: TEXAS SERVICE CENTER Date:  
SRC-03-257-52427

SEP 06 2005

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)

IN 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 Director, Texas Service Center, denied the immigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter was again before the AAO on a motion to reopen and reconsider. Although the motion was untimely, the AAO will exercise its discretion to reopen these proceedings on its own motion and adjudicate the substance of the petitioner's prior motion to reopen and reconsider. The motion to reopen and reconsider is granted. The AAO's decision is withdrawn and the appeal is sustained. The petition is approved.

The petitioner is a restaurant. It 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, accompanied 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 and denied the petition accordingly. The AAO affirmed the director's decision.

On 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.

The petitioner must demonstrate the *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, until the beneficiary obtains lawful permanent residence. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 25, 2003. The proffered wage as stated on the Form ETA 750 is \$35,000 per year. On the Form ETA 750B, signed by the beneficiary on February 20, 2003, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 2002, to have a gross annual income of \$213,634 for three months, and to currently employ 18 workers. The petitioner submitted its corporate tax returns for 2002 and 2003 into the record of proceeding to establish its continuing ability to pay the proffered wage.

The director determined that the petitioner failed to establish its continuing ability to pay the proffered wage because its net income and net current assets, as reported on its corporate tax returns, were both below the amount of the proffered wage. On appeal, counsel asserted that the beneficiary was employed by the petitioner since August 2003 and was paid \$19,994.47 for five months of employment in that year. The petitioner submitted a W-2 form and quarterly wage reports corroborating wages paid to the beneficiary in 2003 and quarterly wage reports for part of 2004 reflecting wages paid to the beneficiary in that year. Additionally, the petitioner submitted a letter from [REDACTED] the petitioner's chef, dated December 1, 2004, stating that he was on the petitioner's payroll in 2003 but he accepted a position at Loews Miami Beach Hotel and the beneficiary will

undertake the responsibilities he handled for the petitioner. [REDACTED] also states that he received an annual salary in the amount of \$50,000 and attests that a chef consultant was hired under his instructions, received a compensation of over \$30,000 for his services, and was employed until the beneficiary had employment authorization. The owner also submitted a letter, dated January 28, 2005, stating that they hired a chef consultant to work in the kitchen to handle many duties that are being offered to the beneficiary and that \$31,200 was paid to the consultant for his services. Additionally, the petitioner's owner stated that [REDACTED] was employed by the petitioner but now works for Loews Miami Beach so the beneficiary will carry on his duties, and that she has been on the corporate payroll since August 1, 2003.

The AAO dismissed the appeal on May 23, 2005 affirming the director's determination that the petitioner's net income and net current assets are insufficient to establish its continuing ability to pay the proffered wage beginning on the priority date and finding that there was insufficient evidence that the duties performed by the chef consultant [REDACTED] and the beneficiary would be the same or that wages were paid at the level asserted.

On motion to reopen and reconsider, counsel states that the AAO failed to conform to Citizenship and Immigration Services' (CIS) policy set forth in a memorandum issued by [REDACTED] titled "Determination of Ability to Pay under 8 CFR [§] 204.5(g)(2)" and dated May 4, 2004, that states that "the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage." Counsel asserts that the AAO ignored evidence of wages paid to contractors terminated by the petitioner who performed the same duties as the proffered position as delineated by [REDACTED] and the petitioner's owners previously submitted letters. Counsel asserts that [REDACTED] chef position, the chef consultant's position and person assuming that position identified in a new letter submitted with the motion, and the beneficiary's position include the same duties. Counsel claims that the word "consultant" after chef was merely the petitioner's way of indicating that the individual was not an employee but a temporarily employed independent contractor retained to update their menus. Additionally, counsel claims that the AAO erred by dividing the total wages the beneficiary earned as the "rate of pay" the petitioner was paying because the petitioner's operations were temporarily suspended in 2004. Finally, counsel asserts that the petitioner's owners have invested their own money into the business that has high grosses but traditional reported losses as a new business.

On motion to reopen and reconsider, the petitioner submits a new letter from its owner that states the following, in pertinent part:

In 2003 I contracted the services of [REDACTED] as the chef, in the amount of \$31,000. My accountant suggested we use the name chef/consultant so it would be clear that she had a short term contract as a consultant, not as an employee. The contract ended in December 2003. [The beneficiary] did not have work authorization so she trained under [REDACTED] and when she had the work authorization she took over [REDACTED] duties.

In September of 2004 my hard liquor license was suspended and I had to close the restaurant. I reopened in January as my staff were [sic] all committed to other jobs over the holidays. We are up and running and business is thriving. We are on south Beach, so our high season is from January through May.

The petitioner also submits a copy of a W-2 form reflecting wages paid in the amount of \$16,807.08 to the beneficiary in 2004.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) 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 CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Since new evidence has been submitted and an assertion is made that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision, the motion qualifies for consideration as a motion to reopen and reconsider.

On review, the AAO overturns its prior decision and accepts evidence that the petitioner paid the proffered wage to another employee and independent contractor who performed the same duties as the proffered position, and in combination with the wages actually paid to the beneficiary, has demonstrated its continuing ability to pay the proffered wage beginning on the priority date<sup>1</sup>. The proffered wage is \$35,000 per year. The petitioner paid the beneficiary \$19,994.47 in 2003 and \$16,807.08 in 2004, leaving it obligated to pay the difference between the wages actually paid and the proffered wage of \$15,005.53 and \$18,192.92, in each year, respectively. According to its Line 20 deductions on its 2003 tax return, the petitioner paid \$31,200 in consulting fees in that year. According to its quarterly wage reports, the petitioner paid [REDACTED] wages in the amount of \$11,974.42 in 2004.

There is no reason not to accept the petitioner's testimony in a public proceeding that its chef consultant's position involves the same duties as the proffered position. Thus, the \$31,200 paid in consulting fees for 2003, which the petitioner provided testimony that that amount was paid for a chef consultant for duties similar to the duties of the proffered position<sup>2</sup>, may be considered as wages actually paid towards the proffered position for that year. Since \$31,200 is greater than the difference between the wages it actually paid and the proffered wage of \$15,005.53 in that year, the petitioner has established its ability to pay the proffered wage in 2003.

There is no reason not to accept the petitioner's testimony in a public proceeding that [REDACTED] position involves the same duties as the proffered position. Thus, the \$11,974.42 paid to [REDACTED] may be considered as wages actually paid towards the proffered position for 2004. That amount is less than the \$18,192.92 required to establish the petitioner's ability to pay for that year; however, the petitioner provides an explanation concerning the interruption in wage reporting for that year. The AAO finds it plausible that the petitioner's restaurant operations were temporarily interrupted because their liquor license was suspended<sup>3</sup>. Although [REDACTED] was not at a pay rate of a \$50,000 annual salary for that year and the beneficiary was not at a pay rate of \$35,000 per year, their combined pay rate would have been \$46,358.28, which is greater than the proffered wage, and since [REDACTED] was terminated and replaced by the beneficiary, the petitioner had illustrated its ability to pay the proffered wage in 2004<sup>4</sup>.

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<sup>1</sup> In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

<sup>2</sup> The AAO notes that "creative menu development" is a duty of the proffered position, which is what the petitioner claims the chef consultant was hired to do.

<sup>3</sup> Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner's gross receipts in 2003 were \$878,741 and it paid wages and salaries in the amount of \$187,486, which shows substantial business activity, factors that weigh in the petitioner's favor in combination with its proposition to replace workers, upon review.

<sup>4</sup> The AAO extrapolates from the petitioner that [REDACTED] position, the chef consultant position, and the beneficiary's position will be merged into one.

Based on the limited and unique facts of this case, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The motion to reopen and reconsider is granted. The AAO's decision of May 23, 2003 is withdrawn. The appeal is sustained. The petition is approved.