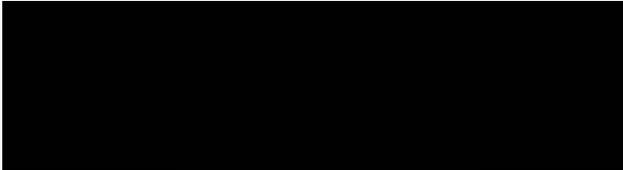




U.S. Citizenship
and Immigration
Services

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invasion of personal privacy**



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FILE:

EAC 03 136 51234

Office: VERMONT SERVICE CENTER

Date: **JAN 29 2007**

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion to reopen or reconsider is granted. The prior decision of the AAO dated June 21, 2005, will be withdrawn. The appeal will be sustained.

The petitioner is a restaurant.¹ 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 U. S. 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 director denied the petition accordingly.

According to the petition, the petitioner's business was established in 1978, and, at the time the petition was prepared, employed 35 individuals.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

¹ The business is organized as a subchapter S corporation as

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 16, 2001.² The proffered wage as stated on the Form ETA 750 is \$12.00 per hour (\$24,960.00 per year). The Form ETA 750 states that the position requires two years of experience.

On appeal, counsel submits a motion to reopen and reconsider and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on May 2, 2003, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of U.S. federal tax returns, IRS Form W-2 Wage and Tax statements for 2001 and 2002, Employers Quarterly Federal Tax Form (Form-941) returns, and, information concerning wages paid to worker(s) who have since vacated the proffered position of cook.

In response to the request for evidence, counsel submitted copies of the following documents: an explanatory legal brief dated July 15, 2003; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for years 2001 and 2002; a statement from the owner of petitioner to personally guarantee the proffered wage; and, the personal money market accounts of the owner of petitioner.

The petitioner's net incomes (found on Form 1120S, Line 21) for 2001 and 2002 were \$2,043.00 and <\$1,506.00> respectively. Net current assets for those two years for which tax returns were provided were <\$27,223.00> and <\$133,287.00> respectively. Since the proffered wage is \$24,960.00 per year, the petitioner's net income and net current assets for those years are less than the proffered wage.

The director denied the petition on September 11, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

² It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

On appeal of the director's decision of September 11, 2003, counsel asserted in his statement in the matter dated October 3, 2003 that the director erred in the decision. Counsel contends that "You may not consider only current assets and compare those to all, long-term [sic] and current liabilities."

Counsel asserts that the "employer" can apply personal assets to pay the proffered wage. Counsel contends a statement from the owner of petitioner to personally guarantee the proffered wage; and, the personal money market accounts of the owner of petitioner, are evidence of the ability to pay the proffered wage.

Counsel contends that the "bank documentation" is acceptable evidence under the regulation at 8 C.F.R. § 204.5(g)(2).

Counsel further asserts in his statement accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel contends that by adding from the 2001 Form 1120S tax returns and their Schedule L line items of depreciation, "cash available at the end of tax year 2001," accumulated depreciation, and capital stock and additional paid-in capital, that these items in total are evidence of the petitioner's ability to pay the proffered wage.

The appeal was dismissed by the AAO finding that the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage.

The petitioner filed a motion to reopen and reconsider the denial on July 20, 2005. In support of the motion, counsel states the reasons for reconsideration, and, he cites the case precedent of *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966) that the petitioner bears the burden of proof in these matters. The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

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 motion does not qualify as a motion to reconsider because counsel fails to identify any erroneous conclusion of law or statement of fact for the appeal based upon the record of proceedings not already considered by the director and AAO.

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 instant motion does qualify as a motion to reopen. There are new facts presented here by counsel that relate to his initial evidence accompanying the petition, and, to the issue of whether or not on the

priority date of the Alien Employment Certification the petitioner had the ability to pay the beneficiary the proffered wage. The motion is granted.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal³.

Counsel contends in his motion to reopen and reconsider that the petitioner has demonstrated its ability to pay the proffered wage. Counsel then repeats the contentions asserted in his statement in this matter dated October 3, 2003 that are set forth above. Counsel has submitted additional evidence as noted below but he fails to note or reference the additional evidence in his motion to reopen and reconsider.

As additional evidence, counsel has submitted the following copies of documents: the AAO's decision dated June 21, 2005; six W-2 Wage and Tax Statements (W-2) of [REDACTED] an excerpt from the American Immigration Lawyers Association website "ISD Liaison Minutes (6/27/02)" that concerns W-2 statements as evidence of the ability to pay the proffered wage; and two bank account statements of the [REDACTED] Corp, trading as [REDACTED]

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. Evidence was submitted to show that the petitioner employed the beneficiary and paid the proffered wage since 2001. W-2 statements were submitted for 1991, 2000, 2001, 2002, 2003 and 2004. The petitioner paid the beneficiary \$19,435.05; \$24,217.71, \$25,385.40, \$26,083.50, \$31,200.00 and \$31,200.00 respectively. As the proffered wage is \$24,960.00 per year, the petitioner paid the beneficiary more than the proffered wage in years 2001, 2002, 2003 and 2004.⁴

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner has demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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 to reopen or reconsider is granted. The prior decision of the AAO dated June 21, 2005, is withdrawn. The appeal is sustained. The petition is approved.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁴ If this matter is pursued, copies of the beneficiary's personal U.S. federal tax returns from the priority date, the petitioner's pay statements to the beneficiary from 2001 to the present, or other indicia such as the beneficiary's U.S. Social Security Administration historical statement of life earnings should be presented.