**U.S. Department of Homeland Security**
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Washington, DC 20529

**U.S. Citizenship and Immigration Services**

B6

[redacted]

FILE: WAC 02 201 52379 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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, California 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. According to the Immigrant Petition for Alien Worker (Form I-140), the petitioner is a Korean Specialty Bakery. The petition is not accompanied by an individual labor certification (Form ETA 750) approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that the director misinterpreted the petitioner's financial information. Counsel maintains that the petitioner's evidence established its 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 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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's priority date. The petitioner must also 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 DOL. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

The record in this case indicates that an I-140 was originally approved for a different alien beneficiary under receipt number WAC-93-138-52056. The approval notice, dated June 9, 1993, indicates that the priority date established by the original ETA-750 is September 25, 1992.

The petitioner filed another I-140 on June 2, 2002, naming a different beneficiary than that indicated on the original approval notice of WAC-93-138-52056. In a letter dated June 3, 2002, counsel indicated that a copy of the approved Labor Certification accompanied the new I-140. A review of the attachments reflects that counsel did not submit a copy or the original of the ETA 750.
On September 26, 2002, the director requested a certified original labor certification along with evidence relating to the new alien beneficiary's work experience and the petitioner's ability to pay the proffered wage.

In response, counsel's transmittal letter, dated November 5, 2002, stated that the original labor certification was with the earlier approved I-140. According to counsel, it was either in Seoul, Korea or at the National Records Center. Along with evidence relating to the beneficiary's work experience and the petitioner's ability to pay the proffered wage, counsel submitted a letter from the petitioner's owner withdrawing the I-40 filed under WAC 93-138-52056 and a copy of the approval notice of WAC 93-138-52056. Counsel also submitted a letter, dated June 29, 1993, from the Transitional Immigrant Visa Processing Center, informing the petitioner that the case had been sent to Seoul, Korea for further processing. Finally, counsel submitted a copy of a letter from DOL, dated July 1, 1998, indicating that, with reference to the original alien, it could not issue a duplicate labor certification, to replace a lost one, to an employer or his agent, but that it could issue one directly to a U.S. Consulate or the Immigration and Naturalization Service (now Citizenship and Immigration Services).

On January 24, 2003, the director denied the petition based on the petitioner's failure to establish that it could pay the proffered wage. This petition is being remanded to the director because the AAO cannot review this appeal without actual verification from the original labor certification or a certified duplicate as to what the proffered wage is supposed to be and what the actual employment, education, and training requirements are. It is unclear how the director concluded that the petitioner had failed to establish an ability to pay where, other than the petitioner's statement on the I-140, there is no evidence in the record certifying the amount of the proffered wage. It is also baffling how the director measured the evidence related to the beneficiary's past employment as a cook, when there is no approved labor certification in the file indicating how much experience, education, and training was required for the position. Finally, it is also unclear how the director determined that the priority date was January 3, 1998, as noted in his denial, when the original approval notice of WAC 02 201 52379 states that the priority date is September 25, 1992. If that is the priority date, then the evidence should be evaluated with that date in mind.

That said, the petition is remanded to the director to take all necessary steps to locate the originally approved I-140 and accompanying original ETA-750 by conducting a thorough search through contacts with the NVC, Consulate, or File Control office that is holding the case. In the alternative, the director can request a duplicate from DOL. Once the original or a certified copy of the original ETA-750 can be located and verified that it is still available for a substitution of an alien beneficiary, the director should review the record to determine eligibility for the visa classification requested.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(1) and (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.