

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

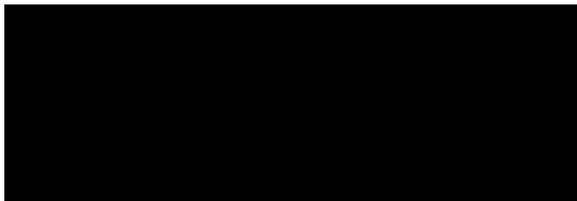
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



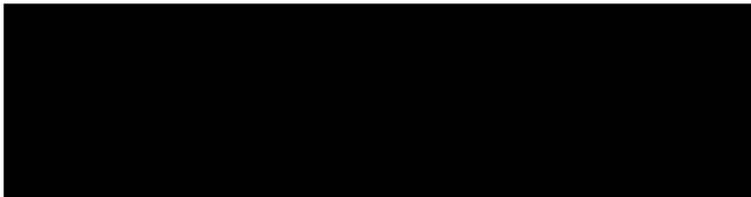
FILE: WAC 02 214 51106 Office: CALIFORNIA SERVICE CENTER Date: SEP 05

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 director denied the employment-based preference visa petition. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be denied, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a freight forwarding service. It seeks to employ the beneficiary permanently in the United States as a financial analyst. 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 or that the beneficiary had the requisite employment experience as stated on Form ETA 750. Accordingly the director denied the petition.

On appeal, counsel submitted a brief and additional evidence. On April 22, 2004, the AAO determined that the petitioner had established its ability to pay the proffered wage during the salient part of the 1997 priority year, and in 1999; however, the AAO also determined that the petitioner had not established that it had the ability to pay the proffered wage in 1998, and 2000. With regard to a statement by counsel that Citizenship and Immigration Service (CIS) Deputy Executive Commissioner William Yates had stated at a conference of immigration lawyers that gross income was a valid consideration in determining the ability to pay a proffered wage, the AAO stated that counsel offered no evidence of this asserted statement, the context within which it was allegedly made, or that it was intended to apply to the circumstances of the instant petition. Furthermore the AAO found the beneficiary's sworn affidavit submitted on appeal to be insufficient evidence to establish that the beneficiary possessed the minimum experience stated on the Form ETA 750.

On motion, counsel submits a transcript of the minutes of a meeting between immigration attorneys and William Yates, former CIS Associate Director for Operations, with regard to the purpose behind the existing statutory and regulatory requirements utilized to establish a petitioner's ability to pay. Counsel also questions why an employer, with gross earnings of over five million dollars, and an annual payroll in excess of five hundred thousand dollars would not have established its ability to pay the proffered wage. Counsel resubmits documentation with regard to the petitioner's monthly bank statements, federal income tax returns, and Forms W-2 and Forms 941. Counsel submits new documentation as to the beneficiary's wages, namely her W-2 Forms for years 2002 and 2003, as well as the petitioner's 2002 federal income tax return, and more recent Forms 941. Counsel also resubmits documentation with regard to the beneficiary's qualifications.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), 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 Citizenship and Immigration Services (CIS) policy. On motion, counsel submits additional documentation as to the petitioner's financial resources for the years 2002 and 2003, for the beneficiary's wages during these years, and also submits a transcript of the minutes from the Yates meeting.

Upon examination of the documentation submitted on motion, it is noted that in its previous dismissal the AAO found that the petitioner had established its ability to pay the proffered wage, except for the years 1998 and 2000. Thus, the federal income tax returns submitted to the record with regard to tax years 2001 and 2002 are not material to the director's reasons for the denial of the petition, nor to the AAO dismissal of the initial appeal.

Similarly, the beneficiary's wages in 2002 and 2003 provide no further documentation of how the petitioner established its ability to pay the proffered wage in the years 1998 or 2000. Any more recent monthly bank statements submitted on motion are also not viewed as new facts, as the AAO addressed the use of bank statements by the petitioner in its previous dismissal.

On motion, counsel refers to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), and requests that the totality of the petitioner's circumstances with regard to the petitioner's ability to pay the proffered wage. However, the director's denial of the petition and the previous AAO dismissal were based on two issues, namely, the petitioner's ability to pay the proffered wage and the beneficiary's qualifications. Counsel provides no new facts or evidence with regard to the beneficiary's qualifications prior to the 1998 priority date, but rather resubmits the declaration made by the beneficiary on June 26, 2003 with regard to her duties as an operations manager, and the letter from the President of [REDACTED], Manila, The Philippines. The AAO reviewed and evaluated these materials in its previous dismissal.

In sum, while counsel correctly noted that the totality of the petitioner's circumstances can be considered with regard to the petitioner's ability to pay the proffered wage, counsel provides no new facts that would warrant reopening the proceedings with regard to the second issue addressed previously by the AAO and by the director, namely, the beneficiary's qualifications. Furthermore, the transcript of an AILA meeting with former Associate Commissioner William Yates is immaterial to the issue raised by the director and by the AAO in previous decisions, namely, whether the petitioner has established that the beneficiary has the requisite two years of relevant work experience prior to the 1998 priority date. The submission of the transcript of this meeting would not warrant the reopening or reconsideration of the proceedings.

As stated in the previous AAO dismissal, what remains unresolved in the instant petition is the petitioner's ability to pay the proffered wage in the years 1998 and 2000, and whether the beneficiary has the requisite two years of work experience as an accountant prior to the 1998 priority date. The motion to reopen/reconsider the previous denial of the petition does not present new facts with regard to both issues and will not be granted.

Therefore, the director's decision shall stand, the motion is denied, and the petition shall be denied.

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 dismissed. The petition remains denied.