U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JAN 02 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: This case comes before the Administrative Appeals Office (AAO) on certification for review pursuant to 8 C.F.R. § 103.4(a).[1] Upon review, the AAO will reverse the decision of the Director, Texas Service Center (the director), and reinstate the approval of the petition.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a salad prep/utility worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director revoked the approval of the petition, finding that the petitioner has failed to demonstrate the continuing ability to pay from the priority date until the beneficiary receives his lawful permanent residence and that the beneficiary did not have the requisite work experience in the job offered before the priority date.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

To be eligible for approval, the petitioner must establish by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date until the beneficiary obtains legal permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The priority date of the petition is April 26, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The rate of pay or the proffered wage specified on the Form ETA 750 is $8.50 per hour or $17,680 per year. In the Form ETA 750, the petitioner specifies that all job applicants, in order to qualify for the position should have at least three months of work experience in a related occupation.[2]

Upon review of the entire record, including evidence submitted on appeal, the AAO is persuaded that the petitioner has the ability to pay the proffered wage of $8.50 per hour or $17,680 per year from April 26, 2001, and that the beneficiary is qualified to perform the duties of the position.

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[1] Under 8 C.F.R. § 103.4(a)(1) allows certifications by district directors to the AAO for review "when a case involves an unusually complex or novel issue of law or fact."

[2] As the petitioner did not indicate a related occupation, we assume that the proffered position requires three months of experience in the job offered.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

In this case, the AAO finds that the director did not have good and sufficient cause to revoke the approval of the petition, as required by section 205 of the Act, 8 U.S.C. § 1155. We withdraw the director's finding that the petitioner did not conduct good faith recruitment in advertising for the proffered position resulting in the approval of the labor certification application.

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 director's decision to revoke the approval of the petition is withdrawn. The petition is approved.