

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

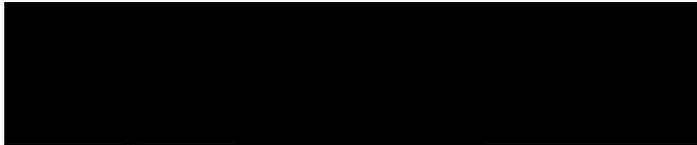
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6



FILE:

EAC 02 143 50999

Office: VERMONT SERVICE CENTER

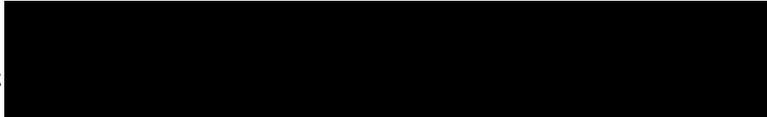
Date:

AUG 30 200

IN RE:

Petitioner:

Beneficiary:



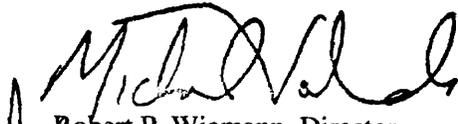
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director  
Administrative Appeals Office

DISCUSSION: The immigrant visa petition approval was revoked by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) affirmed the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider. The motion will be granted. The previous decisions of the director and AAO will be withdrawn. The petition will be approved.

The petitioner is a church day care center. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and, it seeks to employ the beneficiary permanently in the United States as a cook. The director determined that the petitioner had not established that petitioner had the ability to pay the beneficiary on the priority date of the visa petition and denied the petition accordingly. The AAO affirmed that decision, dismissing petitioner's appeal of the director's decision.

In support of the motion, counsel submits copies of the following documents: compiled financial statements of the petitioner for years 2001 through 2003; a letter from the petitioner concerning a former employee and copies of the that former employee's W-2 Wage and Tax Statements for years 2001 through 2003; a letter from petitioner concerning beneficiary, and, bank statements and copies of checks payable to "cash" or the beneficiary as payee.

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, and, he asserts no pertinent precedent decisions for any position. There was no brief in the matter. Petitioner's counsel, in his cover letter transmitting the abovementioned documents, does not raise any issues of law or fact.

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 related to his initial evidence accompanying the petition, or to the issue of whether or not on the priority date of the alien labor application the petitioner had the ability to pay the beneficiary the proffered wage.

The decision of the director dated June 20 2003, stated that the petitioner had not submitted any evidence at that time to demonstrate it had sufficient income to pay the beneficiary on the priority date of the labor certification.

Upon appeal, counsel states that the compiled<sup>1</sup> financial statements for years 2001 through 2003 demonstrate "... that the petitioner possessed substantial current assets, especially cash, versus current liabilities, and

---

<sup>1</sup> A compilation is limited to presenting in the form of financial statements information that is the

substantial equity....” Examining the financial statements submitted by petitioner, they have little probative value since they are neither an audited or reviewed statements.

The accounting service qualified the financial statements stating that “ ... We have not audited or reviewed the ... financial statements and, accordingly, do not express an opinion or any form of assurance on them.”

The regulation 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 financial statements list “Fixed Assets” that according to counsel in the record of proceedings are real estate owned by the petitioner. The real property is a capital asset and not an asset available to pay the proffered wage offered the beneficiary. We reject the petitioner’s assertion that the petitioner’s assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner’s assets include depreciable assets that the petitioner uses for organizational purposes. Those depreciable assets will not be converted to cash during the ordinary course of business, and, they will not, therefore, become funds available to pay the proffered wage of \$22,913.80 per year.

Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner’s ability to pay the proffered wage. Counsel offers the fact that the petitioner had available funds in the amount of \$77,907.00 it choose to direct towards the principal balance of its mortgage. Since these funds were directed not to cash and made available for salaries, but expended, this amount cannot be considered available to pay the proffered wage.

Counsel asserts that the salary paid to a former employee offered into evidence on motion “...could have been used to pay the beneficiary [sic] offered wage.” Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. However, if the petitioner intends to replace an existing employee with the beneficiary in the same occupation, that would have probative value to demonstrate the ability to pay the proffered wage. In this instance, the petitioner submitted W-2 Wage and Tax Statements on appeal stating that the prior employee employed in years 2001 through 2003 received \$15,626.52 in 2001, \$14,825.16 in 2002, and \$3,158.50 in year 2003. Counsel also submitted checks offered to show wages paid to the beneficiary appeal stating that the beneficiary received \$11,557.00 in 2001, \$12,554.00 in 2002, and \$14,254.50 in year 2003. The evidence submitted would indicate that the petitioner could pay the proffered wage since the sum of the amounts paid to both workers are greater than the proffered wage for years 2001 and 2002. (i.e. \$27,183.52 and \$27,379.16). In 2003 the prior employee departed and received a partial year’s income. In 2003, the combined wages total \$17, 413.00. Since the petitioner has stated that the beneficiary will replace the prior employee the petitioner has demonstrated the ability to pay the proffered wage.

Petitioner has the burden in these proceedings of coming forward and presenting evidence responsive to the question of whether or not petitioner on the priority date of the alien labor application had the ability to pay the

---

representation of management

beneficiary the proffered wage. 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. The documentation now submitted by petitioner does establish that petitioner had the ability to pay the proffered wage on the priority date. Accordingly, the decisions of the director and AAO are withdrawn, and the petition will be approved. Petitioner's motion is sustained.

ORDER:           The motion is granted. The petition is approved.