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U.S. Citizenship
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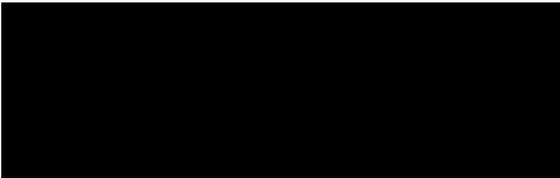


FILE: EAC-03-143-52639 Office: VERMONT SERVICE CENTER Date: FEB 14 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a dinner cook. 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 and denied the petition accordingly.

On appeal, counsel states that the evidence shows that the petitioner has employed the beneficiary at a salary higher than the proffered wage, which establishes the petitioner's ability to pay the proffered wage during the relevant time period.

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 or seasonal 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour, for a 35-hour work week, which amounts to \$21,603.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 1998.

On the petition, the petitioner claims to have been established in 1990, to have a gross annual income of \$587,832.00, and to currently have ten employees.

In support of the petition, the petitioner submitted the following: a copy of a certificate from a former employer of the beneficiary in Tunisia stating the beneficiary's employment as a specialty cook from February 1993 to July 1996, with certified English translation; a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2001; a letter dated March 25, 2003 from a certified public accountant describing the effect of depreciation and amortization on the petitioner's cash flow; a copy of the Monthly Mailing of the American Immigration Lawyers Association for January 1995 containing a summary of a teleconference with the Eastern Service Center; and a copy of the AAO decision in case number EAC9519250171, dated January 26, 1996.

that the beneficiary was employed by the petitioner during 2001, because the compensation shown on that form is “nonemployee” compensation.

The amount of nonemployee compensation shown on the beneficiary’s Form 1099-MISC for 2001 is \$21,610.00. That amount is \$6.40 more than the proffered wage. The petitioner’s payment on nonemployee compensation to the beneficiary indicates that the petitioner did not pay payroll taxes on that compensation. Nonetheless, the payment of compensation to the beneficiary in an amount greater than the proffered wage is considered sufficient to establish the petitioner’s ability to pay the proffered wage, even if that compensation was nonemployee compensation.

In his decision, the director incorrectly based his analysis on a proffered wage of \$24,689.60 per year. The director’s figure is the result of multiplying the hourly wage of \$11.87 by a 40-hour work week, for 52 weeks in a year. However, on the ETA 750 the petitioner states that the work week for the proffered position is 35 hours per week. Calculations based on a 35-hour work week result in the figure of \$21,603.40 as the proffered annual wage. The director also incorrectly stated that the petitioner had submitted a W-2 form showing that it employed the beneficiary in 2001. In fact, as noted above, the tax form submitted for the beneficiary for that year was a Form 1099-MISC, showing nonemployee compensation. The information on the Form 1099-MISC showing payment to the beneficiary of \$21,610.00 is considered sufficient to establish the petitioner’s ability to pay the proffered wage.

On appeal, the petitioner submits no new evidence. However, the issues raised in counsel’s brief and supplemental fax letter as discussed above are sufficient to overcome the decision of the director.

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 appeal is sustained.