



U.S. Citizenship
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FILE: EAC 02 156 51993 Office: VERMONT SERVICE CENTER

Date: JUN 03 2005

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:

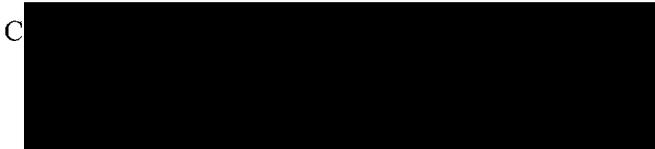
SELF-REPRESENTED

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

Robert P. Wiemann, Director
Administrative Appeals Office



DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and the AAO affirmed the decision. It is again before the Administrative Appeals Office (AAO) on a motion to reopen/reconsider¹. The prior decision of the AAO will be affirmed. The petition will remain denied.

The petitioner is a restaurant². It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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, that petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, the counsel submitted a brief and additional evidence.

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 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 regulation 8 C.F.R. § 204.5(l)(3)(ii) states in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

¹Counsel has signed the Form I-290B stating that she represents the beneficiary. There is no Form G-28 from either the beneficiary or petitioner pertaining to the motion filed. However, counsel has submitted Form I-290B in the name of the beneficiary and a motion requesting a favorable decision in the name of petitioner. We will treat the matter as an appeal by the petitioner, but since counsel has not filed a Form G-28 on the motion from the petitioner, she shall be copied on this decision.

² The restaurant is named [REDACTED] in the petition and in the Alien Employment Application, but named [REDACTED] [sic] Restaurant in petitioner's tax returns.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$ 11.90 per hour (\$24,752.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition counsel submitted the following documents:

- The original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor;
- The beneficiary submitted his own an affidavit detailing his work in New York and Connecticut as a cook from October 1996 until September 3, 2002, the date of the affidavit.
- A co-worker submitted a job verification affidavit of the beneficiary's experience as a cook for the period October 1996 through September 1997.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary had the requisite two years work experience, the Vermont Service Center on July 8, 2002, requested evidence pertinent to both those issues

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

“Submit the 2001 and 2002 United States federal income tax return(s), with all schedules and attachments, for your business....”

Consistent with the requirements of Regulation 8 C.F.R. 204.5 § (1)(3)(ii), the Service Center specifically requested:

Submit evidence to establish that the beneficiary possessed the required two years of work experience as of April 24, 2001, the date of filing.”

“Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainers(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience will be considered.”

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1065 tax returns for years 2000 and 2001. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,752.00 per year from the priority date.

- In 2001, the Form 1065 stated income loss of <\$13,251.00>.
- In 2000, the Form 1065 stated income loss of <\$16,668.00>.

In response to the above Request for Evidence concerning the beneficiary's prior employment, and, the requisite two years work experience as a cook, no additional evidence relating to qualifying experience or training in the form of letters from current or former employers or trainers was submitted.

The director denied the petition on November 21, 2002, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

The petitioner appealed and submitted additional evidence.

The grounds for the appeal according to counsel were as follows:

“The Service erred in reviewing and analyzing the adjudication and evidence in support of the application.”

The Service Director erred in concluding that the petitioner lacks sufficient funds to pay the alien.”

The Service director erred on the qualifications of the beneficiary.”

On appeal, counsel submitted an accountant's letter, a construction agreement, an affidavit made January 21, 2003 from a former co-worker of the beneficiary recounting their work experience together, and, following the filing of the appeal, submitted another affidavit from the same co-worker whom submitted a job verification affidavit previously.

The AAO affirmed the director's decision to deny the petition by its decision dated December 9, 2003 finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

Counsel filed a motion to reconsider/reopen.

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, she asserts no precedent decisions for any position. Counsel, does not raise any issues of law or fact. There was no brief in the matter.

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 not qualify as a motion to reopen. There are no new facts presented here by counsel that related to her initial evidence accompanying the petition, 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 or that petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

Counsel in her "Motion To Reopen/Reconsider" asserts that a different interpretation of the evidence already submitted both in support of the petition and on appeal could be made in favor of the petitioner. Counsel has not submitted new facts, favorable case precedent or asserted an incorrect application of law or Service policy to support her motion.

Nothing in the record of proceedings establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary had the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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 appeal to reopen or reconsider is denied. The prior decision of the AAO dated December 9, 2003 is affirmed. The petition remains denied.