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U.S. Citizenship  
and Immigration  
Services



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FILE: EAC 02 126 54145 Office: VERMONT SERVICE CENTER

Date: **SEP 16 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:



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 came now before the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed by the AAO in a decision dated October 16, 2002. The petitioner filed a motion to reconsider on March 9, 2004. The motion will be granted. The prior decisions of the director to deny the petition and of the AAO to dismiss the appeal are withdrawn. The appeal will be sustained. The petition will be approved.

The petitioner is restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. The priority date on the petition is February 5, 1999. The beneficiary's salary as stated on the labor certification is. In denying the petition the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the time of filing.

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 February 5, 1999. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour or \$39,291 per year. On the Form ETA 750B, signed by the beneficiary on January 22, 1999, the beneficiary did not claim to have worked for the petitioner.

The petitioner's evidence before the director included the petitioner's Form 1120S return for 1998, the year prior to the priority date. The tax return reported ordinary income of \$25,615. The Schedule L balance sheet attached to the petitioner's tax return for 1998 showed that current liabilities exceeded current assets. The director sent a Request for Evidence (RFE) asking for the petitioner's tax returns for 1999 or 1999 annual reports accompanied by audited or reviewed financial statement and any Form W-2 Wage and Tax Statements issued to the beneficiary for 1999. Counsel then submitted a Form 1120S return for 1999, which showed an ordinary income of \$6,344 and net current assets of negative \$148,233.

On October 16, 2002, the director denied the petition, finding the petitioner had not established its ability to pay the proffered wage of \$39,104 because its net income was \$6,344 and also because its current liabilities for 1999 (\$183,301) exceeded its current assets (\$36,068). The director further noted the petitioner had not submitted the requested<sup>1</sup> Form W-2 Wage and Tax Statement issued to the beneficiary.

On appeal the petitioner submitted a November 13, 2002 letter from the petitioner emphasizing its \$1.83 million gross income for 1999, \$9,239 as a depreciation deduction, and \$371,088 spent on payroll. "We anticipated the departure of at least two of our part-time cooks," it states, adding that the cooks' last paychecks issued on November 26, 1999 and on January 7, 2000. The cooks' Form W-2s for 1999 reported yearly wages of \$18,200, and \$32,100 respectively, which if combined, would exceed the proffered wage, it states.

On February 6, 2004, the AAO dismissed the appeal, stating the record had no evidence the two cooks would volunteer to quit early "to facilitate hiring the beneficiary." Further, assuming the cooks' wages were enough to establish ability to pay from the date of their departures, the petitioner still had to establish its ability to pay the proffered wage during the 11 months starting with the priority date until the two cooks had both departed. The AAO further rejected counsel and the petitioner's assertions that it should be able to add to the ordinary income figure its business expenses, such as amortized depreciation in 1999. In a footnote, the AAO stated that one way the petitioner could establish its ability to pay the proffered wage would be to "show that hiring the beneficiary would somehow have reduced its expenses," adding in a footnote:

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<sup>1</sup> The Form ETA 750, signed by the beneficiary on January 22, 1999, contains no claim of the beneficiary working for the petitioner.

The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

From the date the AAO dismisses an appeal, the affected party has 30 days, plus an additional three days for mailing, to file a motion to reopen or reconsider our latest decision. 8 C.F.R. §§ 103.5 and 103.5a(b).

The regulation at 8 C.F.R. § 103.5(a)(3) states as follows.

*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 [CIS] 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 regulation at 8 C.F.R. § 103.5(a)(2) states as follows:

*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. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- (i) The requested evidence was not material to the issue of eligibility;
- (ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- (iii) The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

The petitioner's motion for reconsideration was filed within 33 days of the service of the decision by the AAO. The motion is timely.

The motion fails to cite specific legal authority, but it makes an argument grounded on the structure of the employment-based provisions of the Immigration and Nationality Act. Further, this office notes that counsel's motion qualifies as a motion to reopen in that it asserts error based upon the director's or the AAO's failure to give due weight to counsel's assertion that the petitioner intended to hire the beneficiary as a replacement for existing employees. The motion to reopen also qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

The motion therefore meets the minimum requirements of a motion to reconsider. The AAO will therefore grant the motion to reconsider, and will address the issues raised in the motion concerning the merits of the case.

In the petitioner's motion to reconsider, counsel asserts that the petitioner had demonstrated just what the footnote had suggested, that its November 13, 2002 letter had identified and named the two cooks the beneficiary would replace. Further, counsel states that the two part-time cooks had worked with the understanding that "they both of them could be released if the beneficiary was authorized or otherwise legally able to take the position."

Counsel cites no authority to indicate that the decision of the AAO dismissing the appeal in this case was incorrect as a matter of law. As was stated in the AAO decision, reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

However, counsel asserts that the petitioner has met its burden by establishing that the proffered position would replace existing two part-time employees performing duties similar to those the beneficiary would perform.

Counsel is correct in stating that one way to establish the petitioner's ability to pay the proffered wage is by showing that the beneficiary will replace workers. The record here names these workers, states their wages, includes W-2 Forms for them and verifies that they worked part-time at the petitioner's restaurant. The company president's November 13, 2002 letter represents, "[W]e anticipated the departure of at least two of our part-time cooks," naming them. The record does not contain, however, any evidence corroborating that the named cooks did leave the petitioner's employ, which would be important in establishing that wages were not already being paid to at the priority date of the petition and continuing to the present. However, the record does establish that as of the priority date the petitioner stood ready to hire the beneficiary in place of the named cooks for substantially the same duties as those set forth in the Form ETA 750.

For the foregoing reasons, the petitioner's motion to reconsider/reopen establishes that the decision of the AAO was based on an incorrect application of facts and that the decision was incorrect, based upon the evidence of record at the time of that decision. See 8 C.F.R. § 103.5(a)(3).

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 motion to reconsider is granted. The prior decisions of the director to deny the petition and of the AAO to dismiss the appeal are withdrawn. The appeal is sustained. The petition is granted.