



U.S. Citizenship
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Services

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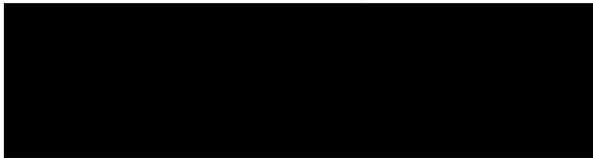


File: WAC-01-238-50778 Office: CALIFORNIA SERVICE CENTER Date: OCT 26 2001

In re: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The petitioner filed a Motion to Reopen and Reconsider the AAO determination. The matter is now before the AAO. The AAO will reopen the petition. Following reconsideration, the appeal will be dismissed.

The petitioner is a board and care home and seeks to employ the beneficiary permanently in the United States as a residence supervisor ("Board and Care Manager"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's May 7, 2002 denial, the case was denied based on the petitioner's failure to demonstrate that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on June 13, 1997. The proffered wage as stated on Form ETA 750 for the position of a residence supervisor is \$10.98 per hour, 40 hours per week, which is equivalent to \$22,838.40 per year. The labor certification was approved on July 9, 2001, and the petitioner filed the I-140 on the beneficiary's behalf on August 21, 2001.

On January 29, 2002, the Service Center issued a Request for Evidence ("RFE") for the petitioner to provide additional evidence of the petitioner's ability to pay, including tax returns, quarterly wage reports, and additional evidence to verify the beneficiary's prior experience to show that she met the requirements of the ETA 750. The petitioner responded. The director denied the petition on May 2, 2002 and the petitioner appealed to the AAO.

The AAO reviewed the decision and new evidence submitted on appeal pursuant to *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Following review, the AAO issued a determination on July 16, 2003, which concluded that the petitioner had not demonstrated its ability to pay the beneficiary from the priority date until the beneficiary obtained permanent residence. The AAO determination reviewed all the evidence submitted, including new evidence submitted on appeal: the determination reviewed wages paid to the beneficiary (insufficient to demonstrate the petitioner's ability to pay); the petitioner's Forms 990-EZ showing exemption from income taxes as a not for profit organization (which demonstrated that the petitioner's expenses exceeded the petitioner's revenue); the determination considered copies of bank statements submitted, both for the petitioner (which failed to demonstrate that the bank statements reflected additional funds than those listed on the Forms 990-EZ), and the bank statements submitted for the petitioner's President (unrelated to the petitioner's ability to pay).

The petitioner then filed a Motion to Reopen/Reconsider. Pursuant to 8 C.F.R. § 103.5(a)(3) 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 must, when filed, also establish that the decision was incorrect based on the evidence of the record at the time of the initial decision."

Counsel provides in its Motion to Reopen/Reconsider that "a careful analysis of the taxes indicates that the Petitioner's revenue has steadily increased from 1997 to 2001." Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and provides that "in the case at bar the court stated that an important consideration was a Petitioner's expectation of continued profit. The service seems to ignore that the Petitioner has been in business for over 10 years and expects to continue in business for many years to come." As counsel asserts that the Service erred in its application of the law and cites to precedent, we will grant the petitioner's Motion to Reopen.

Regarding the precedent that counsel cites, *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years, but must be viewed in comparison to a petitioner's prior profitable or successful years. The petitioner in *Sonogawa* provided evidence to show that the petitioner had sustained significant expenses in one year related to the relocation of the business, and an increase in rent, which accounted for the petitioner's decrease in ability to pay the required wages.

In the case at hand, the petitioner's tax returns were reviewed by the Service Center and the AAO. The Forms 990-EZ reflected that the petitioner's expenses continually exceeded its revenue. Therefore, while the petitioner's revenue may have increased as the petitioner asserts, the petitioner has not demonstrated a reduction in expenses to the level necessary to demonstrate sufficient funds remaining to show the petitioner's ability to pay the beneficiary the proffered wage. Further, both the Service and the AAO will consider a petitioner's length of time in business under a *Sonogawa* analysis of the petitioner's ability to pay the proffered wage. However, a petitioner's expectation that it will remain in business, or that the business has remained operational is insufficient to demonstrate its ability to pay the proffered wage.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner raises the additional points that it has employed the beneficiary and submitted evidence regarding payment to the beneficiary. This point was addressed by both the Service Center decision and the prior AAO determination. The petitioner has submitted no further documentation related to this point. As noted in both prior decisions, the amounts that the petitioner demonstrated that it paid to the beneficiary (\$3,708 in the year 2001, and \$1,355 in the year 2000), were insufficient to demonstrate the petitioner's ability to pay the beneficiary the proffered wage of \$22,838.40 per year.

As a final point, the petitioner references bank statements submitted, which it asserts demonstrates that the petitioner had the ability to pay the proffered wage. Similarly, this point was addressed in the prior AAO determination. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements reflected additional available funds that were not reflected on its tax return.

Accordingly, the motion to reopen/reconsider is granted and the petition is reopened. Following reconsideration of the petitioner's additional arguments, we find that the petitioner has failed to overcome the reasons for the petition's denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.