

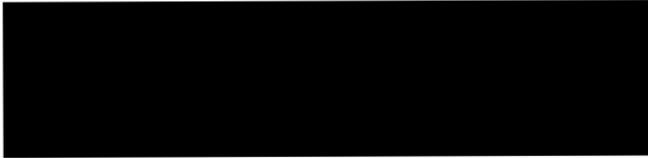
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**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date:
EAC 04 075 50970

JUL 02 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The director, Vermont Service Center, denied the preference visa petition based on the petitioner's failure to respond to the director's Notice of Intent to Deny the petition (NOID) dated September 26, 2005. On appeal, counsel stated that the NOID¹ was not received by counsel, the petitioner, or the beneficiary except as an attachment to the director's denial decision and asked that the case be reopened.² The matter is presently before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded to the director to issue a substantive decision after considering submissions on appeal intended as a response to the NOID.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty food 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 in the NOID stated that Citizenship and Immigration Services (CIS) intended to deny the instant petition. The director stated that the beneficiary's previous I-1485 Application to Adjust Status, and the Form ETA 750 submitted with the instant petition contained conflicting information with regard to the beneficiary's prior employment as a cook, which called into question whether the beneficiary had the requisite two years of relevant work experience. The director noted that the previous proceedings for the first Form I-485 filed by the beneficiary included a letter from a gas station owner that indicated the beneficiary was working for the gas station during March 1998. The director also noted that the beneficiary did not include this employment experience in the Form ETA 750 submitted with the instant petition. The director also noted that the record indicated a prior marriage that the beneficiary did not note on his G-325 submitted with the second I-485 filed concurrently with the instant I-140 petition.

The director questioned the petitioner's documents submitted to the record entitled "Paystub Details" and requested documentary evidence to support the beneficiary's prior employment, such as W-2 forms, for the years 1998, 1999, and 2000 or copies of canceled checks for the beneficiary's wages. The director also requested IRS certified copies of the beneficiary's tax returns for the years 1998, 1999, and 2000, and IRS certified copies of the petitioner's quarterly federal returns for the first two quarters of 1995 and all quarters of 1994, to include all pages and attachments/schedules.³ The NOID included no instructions on the time period within which the petitioner should respond to the document, and the document was not signed. On February 13, 2006, the director subsequently denied the petition based on the petitioner's failure to respond to the director's NOID.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The petitioner states on the I290B and in a brief submitted with the appeal that the NOID was not received by either the petitioner, counsel or the beneficiary.⁴ The AAO notes that the director's NOID

¹ The AAO notes that this document does not follow the usual format of a NOID and seems to be a Request for Further Evidence.

² Counsel also submitted documentation as to enquiries made with regard to the processing of the I-140 following the petitioner's response to a request for further evidence from the director dated March 24, 2005. The record indicates that the director also sent a request for further evidence also dated March 24, 2005 with regard to the petitioner's I-485 petition. The record contains the petitioner's responses to both RFEs issued on March 24, 2005.

³ The record is not clear as to why the director requested this final 1994 and 1995 tax documentation, as the priority date for the instant petition is April 30, 2001.

⁴ The petitioner also submitted further evidentiary documentation with regard to the beneficiary's wages as

primarily focuses on the beneficiary's qualifications for the proffered position, which was not explicitly addressed in either previous RFE. The AAO also notes that although the director requested further information on the petitioner's ability to pay the proffered wage in one of the RFEs dated March 24, 2005, the director did not address this issue in the NOID or in his final decision. Although the petitioner had responded to two RFEs that addressed the beneficiary's wages and the petitioner's ability to pay the proffered wage, the director did not contain any analysis of the petitioner's ability to pay the proffered wage in his decision. Further the AAO notes that the issue of the beneficiary's prior marriage, as addressed by the director in the NOID, does not appear relevant to the issues in this immigrant visa adjudication.

Upon review of the record, the AAO does not find the NOID upon which the director based his February 13, 2006 decision to be a sufficient basis for the denial of the instant petition. There is no final decision from the director in the record as to the merits of the I-140 petition with regard to the petitioner's ability to pay the proffered wage or the beneficiary's qualifications to perform the duties of the proffered position. There is no further analysis of any documentation submitted by the petitioner or counsel in response to earlier requests for further evidence.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of both the petitioner's ability to pay and the beneficiary's qualifications. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

they pertain to the petitioner's ability to pay the proffered wage.