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U.S. Citizenship
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FILE:



SRC-07-283-57682

Office: TEXAS SERVICE CENTER

Date:

MAR 03 2009

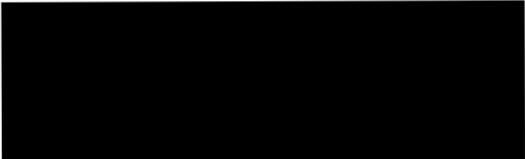
IN RE:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition and a subsequent motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the petition will be remanded for further action and entry of a new decision.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian specialty cook. On September 22, 2008, the director denied the petition, finding 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. The director further found that the petitioner had not demonstrated that the beneficiary had the qualifications stated on the Form ETA 750, Application for Alien Employment Certification, as certified by the Department of Labor (DOL). The petitioner filed a Motion to Reopen and a Motion to Reconsider the decision. On November 20, 2008, the director denied the motion. The director found that the petitioner had failed to establish that it had the ability to pay the proffered wage in 2006 and 2007. The director further found that the petitioner had failed to provide an original copy of the Form ETA 750 certified by the DOL.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 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 DOL. *See* 8 C.F.R. § 204.5(d). 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 DOL 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 June 9, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$34,379.80 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel has submitted a brief and copies of the Form 1099-MISC issued by the petitioner to the beneficiary for the years 2006 and 2007. Other relevant evidence in the record includes copies of the Form 1099-MISC issued by the petitioner to the beneficiary for the years 2001 through 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the I-140 petition the petitioner claimed to have been established in 1997 and to currently have three employees. On the ETA 750B, signed by the beneficiary on June 13, 2001, the beneficiary claimed to have worked for the petitioner since March of 2001.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted copies of Form 1099-MISC, Miscellaneous Income, issued to the beneficiary for the years 2001 through 2007. The amounts that the petitioner paid the beneficiary during the years 2001 through 2007 are listed in the table below.

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).

<u>Year</u>	<u>Wages Paid</u>
2001	\$43,288.00
2002	\$44,555.00
2003	\$45,920.00
2004	\$49,633.00
2005	\$52,550.00
2006	\$54,885.00
2007	\$56,995.00

These 1099-MISC forms establish that the petitioner paid the beneficiary in excess of the proffered wage in each year from 2001 through 2007. Therefore, the evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

As noted above, the director found, in his November 20, 2008 decision, that the petition could not be approved because of the absence of an original labor certification from the Department of Labor.² An original, certified labor certification is required for approval of an I-140 petition filed on behalf of qualified immigrant under section 203(b)(3)(A)(i) of the Act. However, on appeal, counsel states that the original labor certification application was submitted with the I-140 petition. Further, even where an original labor certification is absent from the record, the director may request a duplicate labor certification from the DOL. The regulation at 8 C.F.R. § 656.30(e)(1) states that the Certifying Officer from the DOL “shall issue a duplicate labor certification at the written request of a Consular or Immigration Officer. The Certifying Officer shall issue such duplicate labor certifications only to the Consular or Immigration Officer who initiated the request.”

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. Therefore, the decision of the director is withdrawn and the case is remanded to the director for the purpose of obtaining a duplicate labor certification from the DOL as well as issuance of a new final 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.

² The director did not note the lack of an original labor certification application in the September 22, 2008 decision.