

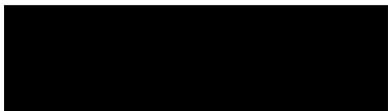
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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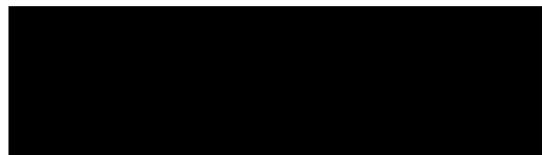
Date: **APR 27 2012** Office: NEBRASKA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.


Thank you,
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion is granted, the previous decision of the AAO to dismiss the appeal is withdrawn, and the appeal will be sustained.

The petitioner is an individual that seeks to employ the beneficiary permanently in the United States as a housekeeper. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had failed to submit evidence establishing that it had the continuing ability to pay the proffered wage to the beneficiary since the priority date. The director further determined that the petitioner had failed to submit sufficient evidence demonstrating that the beneficiary had the education, training and experience required by the labor certification.

The AAO subsequently determined that there was insufficient evidence in the record to show that the petitioner had the continuing ability to pay the proffered wage to the beneficiary since the priority date. The AAO further determined that the petitioner failed to demonstrate that the beneficiary possessed three months of experience in the offered job of housekeeper as required by the Form ETA 750. The AAO dismissed the appeal on November 22, 2010, and petitioner subsequently filed a motion to reconsider the decision with the AAO on December 22, 2010.

As set forth in the director's denial and the AAO's decision, the first issue to be considered in this case is whether or not the petitioner has the continuing ability to pay the proffered wage to the beneficiary since the priority date.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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 either 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 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour or \$20,800.00 per year.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

The record contains cancelled checks for 2001 to 2006, January 2007 to August 2007, January 2008 to October 2009, and May 2010 through December 2010, representing employee compensation paid by the petitioner to the beneficiary, the Forms 1040, U.S. Individual Income Tax Return, of the petitioner and her spouse from 2001 to 2007, bank account statements, and the deed for the home of the petitioner and her spouse.

An examination of wages paid to the beneficiary, the annual household adjusted gross income of the petitioner and her spouse, and the household assets of the petitioner and her spouse demonstrate that it is more likely than not that the petitioner and her spouse possess the continuing ability to pay the beneficiary the proffered wage of \$20,800.00 since the priority date. Therefore, the AAO is persuaded that the petitioner has the ability to pay the salary offered as of the priority date and continuing to present.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). As noted above, the priority date of the petition is April 25, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The Form ETA 750 reflected that the proffered position of housekeeper required no education, no training, and three months experience in the offered job. On the Form ETA 750B, the beneficiary claimed to have been employed as a housekeeper by [REDACTED] from January 1997 to August 1998, and by the petitioner from February 2001 up through April 21, 2001, the date the beneficiary signed the Form ETA 750B.

The record contains an employment letter signed by [REDACTED] who stated that the beneficiary had been employed in her household as a nanny and housekeeper and she had found the beneficiary to be hard-working, competent, trustful, and devoted. The record also contains a letter and an affidavit from the petitioner indicating that she had employed the beneficiary as a housekeeper beginning in February 2001 up through the present. These documents tend to corroborate the prior work experience listed by the beneficiary on the Form ETA 750B that she signed on April 21, 2001. Consequently, it must be concluded that the beneficiary possessed the

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

required three months of experience in the offered job of housekeeper as listed on the Form ETA 750 as of the priority date of April 25, 2001.

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 with respect to both of the issues discussed above.

ORDER: The motion is granted. The AAO decision dated November 22, 2010 is withdrawn. The appeal is sustained, and the petition is approved.