

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



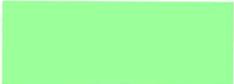
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 23 2013**

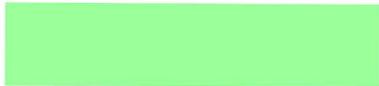
OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE:

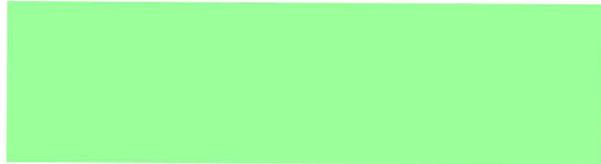
Petitioner:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal on January 11, 2013. The matter is again before the AAO on a motion to reopen and motion to reconsider. The motion to reopen will be granted. The motion to reconsider will be granted. The matter will be remanded to the director for issuance of a new decision.

The petitioner describes itself as a resort. It seeks to employ the beneficiary permanently in the United States as a guest services manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (priority date – December 19, 2003) approved by the United States Department of Labor (the DOL). The director determined 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 denied the petition accordingly. The AAO then dismissed a subsequent appeal on the same grounds (decision dated January 11, 2013). The matter now being considered is the petitioner's motion to reopen and motion to reconsider filed on February 12, 2013. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The regulation at 8 C.F.R. § 103.5 provides in pertinent part that “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.” “New” facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion to reconsider must: (1) 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 [USCIS] policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner's motion to reopen and motion to reconsider are granted. The petitioner submitted additional documentation in support of the record. Relevant documentation included the petitioner's 2009, 2010 and 2011 tax returns and the beneficiary's 2009, 2010 and 2011 W-2 Forms showing wages paid by the petitioner to the beneficiary. The petitioner also submitted documentation in support of a claim of fire loss to its business premises in April of 2006. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioner has also stated reasons for reconsideration which, when considered with the additional evidence submitted in support of the petitioner's motion to reopen and motion to reconsider, warrant a reconsideration of the AAO's prior decision. These proceedings are reopened and the AAO's decision dated January 11, 2013 shall be reconsidered.

The 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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). The priority date of the petition is December 19, 2003, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The Immigrant Petition for Alien Worker (Form I-140) was filed on March 12, 2008.

Upon review of the entire record, including evidence submitted on appeal and with the petitioner's motion to reopen and reconsider, the AAO concludes that the petitioner has established that it is more likely than not that the petitioner has maintained the continuing ability to pay the proffered wage from the priority date onward based on the totality of the petitioner's circumstances. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The AAO's decision of January 11, 2013 is withdrawn upon reconsideration.

It is noted, however, that the Form ETA 750 requires a Bachelor's degree in hotel and restaurant management plus one year of experience in the related occupation as a concierge. The following special requirements are also stated for the position on the Form ETA 750, box 15:

- Demonstrated ability to communicate effectively in both spoken and written English and Spanish;
- Demonstrated ability to effectively manage guest services and staff; and
- Demonstrated ability to respond to guest requests and complaints.

The Form ETA 750 lists the beneficiary's work experience as follows:

- Employed by the petitioner from January 1999 to the date of signature on the labor certification (December 15, 2003) as the manager of guest services;
- Employed by [REDACTED] from 1995 to 1998 as the Chief Concierge.

The AAO finds that the petitioner has submitted sufficient documentation to establish that the beneficiary has the foreign equivalent of a U.S. Bachelor's degree Restaurant Management. The petitioner must also establish that the beneficiary has one year of experience as a concierge as required by the labor certification. The petitioner submitted an employment letter from the human

resource manager of [REDACTED] which states that the beneficiary was employed by that organization from November 14, 1994 until November 14, 1997. The duties of the beneficiary, as stated in the letter, are set forth as follows:

It should also be mentioned that [the beneficiary] supported the opening of the Hotel, as well as the standardization of the duties of Concierge, he worked a few months as receptionist, later he was promoted to Chief Concierge.

The employment letter does not establish that the beneficiary has one year of experience as a concierge as required by the labor certification in that the letter states employment dates which conflict with the dates attested to by the beneficiary on the Form ETA 750. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Further, the letter does not state whether the beneficiary worked on a full-time basis as a concierge for a period of at least one year. As the petitioner was not previously given an opportunity to respond to these concerns, this matter shall be remanded to the director to determine whether the beneficiary has one year of experience as a concierge as well as the special skills as required by the Form ETA 750. The director may ask the petitioner to address these concerns in an RFE and take any further action deemed appropriate in the adjudication of this issue.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.