

(b)(6)

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

DATE: **AUG 29 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

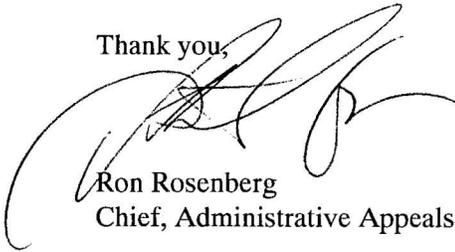
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[REDACTED]

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

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


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 April 20, 2012. On May 31, 2012, the petitioner filed a motion to reopen and a motion to reconsider the AAO's April 20, 2012 decision. On May 20, 2013, the AAO granted the petitioner's motion to reopen and motion to reconsider the AAO's decision of April 20, 2012, reopened the proceeding and reconsidered its prior decision based on all evidence of record then issued a decision affirming its prior decision denying the petition. The matter is again before the AAO on a motion to reconsider. The matter will be reconsidered based on all evidence of record. Upon review of the matter, the AAO's prior decisions of April 20, 2012 and May 20, 2013 are affirmed. The petition remains denied.

The petitioner is a restaurant establishment. It seeks to employ the beneficiary permanently in the United States as a "Cook, Italian Specialty." As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to submit the initial required evidence to establish: (1) that the petitioner had the ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition; and, (2) that the beneficiary had the required experience for the position offered. As noted above, the AAO dismissed an appeal by the petitioner finding that the petitioner failed to establish its ability to pay the beneficiary's proffered wage and that the petitioner failed to establish the beneficiary had the required experience for the position offered and affirmed its decision dismissing the appeal on the petitioner's motion to reopen and reconsider.

The record shows that the motion to reconsider is properly filed. 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.

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).

Counsel states, on motion, that the petitioner has maintained the continuing ability to pay the proffered wage from the priority date onward and that the beneficiary has two years of experience in the proffered position as required by the labor certification.

The petitioner submits, for the first time with its motion to reconsider, a copy of a purported employment agreement signed by the petitioner's owner and the beneficiary on April 19, 2001 wherein the petitioner agreed to sponsor the beneficiary as an "Italian Specialty Cook," paying the beneficiary \$450 per week to work on an "as needed" basis until the beneficiary obtained a taxpayer identification number. The agreement further provided that upon approval of a labor certification, the beneficiary would then be paid the sum of \$607.20 per week. The petitioner states that "[i]f [the beneficiary] was paid in accordance with our agreement of \$450.00 per week, [the petitioner's tax returns] profit for 2001 of \$20,767 would have proved [the 'petitioner's] ability to pay [the

beneficiary's] wages, as of the contract date of April 26, 2001." First, the petitioner's ability to pay the proffered wage has been in issue since the director initially denied the petition on September 18, 2008. The ability to pay was also central to the AAO's denial of the initial appeal and a subsequent motion to reconsider. It seems suspect that the parties now remember this agreement for the first time at this stage of the proceedings. This lessens the credibility of the asserted agreement and it will not establish the petitioner's ability to pay the proffered wage during 2001. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Further, the petitioner's owner does not state that he paid the beneficiary \$450 per week under that agreement, but contends that "if" the beneficiary had been paid that sum under the terms of the agreement he would have been able to establish the ability to pay the proffered wage in 2001. The petitioner has not established its ability to pay the proffered wage in 2001, the year of the priority date.

The petitioner submitted additional documentation in support of its motion to reconsider (W-2 Forms showing that it paid the beneficiary at least the proffered wage in 2008 through 2012, and 2013 pay stubs showing that it was paying the proffered wage during that year; the W-2 Form submitted by the petitioner for 2007 does not show wages paid which equal or exceed the proffered wage). Thus, the record does not establish that the petitioner had the ability to pay the proffered wage in 2007 either. It must be further noted that even though the petitioner submitted the aforementioned W-2 Forms for years 2008 through 2012, the record does not contain copies of the petitioner's tax returns for those years to assess the petitioner's continuing growth, if any. *See also* 8 C.F.R. § 204.5(g)(2) wherein it is stated that "[t]he petitioner must demonstrate [the ability to pay the proffered wage] 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."

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the

petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the AAO's May 20, 2013 decision it was noted that the petitioner failed to state on the Form I-140 its date of establishment or number of employees. It was also noted that the petitioner's tax returns reflect low officer compensation paid and low wages paid in any year (although tax returns reflect some cost of labor paid). Although the petitioner has apparently been in operation since 1997 the record contained no information about the petitioner's reputation in the industry. The petitioner did not provide any new information with its motion relative to these issues and the AAO must again conclude that the petitioner has not established any unusual circumstances to parallel those in *Sonegawa* and that assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date onward. As noted above, the record lacks the petitioner's tax returns for 2008 to 2012, which might allow the AAO to assess the petitioner's continued growth.

The petitioner also submitted, in support of its motion to reconsider, a letter from one of its suppliers to show that in the industry, it is customary for the cook of a small to medium sized restaurant to plan menus and order food. As noted by the AAO in its previous decisions, however, the experience letter provided by the petitioner from [REDACTED] states that the beneficiary worked for that organization from February 5, 1995 until November 8, 1997 as a cook preparing national and international dishes "such as Italian and Portuguese." In addition to those duties the beneficiary used kitchen appliances and tools, planed the menu and ordered foodstuffs on a daily basis. These duties would appear to be in line with the duties of a cook. The labor certification, however, specifically requires the petitioner to have two years of experience as an Italian Specialty Cook, performing the following duties:

Responsible for preparing, seasoning and cooking of Italian specialty foods such as pollo con provatura, pollo piccata, filetti de sogliola ambrosiana, salmon alla griglia al senape, saltimbocca alla romana, scaloppini de vitello Bolognese, maiale con salsa snape, etc. Estimate food consumption.

As stated in the above referenced experience letters, the beneficiary prepared both national and international dishes such as Italian and Portugese dishes. Thus, the evidence does not establish that the beneficiary had two years of full-time experience as an Italian Specialty Cook as required by the labor certification in that the beneficiary worked as a cook generally preparing a variety of foods, not just Italian specialty foods. It is not possible to ascertain from the experience letter presented how much of the beneficiary's experience from February 5, 1995 until November 8, 1997 involved full-time work as an Italian Specialty Chef (for example, what per cent of the beneficiary's work hours were devoted to cooking Italian Specialty dishes) as required by the terms of the labor certification. Nothing submitted on motion overcomes these concerns in order to establish that the beneficiary has two full years of full-time experience as an Italian Specialty Cook. The labor

certification does not allow an individual to qualify based on any related occupation such as a general cook (no specialty).

The motion to reconsider must be dismissed as the petitioner has not stated reasons for reconsideration supported by any pertinent precedent decisions which establish that the AAO's May 20, 2013 decision was based on an incorrect application of law or [USCIS] policy. Nor did the petitioner establish that that the AAO's 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).

ORDER: The motion to reconsider is dismissed. The previous decisions of the AAO dated April 20, 2012 and May 20, 2013 are affirmed. The petition remains denied.