

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: JUN 04 2013 OFFICE: TEXAS SERVICE CENTER

FILE:

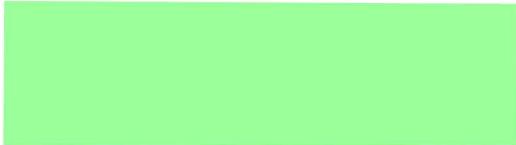


IN RE: Petitioner:
Beneficiary:



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 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.

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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). The appeal was dismissed by the Chief, Administrative Appeals Office (AAO). The case is now before the AAO on a motion to reopen and reconsider. The motion will be granted, and the appeal sustained.

The petitioner is an Italian restaurant. It seeks to permanently employ the beneficiary as a cook and to classify him as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). The petition, Form I-140, is accompanied by an Application for Alien Employment Certification, Form ETA 750, certified by the U.S. Department of Labor (DOL).

On February 25, 2008, the Director denied the petition on the ground that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage from April 23, 2001 (the priority date of the petition) up to the present. Specifically, the Director found that the petitioner had not established its ability to pay the proffered wage in the year 2005.

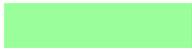
On August 26, 2011, the petitioner filed a motion to reopen and reconsider. Because this motion was accompanied by new evidence, the motion will be granted. See 8 C.F.R. § 103.5(a)(2). The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 203(b)(3)(A)(i) of the Act 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. 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 Dec. 158 (Act. Reg. Comm. 1977). The petitioner must also establish its continuing ability to pay the proffered wage to the beneficiary from the priority date up to the present. See 8 C.F.R. § 204.5(g)(2). The priority date of the instant petition is April 23, 2001, which is the date the underlying 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 April 26, 2007.

In its initial decision, dated July 27, 2011, the AAO affirmed the Director's finding on the ability to pay issue and dismissed the appeal. Based on additional evidence submitted in support of its motion to reopen and reconsider, however, the AAO determines that the petitioner has established that it more likely than not had the continuing ability to pay the proffered wage from the priority date up to the present. The AAO also determines that the beneficiary had all the education, training, and experience specified on the Form ETA 750 as of the priority date. Accordingly, the petition is approved under section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), for classification of the beneficiary as a skilled worker.

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

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ORDER: The motion to reopen or reconsider is granted. The AAO's July 27, 2011 decision is withdrawn. The appeal is sustained. The petition is approved.