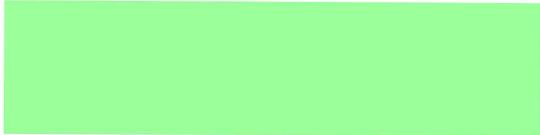


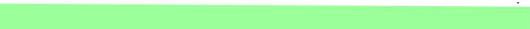


U.S. Citizenship
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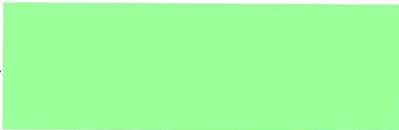


Date: Office: TEXAS SERVICE CENTER FILE: 
MAR 27 2013

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On May 3, 2011 the Administrative Appeals Office (AAO) dismissed the appeal and affirmed the decision of the Director, Texas Service Center (the director), to revoke the petition. The petitioner has now filed a motion to reconsider the AAO's decision to revoke the petition's approval. The motion will be granted, and the appeal will be reconsidered. Upon reconsideration, the appeal will be dismissed, and the approval of the petition will remain revoked.

The petitioner is a restaurant.¹ It seeks to employ the beneficiary permanently in the United States as a cook, 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).² 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 petition was initially approved on August 11, 2003 by the Vermont Service Center, but the director revoked the approval of the petition. The director concluded that the petitioner failed to establish that the beneficiary had the requisite work experience in the job offered as of the priority date.

The petitioner subsequently appealed the director's decision to the AAO. Upon review, we dismissed the appeal because the petitioner failed to establish the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives lawful permanent residence. On motion to reconsider, the petitioner submitted additional evidence to demonstrate its continuing ability to pay the beneficiary's proffered wage from the priority date.

The record shows that the motion to reconsider is properly filed, timely and states specific reasons for reconsideration. The AAO conducts this 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 in this proceeding.³

A motion to reconsider must 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 U.S. Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(2). A

¹ The petitioner is a franchisee of Wendy's Old Fashion Hamburgers (Wendy's) in Massachusetts.

² 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.

³ 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).

motion to reconsider a decision on an application or petition must, when filed, also 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).

As stated earlier, to be eligible for approval, the petitioner must establish by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date until the beneficiary obtains legal permanent residence. See 8 C.F.R. § 204.5(g)(2). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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).

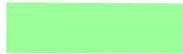
The priority date of the petition is June 22, 2001, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d). The rate of pay or the proffered wage specified on the Form ETA 750 is \$13.01 per hour or \$23,678.20 per year (based on a 35-hour work per week).⁴ In the Form ETA 750, the petitioner specifies that all job applicants, in order to qualify for the position should have a minimum of two years of work experience in the job offered.

On motion to reconsider, counsel for the petitioner maintains that it has the continuing ability to pay the proffered wage from the priority date and urges the AAO to consider the additional evidence submitted. As the motion to reconsider states a specific reason for reconsideration and is supported by additional evidence, the motion will be granted, and the appeal reconsidered.

Upon review of the entire record, including evidence submitted on motion, the AAO is not persuaded that the petitioner has the ability to pay the proffered wage of \$13.01 per hour or \$23,678.20 per year from April 19, 2001.

The record contains Internal Revenue Service (IRS) Forms W-2 Tax and Wage Statement issued by the petitioner to the beneficiary from 2001 to 2009. The AAO in its May 2011 decision erroneously accepted all of the IRS Forms W-2 as evidence of the petitioner's ability to pay. However, the IRS Forms W-2 for the years 2001 and 2002 issued by the petitioner to the beneficiary contain a social security number (xxx-xx-1077) that does not appear to belong to the beneficiary. The record contains a copy of the beneficiary's social security statement reflecting xxx-xx-8099 and IRS Taxpayer Identification Number (ITIN) as xxx-xx-0068. Because the record does not reliably establish the identity of the recipient of the wages, the AAO will not consider the wages on the IRS Forms W-2 for 2001 and 2002. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the

⁴ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).



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remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Based on the evidence of record, the beneficiary received the following wages from the petitioner:

<i>Tax Year</i>	<i>Actual wage (AW) (Box 1, W-2)</i>	<i>Yearly Proffered Wage (PW)</i>	<i>AW minus PW</i>
2003	\$29,788.49	\$23,678.20	Exceeds PW
2004	\$32,051.95	\$23,678.20	Exceeds PW
2005	\$36,118.21	\$23,678.20	Exceeds PW
2006	\$39,448.44	\$23,678.20	Exceeds PW
2007	\$43,330.98	\$23,678.20	Exceeds PW
2008	\$45,909.32	\$23,678.20	Exceeds PW
2009	\$54,109.55	\$23,678.20	Exceeds PW

The petitioner has established that it employed the beneficiary from 2003 to 2009, at or above the proffered wage. The record does not contain any other evidence of the petitioner’s ability to pay. Therefore, the petitioner has failed to establish the ability to pay in 2001 and 2002.

Concerning the beneficiary’s qualifications for the position, the AAO finds that the record does not support the petitioner’s contention that the beneficiary had the requisite work experience in the job offered before the priority date. Consistent with *Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, as stated earlier, the Form ETA 750 was filed and accepted for processing by the DOL on June 22, 2001. The name of the job title or the position for which the petitioner seeks to hire is “Cook.” Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, “Prepare all types of dishes.” Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

In the May 2011 decision, the AAO found that the inconsistencies in the record with regard to the beneficiary’s qualifications were either immaterial and/or resolved. However, upon further consideration, we withdraw that decision and find that the petitioner has not established that the beneficiary possessed the minimum experience required for the proffered position for the following reasons.

First, the beneficiary failed to list her qualifying employment in Brazil on her Biographic Information, Form G-325, under the section eliciting information about her work experience abroad. Further, the beneficiary listed on the Form G-325 that she started to work for the petitioner in 1999; however, the letter from the petitioner submitted in response to the director’s

Notice of Intent to Revoke (NOIR) stated that the beneficiary started her employment with the petitioner in November 1998.

Additionally, none of the letters of employment verification from [REDACTED] the former owner of the restaurant in Brazil, complies with the regulations at 8 C.F.R. §§ 204.5(g)(1) and (1)(3)(ii)(A), in that none contains the a sufficient description of the beneficiary's job duties. Simply stating the beneficiary worked as a cook in charge of preparing food is not sufficient for purposes of describing the experience or the training received by the beneficiary and does not establish the reliability of the assertion.

We further note that the business where the beneficiary claimed to have worked as a cook in Brazil from January 1994 to December 1997 was, according to the CNPJ printout, still active in 2005.⁵ In his statement dated July 6, 2009, Mr. [REDACTED], the former owner of [REDACTED], stated that the company "is no longer in activity since 2003."

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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The record does not contain any independent objective evidence establishing the beneficiary's qualifications for the job offered in this case.

Furthermore, Mr. [REDACTED] wrote or typed his sworn statement dated July 6, 2009 on the company's letterhead, as if the business were still active, when he states that the business closed in 2003. 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. *Id.*

When requested to submit independent objective evidence, such as copies of pay stubs, payroll records, and so forth from the beneficiary's former employer in Brazil, the beneficiary stated in her signed statement that she no longer has any proof to show that she worked as a cook in Brazil, because her house where she and her family used to reside in Brazil had termite and water problems and as a consequence, all of the evidence such as pictures was destroyed. Counsel for the petitioner (and the beneficiary) added that due to passage of time, it is unreasonable and overly burdensome for the beneficiary to produce such evidence.

If primary or independent objective evidence, i.e. pay stubs, etc., is unavailable, the petitioner can submit secondary evidence. USCIS regulations at 8 C.F.R. §§ 103.2(b)(2)(i) and (ii) allow USCIS to accept secondary proof in the event that the primary evidence is not available. The

⁵ CNPJ or Cadastro Nacional da Pessoa Juridica is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ. The Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

regulations further state, "If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances." 8 C.F.R. § 103.2(b)(2)(i). Here the petitioner has not submitted any secondary evidence.

The signed statement from [REDACTED] the beneficiary's former co-worker, alone is not sufficient to demonstrate the beneficiary's qualifications in this case. She may have personal knowledge of the beneficiary's prior experience as a cook in Brazil, but she was, as she stated in her statement, there for a short time. She did not specify when or how short (or long) she worked at [REDACTED], nor did she corroborate the beneficiary's dates of employment there.

Therefore, the petition is dismissed, with each considered as an independent and alternative basis for the decision. 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 not met that burden. For the reasons stated above, the appeal must be dismissed.

ORDER: The motion is granted; upon reconsideration the appeal is dismissed, and the approval of the petition remains revoked.