

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: ~~MAY 2 2013~~ MAY 2 2013

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:

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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** On November 1, 2012 the Administrative Appeals Office (AAO) dismissed the appeal and affirmed the decision of the Director, Texas Service Center (the director) to revoke the petitioner's approval. The petitioner has now filed a motion to reopen the AAO's decision to revoke the petitioner's approval. The motion will be granted, the appeal will be sustained, and the petitioner's approval will be reinstated.

The petitioner is a retail store. It seeks to employ the beneficiary permanently in the United States as an assistant retail manager. 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 December 12, 2004 by the Vermont Service Center, but the director revoked the approval of the petition on June 13, 2012. The director concluded that the petitioner failed to show that it followed the DOL regulations on recruiting eligible U.S. workers, that it has the ability to pay the proffered wage from the priority date, and that the beneficiary possessed the minimum requirements for the job offered.

The petitioner subsequently appealed the director's decision to the AAO. Upon review, the AAO 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 reopen, the petitioner maintains that it has the ability to pay the proffered wage from the priority date and submits additional evidence to demonstrate its continuing ability to pay the beneficiary's proffered wage from the priority date.

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.

The record shows that the motion to reopen 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). A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

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 April 2, 2003, 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 \$10.10 per hour or \$18,382 per year (based on a 35-hour work per week).<sup>1</sup> 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 reopen, counsel for the petitioner states that the petitioner intends to continuously employ the beneficiary and that it has the ability to pay \$10.10 per hour or \$18,382 per year. Counsel also urges the AAO to consider the additional evidence submitted. The motion to reopen is granted, and the matter will be reopened and reviewed.

Upon review of the entire record, including evidence submitted on motion, the AAO is persuaded that the petitioner has the ability to pay the proffered wage of \$10.10 per hour or \$18,382 per year from April 2, 2003, and that the beneficiary is qualified to perform the duties of the position. 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.

**ORDER:** The motion is granted. The AAO's November 1, 2012 decision is withdrawn. The appeal is sustained, and the petition's approval is reinstated.

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<sup>1</sup> 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).