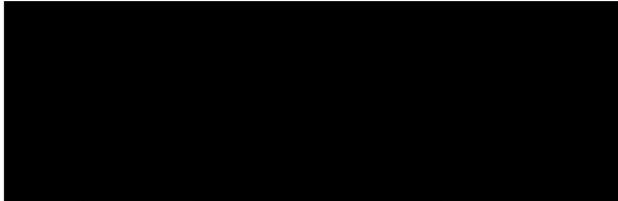


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U.S. Citizenship
and Immigration
Services

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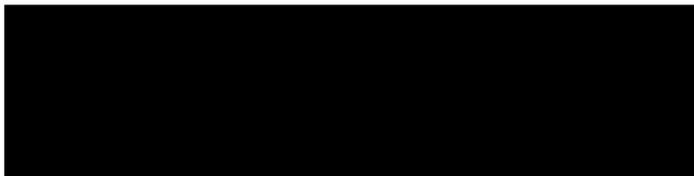
Office: NEBRASKA SERVICE CENTER

Date: OCT 02 2006

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

Cc: Soondong Choi
900 River Drive, Suite 200
Glenview, IL 60025

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO issued a decision on January 24, 2006, and ordered the appeal dismissed, upholding the director's decision that the petitioner had not established the ability to pay the beneficiary the proffered wage. The petitioner¹ brought suit in United States District Court. Based on an agreement between the parties, the AAO will reopen and remand the decision back to the director for further consideration of the petitioner's ability to pay the beneficiary the proffered wage.

The petitioner is a Korean newspaper and seeks to employ the beneficiary permanently in the United States as an Economic Reporter. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's June 21, 2004 denial, the case was denied for two reasons: based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence; and for failure to document that the beneficiary met the requirements of the certified Form ETA 750.

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 regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ We note that prior to the petitioner's action in District Court, the petitioner was represented by a different attorney. Since the record does not contain current information regarding that attorney's status as a representative of the petitioner, a copy of this decision will be sent to both the attorney representing the petitioner in the District Court proceedings and the petitioner's initial attorney who represented it in the proceedings before CIS.

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on June 18, 2003.² The proffered wage as stated on the Form ETA 750 is \$20.00 per hour, 40 hours per week, for an annual salary of \$41,600, with a designated over time rate of \$30.00 per hour. The labor certification was approved on November 10, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on January 27, 2004.

The Service Center issued a Request for Additional Evidence ("RFE") for the petitioner to submit additional evidence and clarification related to the petitioner's ability to pay, and the exact petitioning entity. The RFE also sought additional evidence related to the beneficiary, and whether the beneficiary met the requirements of the certified ETA 750. The RFE specifically requested that the petitioner submit evidence: to document the beneficiary's name change; to demonstrate that the beneficiary completed four years of college education in the designated field of study; and to demonstrate that the beneficiary had the required two years of prior experience in the related occupation.

The petitioner responded to the RFE and following the director's review, the director determined that the evidence submitted in response to the RFE was insufficient to demonstrate the petitioner's ability to pay the beneficiary the proffered wage, as well as to demonstrate the beneficiary's qualifications. The director denied the case on June 21, 2004.

On July 22, 2004, the petitioner appealed to the AAO, and submitted additional evidence related to both points raised in the director's denial. The AAO issued a decision on January 24, 2006, which dismissed the appeal based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtained permanent residence. The AAO acknowledged and was persuaded by the additional evidence presented that the beneficiary met both the educational and work experience requirements as set forth in the certified Form ETA 750. However, based on the petitioner's failure to overcome its burden to document the ability to pay the proffered wage, the appeal was dismissed.

Subsequent to the AAO's determination, in May 2006, the petitioner instituted litigation as the plaintiff³ against Defendants Alberto Gonzales, U.S. Attorney General, Department of Homeland Security, U.S. Citizenship and Immigration Services, and Robert P. Wiemann, Director of the Administrative Appeals Office, in the United States District Court for the Northern District of Illinois claiming that the defendants unlawfully denied the plaintiff's immigrant visa petition.

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries is permitted by the DOL. DOL had published an interim final rule, October 23, 1991, which limited the validity of an approved labor certification to the specific alien named on the labor certification application (See 56 FR 54925, 54930). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to the Service based on a Memorandum of Understanding. Procedures for the Service were then set forth in a memorandum from Louis Crocetti, INS Associate Commissioner, Substitution of Labor Certification Beneficiaries, File No. HQ 204.25P (March 7, 1996).

³ The beneficiary is additionally named as a plaintiff in the District Court action.

Pursuant to an agreement reached between the parties, the AAO will reopen and remand the petition to the Director, Nebraska Service Center, in order that the director may issue a Request for Additional Evidence to allow the petitioner to submit additional evidence specifically related to its ability to pay the beneficiary the proffered wage. The petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The petition is reopened and remanded to the director for further action in accordance with the foregoing and entry of a new decision.