U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

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U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 00 262 51308 Office: VERMONT SERVICE CENTER Date: APR 19 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming its decision on a motion to reopen. The matter is again before the AAO on a motion to reconsider. The motion will be granted. The previous decision of the AAO will be affirmed. The petition will be denied.

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 petitioner, a restaurant, seeks to classify the beneficiary as a skilled worker, namely, a specialty cook.

The Director of the Vermont Service Center and the AAO denied the visa petition because the petitioner failed to establish its ability to pay the proffered wage and to resolve inconsistencies in the record concerning the beneficiary's identification on supporting documentation. Counsel submits a Motion to Reconsider that is not accompanied by additional documentary evidence.[1]

The regulation at 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is $11.47 per hour for a forty-hour workweek, which equates to $23,857.60 per annum.

On June 29, 2001, the director denied the initial petition, determining that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The petitioner appealed this decision, and on July 25, 2001, counsel for the petitioner submitted a brief and additional evidence. The AAO reviewed the evidence submitted and found it insufficient to overturn the decision of the director. Consequently, the appeal was dismissed on March 5, 2002.

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[1] Counsel claims to file the motion on behalf of the beneficiary. The regulations preclude the beneficiary as a party to the proceeding or as one entitled to representation. *See* 8 C.F.R. § 103.2(a)(3). The office notes, however, that a previously filed entry of appearance indicates that counsel is representing both the petitioner and the beneficiary. Since no withdrawal of counsel's appearance on behalf of the petitioner is in the record, the office will presume that counsel is still representing the interests of the petitioner in this matter, and will therefore forward notice of the decision on appeal to both counsel and the petitioner. *See* 8 C.F.R. § 292.5(a).

On April 24, 2002, counsel for the petitioner filed a Motion to Reopen accompanied by additional evidence. The AAO reviewed counsel's assertions, but again determined that the petitioner had not sustained its burden of proof. On January 14, 2003, the AAO affirmed its prior decision of March 5, 2002, and denied the petition. In response, counsel filed a Motion to Reconsider on February 12, 2003.

The regulation at 8 C.F.R. §103(a)(3) states:

> 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 [CIS] policy. A 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.

In its motion, counsel states that:

> [The petitioner] is a well established restaurant with 1999 revenues in excess of $984,270. They have been in existence since: [sic] 1989. They clearly will be in business long term and will have the ability to pay the wages of [the beneficiary].

In addition, counsel asserts that:

> [The beneficiary] was born [redacted] When she married, she took her husband's name. The minor discrepancy in her names is frequently seen in the Latino population. There is no reasonable doubt about her identity.

Counsel's assertions in the Motion to Reconsider do not overcome the AAO's finding that the evidence in the record of proceeding is insufficient. Counsel cites no pertinent precedent decisions to establish that the decisions of the director or the AAO were based on an incorrect application of law or policy. Furthermore, counsel provides no attestation that the evidence in the record at the time of the initial decision contributed to an incorrect or erroneous finding by the director.

Finally, the motion includes no additional evidence to supplement counsel's assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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.

ORDER: The Motion to Reconsider is granted. The AAO's decisions of March 15, 2002 and January 14, 2003 are affirmed. The petition is denied.