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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



AUG 27 2003

File: EAC 01 069 50044 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[Redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Alex E. Crawford for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal nature, for which qualified workers are not available in the United States.

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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$18.89 per hour or \$39,291.20 per year.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated July 23, 2001, the director required

additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing to the present. The RFE specified federal tax returns from 1998-2000 and the beneficiary's wage and tax statements (Forms W-2), if any, to show wages paid to the beneficiary from 1998-2000.

Counsel submitted, in response, the petitioner's Forms 1120, U.S. Corporation Income Tax Returns, for fiscal years 1997-1999, each beginning September 1 and ending August 30. These years reflected, sequentially, gross receipts of \$912,090, \$931,481, and \$878,062. Salaries and wages were \$123,210, \$176,415, and \$174,540, plus officers' compensation of \$25,050 in 1997. The returns reported taxable income before net operating loss deduction and special deductions of (\$33,381), (\$10,012), and \$3,245. Current assets minus current liabilities stated net current assets for fiscal years 1997-1999 of \$21,939, \$24,385, and \$44,937, sums equal to or greater than the proffered wage.

The director conceded that the owners might replace themselves as cooks and divert their wages to the beneficiary, but the director found no evidence of a total:

The letter by [REDACTED] 50% owner/secretary, states that if the beneficiary is hired both [REDACTED] and [REDACTED] will stop or quit cooking. No evidence was submitted to their individual or total income, which could have been diverted.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage, continuing to the present, and denied the petition.

On appeal, counsel submits Forms W-2 for calendar years 1998-2000 for payments of wages to the two (2) shareholders, who desire to quit cooking. The response to the RFE asserted the enclosure of their Forms W-2, but it was, evidently, neglected. This evidence reported combined wages of \$37,100 in 1998, as well as compensation of [REDACTED] as an officer in fiscal year 1997, of \$25,050, for a total of \$62,150, equal to or greater than the proffered wage. Forms W-2 reported payments of wages to the pair of \$45,600 in 1999, and \$45,600 in 2000, each equal to or greater than the proffered wage.

In the present case, the petitioner is a firm that had been in business for nearly six (6) years at the time the Form ETA 750 was filed. The petitioner had over \$900,000 in gross receipts and, during the year in which the priority date was established, paid out \$62,150 in officers' compensation and wages to the two

(2) employees stipulated for replacement.

Although the Bureau will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The visa petition (Form I-140) indicated that the proffered position was not a new position. The decision conceded that the beneficiary would replace the two (2) shareholders. They aver, consistently, that they want to quit cooking and that their salaries are available to pay the wages of the beneficiary. The record convincingly establishes the validity of the job offer as realistic and as one that the petitioner can satisfy. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Other contentions of the brief on appeal do not control this decision. Counsel refers to the matter of an "alien worker [who] was in the employ of the employer at the time of the application and [who] was paid the proffered wage." Counsel does not, however, provide its published citation. While 8 C.F.R. § 103.3(c) provides that Bureau precedent decisions are binding on all Bureau employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

After a review of the federal tax returns, Forms W-2, and evidence for replacements, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

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 appeal is sustained.