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Citizenship and Immigration Services

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

[Redacted]

File: [Redacted] LIN 02 151 54502 Office: NEBRASKA SERVICE CENTER

Date: DEC 05 2003

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:

[Redacted]

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 Citizenship and Immigration Services (CIS) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel argues that the petitioner's financial ability to pay the proffered wage had been established by the evidence submitted.

Section 203(b)(3)(A)(i) of 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.

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

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The sole issue on appeal is whether the petitioner established that it has the ability to pay the proffered wage. Eligibility in this case rests upon 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). Here, the petition's priority date is March 22, 2001. The beneficiary's salary as stated on the approved labor certification is \$9.93 per hour or \$18,072.60 annually based on a 35 hour week.

The petition was filed on April 4, 2002. As evidence of its ability to pay, the petitioner submitted a copy of its 2001 Form 1120S U.S. Income Tax Return for an S Corporation. This tax return showed that the petitioner had \$285,317 in gross receipts or sales, \$50,967 in officers'

compensation, \$33,968 in salaries and wages, and \$28,984 in ordinary income. Schedule L reflects that it had \$11,235 in net current assets.

In response to the director's request for additional evidence relevant to the petitioner's ability to pay the offered wage, the petitioner also submitted copies of its Illinois sales and use tax return for the period from January 2002 through May 2002, and a copy of its federal Form 941 Employer's Quarterly Federal Tax Return.

The director denied the petition. He determined that the petitioner had not established its ability to pay the beneficiary's proffered wage as of the priority date of the visa petition because it had not submitted a copy of its 2000 corporate tax return.

We do not concur with the director's decision. As noted by counsel on appeal, the 2001 corporate tax return indicates that it represents a calendar year. Therefore the petitioner's ability to pay as of the March 22, 2001 priority date is reflected within its 2001 corporate tax return, covering its financial data from January 1st to December 31, 2001. Its 2001 ordinary income of \$28,984 more than covers an amount necessary to meet the beneficiary's offered wage of \$18,072.60.

Accordingly, we conclude that the petitioner has established that it had the ability to pay the beneficiary's wage as of the priority date and continuing until the 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.