

U.S. Department of Homeland Security

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



File: EAC 02 091 52297 Office: VERMONT 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:



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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 chef. 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 contends that the evidence established that the petitioner has the financial ability to pay the proffered wage.

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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), further provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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.

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 26, 2001. The beneficiary's salary as stated on the approved labor certification is \$12.00 per hour or \$24,960 annually.

The petition was filed on January 22, 2002. As evidence of its ability to pay the proffered wage, the petitioner submitted a copy of its Form 1120S U.S. Income Tax Return for an S Corporation for the year 2000. The portion submitted was page one. It showed that the petitioner had gross receipts or sales of \$293,492, no officers' compensation, salaries and wages of \$49,416 and an ordinary income of -\$48,287. Schedule L of this return showed that the petitioner had \$3,873 in net current assets.

On March 8, 2002, the director requested further evidence relevant to the petitioner's ability to pay the proffered wage. Included in its response, the petitioner submitted a copy of its 2001 Form 1120S corporate tax return. The 2001 corporate tax return showed that the petitioner claimed \$254,818 in gross receipts or sales, no officers' compensation, \$56,183 in salaries and wages, and an ordinary income of -\$82,879. Schedule L of this tax return showed that the petitioner had -\$361 in net current assets.

Along with this material, the petitioner submitted a copy of the beneficiary's W-2 showing that the petitioner paid the beneficiary \$6,192 in 2001. The petitioner also submitted a copy of the beneficiary's 2001 individual tax return showing that he claimed \$12,912 in total wages.

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 and continuing until the present. The director noted that although the beneficiary's tax return showed that he earned \$12,912 in 2001, the beneficiary's W-2 shows that the petitioner only paid \$6,192. The supporting evidence provided does not corroborate the beneficiary's statement that he was paid off the books. The petitioner provided no proof of payment to the beneficiary in 2001 beyond that reflected by the beneficiary's W-2. Although on appeal, counsel asserts that this additional amount should be considered, we would note that the beneficiary's individual tax return does not establish the source of his total income. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record also contains a copy of a May 28, 2002 letter in which the petitioner's owner/manager indicates that in the "unlikely event the business is unable to fund the \$2,000 difference from gross receipts, I will address the shortfall by a personal addition to operating funds in that amount." As noted by the director, the owner was referring to the difference when comparing the proffered wage of \$24,960 to the addition of the beneficiary's total income of \$12,912 to \$9,100 already paid to a previous employee who departed the petitioner's employment in June 2001. In his denial, the director correctly noted that because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations couldn't be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Counsel contends on appeal that the director misinterpreted the owner's statement. Counsel argues that the owner will lower his own wages in order to divert the available funds to cover the beneficiary's salary and that this represents corporation assets rather than personal assets. Although a careful reading of the owner's statement supports the director's

interpretation, we would simply note that other wages paid including the owner's compensation represent funds already disbursed and were not readily available to pay the beneficiary's wage as of the filing date of the petition. The petitioner also failed to clarify whether the employee who departed two months after the beneficiary's priority date held the same job or performed the same duties as the job offer described in the labor certification contained in the record.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner's ability to pay is established at the priority date. In this case the difference between the offered wage of \$24,960 and the \$6,192 wages actually paid to the beneficiary in 2001 is \$18,768. Neither the petitioner's ordinary income of -\$82,879 nor its 2001 net current assets of -\$361 could cover this sum. We cannot conclude that the petitioner has persuasively established its ability to pay the beneficiary's offered wage as of the visa priority date of March 26, 2001 and continuing until the present.

Beyond the decision of the director, it is noted that the visa classification sought by the petitioner does not conform to the position set forth by the terms of the approved labor certification. The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), as a skilled worker requiring at least two years training or experience. The terms of the labor certification do not describe a skilled worker position because they do not require any specified period of training or experience.

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 appeal is dismissed.