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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: WAC 01 237 51997 Office: California Service Center Date: DEC 11 2003

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 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.

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

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a lead sushi 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 provides a brief and additional evidence.

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). Here, the petition's priority date is October 25, 1995. The beneficiary's salary as stated on the labor certification is $4,200 per month or $50,400.00 per annum.

Counsel submitted copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return. The tax return for fiscal year from

June 1, 1999 through May 31, 2000 reflected gross receipts of $5,078,228; gross profit of $3,319,128; compensation of officers of $31,560; salaries and wages paid of $1,446,870; and a taxable income before net operating loss deduction and special deductions of -$408,240. The tax return for fiscal year from June 1, 2000 through May 31, 2001 reflected gross receipts of $5,860,141; gross profit of $3,712,606; compensation of officers of $65,561; salaries and wages paid of $1,550,694; and a taxable income before net operating loss deduction and special deductions of -$223,481.

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

On appeal, counsel submits copies of the beneficiary's W-2 Wage and Tax Statement for the years from 1989 to 2001, and a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for fiscal year from June 1, 1995 through May 31, 1996 which reflects gross receipts of $8,556,638; gross profit of $5,811,589; compensation of officers of $67,620; salaries and wages paid of $2,270,508; and a taxable income before net operating loss deduction and special deductions of -$725,693.

Counsel argues that:

> Since October 24, 1995 (labor certification filing date), the employer has, in fact, been paying the employee between $47,080.22 to $50,578.57 (See W-2s enclosed). Hence the ability to pay involves, at most, an additional $3,000 per year beyond what is already being paid to the beneficiary.

Counsel further states that the facts of this case are similar to several unpublished CIS decisions. It should be noted that while 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner's Form 1120 for fiscal year from June 1, 1995 through May 31, 1996 shows a taxable income of -$725.693. The petitioner submitted the beneficiary's 1995 W-2 which showed a salary paid of $50,578.57, more than the proffered wage.

The tax returns for fiscal years from 1996 through 2001, show an inability to pay the proffered wage of $50,400.00, and the Forms W-2 submitted for those same years does not show that the beneficiary was paid at or above the proffered wage.

Accordingly, after a review of the federal tax returns submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of filing of the petition.

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.