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U.S. Department of Homeland Security
Citizenship and Immigration Services

B6

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

[REDACTED]

File: WAC 01 287 52039 Office: CALIFORNIA SERVICE CENTER Date: **DEC 13 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 Bureau 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 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 sustained.

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 a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director denied the petition because the petitioner had failed to provide a requested **signed** copy of its 2001 income tax returns.

On appeal, counsel submits a statement 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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 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 Form ETA 750 was accepted on March 16, 2001. The proffered wage as stated on the Form ETA 750 is \$378 per week, which equals \$19,656 per year. The petition states that the petitioner has five employees.

The petition was submitted on September 11, 2001. With the petition counsel submitted a signed copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. That return indicates that the petitioner reports taxes based on a fiscal

year beginning on May 1. Therefore, the petitioner's nominal 2000 tax return covers the period from May 1, 2000 to April 30, 2001. The priority date, March 16, 2001, is included in that fiscal year.

That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$40,292 during its 2000 fiscal year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on February 8, 2002, requested additional evidence pertinent to that ability.

The Service Center reminded the petitioner that it is obliged to demonstrate the ability to pay the proffered wage beginning on the priority date and during each ensuing year. The Service Center also noted that, consistent with 8 C.F.R. § 204.5(g)(2), the evidence must consist of copies of annual reports, federal tax returns, or audited financial statements. The petitioner was specifically requested to provide that evidence for the year 2000.

In addition, the Service Center requested that the petitioner provide copies of its quarterly wage reports for all five employees for the previous four quarters. The Service Center also requested the beneficiary's Form W-2 Wage and Tax Statements for 1996, 1997, 1998, and 1999.

In response, counsel submitted copies of the petitioner's Arizona Unemployment Tax and Wage Reports for all four quarters of 2001. Those reports show that the petitioner did not employ the beneficiary during those quarters. Counsel also submitted 1996, 1997, 1998, 1999, and 2000 W-2 forms showing wages the petitioner paid to the beneficiary during those years. Because the priority date of the petition is March 16, 2001, wages paid to the beneficiary during those years are of no direct relevance to the petitioner's ability to pay the proffered wage beginning on the priority date.

On July 11, 2002, the California Service Center issued another request for evidence in this matter. The Service Center again requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date and stipulated that the evidence must be in the form of copies of annual reports, federal tax returns, or audited financial statements. The Service Center further stipulated that any federal tax returns submitted should be signed.

In response, counsel submitted an unsigned copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return.

That return covers the period from May 1, 2001 to April 30, 2002. During that period, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$44,288.

On August 20, 2002, the Director, California Service Center, denied the petition. The decision was based on the submission of the unsigned fiscal year 2001 tax return, rather than a signed return.

On appeal, counsel provided a signed copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return and a copy of the petitioner's Arizona Unemployment Tax and Wage Report for the second quarter of 2002. That report indicates that the petitioner did not employ the beneficiary during that quarter.

In a statement on appeal, counsel noted that the decision of denial was based on the petitioner's failure to provide a signed copy of its 2001 tax return, and that a signed tax return had been provided on appeal.

The reason for the Service Center's stipulation that the tax returns submitted must bear a signature is unclear to this office. Pursuant to section 274C of the Act (8 U.S.C. 1324c), forging, counterfeiting, altering, or falsely making a document for submission in an immigration matter, or using, attempting to use, providing or attempting to provide such a document in an immigration matter is an offense punishable by a fine.

In addition, pursuant to 18 U.S.C. Part 1, Chapter 75, §1546(a), whoever, in an immigration matter, knowingly presents a document which contains any false statement may be fined and imprisoned for ten years, absent aggravating factors which might increase the maximum sentence. That a submitted return is signed does not appear to increase the penalty for its submission. That a return is signed appears to add no evidentiary weight.

In any event, counsel has provided a signed copy of the offending return and has, therefore, overcome the sole basis for the decision of denial.

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.