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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 Eye Street N.W.
Washington, D.C. 20536



File: WAC 02 045 56361 Office: California Service Center

Date:

DEC 13 2003

IN RE: Petitioner:
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:



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.


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. The petitioner stated on the Form I-140 immigrant petition that it has four employees. 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 determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a statement from the petitioner's owner 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 continuing ability to pay the proffered wage beginning on the priority date, 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 request for labor certification was accepted for processing on February 26, 2001. The proffered wage as stated on the labor certification is \$11.75 per hour which

equals \$24,440 annually.

With the petition, counsel submitted a copy of the 1999 and 2000 Form 1040 U.S. individual income tax return of the petitioner's proprietor and the proprietor's spouse, including Schedule C, profit or loss from a business (sole proprietorship). Those returns state that the petitioner's proprietor and the proprietor's spouse have two dependent children.

The 1999 Schedule C shows that the petitioner's restaurant had a profit of \$36,934 during that year. The Form 1040 shows that the petitioner's proprietor's adjusted gross income during that year was \$34,338.

The 2000 Schedule C shows that the petitioner's restaurant suffered a loss of \$17,942 during that year. The Form 1040 shows that the petitioner's proprietor's adjusted gross total income during that year was \$96,512.

Because the priority date in this matter is February 26, 2001, the petitioner's proprietor's 1999 and 2000 tax returns are not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date. Therefore, on February 26, 2002 the California Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Specifically, the Service Center requested, consistent with 8 C.F.R. § 204.5(g)(2), that the petitioner demonstrate its continuing ability to pay the proffered wage, beginning on the priority date, with copies of annual reports, federal tax returns, or audited financial statements.

The Service Center also requested that the petitioner submit its California Form DE-6 quarterly wage reports, although this office notes that the petitioner's restaurant apparently is not located in California. Finally, the Service Center requested copies of the petitioner's 2001 Form W-2 wage and tax statement and Form W-3 transmittal of wage and tax statements.

In response, counsel submitted the 2001 Form 1040 joint income tax return of the petitioner's proprietor and the proprietor's spouse. The corresponding Schedule C shows that the petitioner's proprietor derived \$31,579 in income from the petitioning entity, the restaurant, during that year. The Form 1040 return states that the proprietor and spouse declared an adjusted gross income of \$35,199 during that year. Counsel submitted no evidence at that time that the proprietor has any additional income or assets.

Counsel also submitted the petitioner's 2001 Form 940-EZ unemployment (FUTA) tax return and the petitioner's Form 941 employer's federal quarterly tax return for the last quarter of 2001.

The Form 940-EZ shows that during the 2001 calendar year the petitioner paid \$3,862 in wages to its employees. The Form 941 shows that the petitioner paid that same amount during the last quarter of that year.

In addition, the counsel submitted the petitioner's 2001 Form W-3 transmittal of wage and tax statements and two 2001 Form W-2 wage and tax statements issued to the petitioner's employees. The amount of the wages shown on those two W-2 forms, added together, equals \$3,862. Neither of those employees is the beneficiary. The W-3 form confirms that the petitioner paid \$3,862 in wages during 2001.

On May 15, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director observed that although the petitioner's adjusted gross income during 2001 was greater than the proffered wage, if reduced by the amount of the proffered wage it would be insufficient to support the petitioner's family.

On appeal, the petitioner's proprietor stated that she had sold the restaurant, for which she received \$55,000 on July 12, 2000 and \$58,431.67 on August 18, 2000. As evidence of that assertion, the petitioner submitted two statements of remittance showing that Lowe's of North Wilkesboro, North Carolina paid those amounts to the petitioner's proprietor.

The petitioner's proprietor also stated that she bought the petitioner's present restaurant during September 2000 for \$60,000, leaving \$53,431.67 for living expenses and renovation of the restaurant. In support of that statement, the petitioner's proprietor submitted a bank statement showing a deposit of that amount credited to the bank account of the petitioner's proprietor and the proprietor's spouse on August 23, 2000.

The petitioner's proprietor continued that on January 1, 2002 the restaurant began subletting the bar area of the restaurant for \$2,500 per month. In support of that statement, the petitioner's proprietor submitted statements of remittance showing that Chicago Express Corp./MTL Corporation paid that amount to the petitioner on December 23, 2001, January 31, 2002, March 1, 2002, April 1, 2002, May 1, 2002, and May 30, 2002.

Finally, the petitioner's proprietor stated that from January 2002 to May 2002 the restaurant showed a net profit of at least \$5,500 per month. In support of that assertion, the petitioner submitted unaudited handwritten statements of income and expenses for January, February, March, April, and May of 2002.

The petitioner's proprietor argues that those documents demonstrate the petitioner's ability to pay the proffered wage.

The petition, filed on November 20, 2001, states that the petitioner had four employees. On February 26, 2002, the Western Service Center asked for the 2001 W-2 forms for those four employees. Without explanation, the petitioner provided 2001 W-2 forms for only two employees. The accompanying W-3 indicates that the total paid to those two employees, \$3,862, was the total amount the petitioner paid in wages during 2001. This would appear to contradict the representation, on the petition, that the petitioner employs four people, or that it employed four people at any time during 2001, including November 20, 2001, when it made the representation.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Counsel has asserted that the petitioner's gross receipts demonstrate the petitioner's ability to pay the proffered wage. The petitioner, however, is obliged to show the ability to pay the proffered wage out of funds remaining after payment of expenses. Further, in the case of a sole proprietor using a personal income tax return to demonstrate the ability to pay the wage from his personal income and assets, that ability would be demonstrated by the amount shown on line 33 of Form 1040, adjusted gross income. For a sole proprietor to demonstrate the ability to pay the proffered wage, however, he must show the ability to support himself and his dependents in addition to paying the proffered wage. A sole proprietor with income and assets equal to the proffered wage is unable to pay that wage if it would leave no income or assets to support that proprietor's family.

During 2001, the petitioner's proprietor and the proprietor's spouse declared an adjusted gross income of \$35,199, including the profit derived from the restaurant. That income, reduced by

\$24,440, the amount of the proffered wage, would be \$10,759, an amount insufficient to support the petitioner's proprietor's family of four.

The petitioner's proprietor asserts on appeal that she had \$53,431.67 remaining from the sale of her first restaurant after she bought her new restaurant during September 2000. She asserts that the money was available for payment of living expenses and renovation of the restaurant. Counsel has not indicated, however, what portion of that amount remained during 2001 and was not needed to renovate the restaurant. The record contains no indication that any portion of that amount was available to pay the proffered wage during 2001.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2001. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, this office notes that the petitioner's Form 941 for the last quarter of 2001 states that the petitioner incurred all of its 2001 wage expense during that last quarter of 2001. This appears to indicate that the petitioner did not operate a restaurant during the first three quarters of 2001, notwithstanding that the petitioner filed the petition during the first quarter of 2001. Whether a prospective employer may file a petition when it is not currently in business, and is therefore presently unable to employ the beneficiary, is unclear. This office need not address this issue, however, in view of our finding pertinent to the ability to pay the proffered wage.

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.