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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE

425 I Street, N.W.

CIS, AAO, 20 Mass, Rm 3042

Washington, DC 20536



File: WAC 01 220 50038

Office: CALIFORNIA SERVICE CENTER Date:

DEC 16 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition remanded for further consideration.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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). The petition's priority date in this instance is March 13, 1998. The beneficiary's salary as stated on the labor certification is \$36,649.60 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a Notice of

Action dated November 14, 2001 (Form I-797), the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director mandated federal tax returns (business) with all schedules and tables for 1998, 1999, and 2000, quarterly wage reports (Forms DE-6) for 2000, and Forms W-2 and W-3 for 2000.

Counsel submitted the 1998-2000 Forms 1040, U.S. Individual Income Tax Returns, with Schedule C, Profit or Loss from Business (Sole Proprietorship). The Forms 1040 for 1998-2000, respectively, showed adjusted gross income of \$50,114, \$48,397 and \$48,464. The corresponding Schedules C reported net profit from business activity of \$53,597, \$50,030, and \$50,091. Each amount was equal to, or greater than, the proffered wage.

In a decision dated June 19, 2002 (NOD), the director considered the cost of maintaining the sole proprietor's (petitioner's) household and concluded that it is not possible for three (3) family members to live off the remaining income after the subtraction of the of the beneficiary's salary. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition on June 19, 2002 (decision).

On appeal, counsel reasons that:

The decision to approve or deny an I-140 petition must be predicated on the appropriate provisions of the Code of Federal Regulations rather than on guesswork and conjecture about a family's standard of living. The [request] that the petitioner provide business tax returns is firmly anchored in the provisions of 8 C.F.R. § 204.5(g)(2).

The director did not request evidence of the living expenses of family members. The director must, upon remand, seek and consider the facts before basing a decision on conjecture.

On appeal, counsel initiates the petitioner's declaration that the beneficiary will replace three (3) part-time cooks. On the other hand, the Immigrant Petition for Alien Worker (I-140) claimed only three (3) employees in total. Form W-2 shows that one, the petitioner's daughter, received \$5,380.50 in 2000, less than the proffered wage. The petitioner does not document other part-time employees, their compensation, their replacement, or their tasks.

Counsel contends that the capitalization of two restaurants in Shanghai, China and the equity of the petitioner's real property in Belmont, California prove the ability to pay the proffered wage. The petitioner's evidence does not establish that net income or net current assets of the two (2) foreign businesses are equal to, or greater than, the proffered wage or, for that matter, readily available at the priority date and continuing until the beneficiary obtains lawful permanent residence. Equity in the home is a fixed asset, and the evidence now of record does not establish that it was available.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

The petitioner's bank statements from United Commercial Bank total \$22,497 in additional funds not reflected in the tax returns. On remand, the director may be satisfied that these represent assets available to pay the proffered wage. The sole proprietor's income, as found on federal tax returns, and other assets are available to establish the ability to pay the proffered wage.

From a review of the director's decision, federal tax returns, and claimed replacements and assets, it can not be determined whether the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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 director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.