U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 01 275 57689 Office: California Service Center Date: FEB 27 2003

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 Service 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.

Ellen E Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting 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 an individual labor certification approved by the Department of Labor. The acting 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 submits a brief.

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 April 2, 2001. The beneficiary's salary as stated on the labor certification is $10.09 per hour for a 40 hour week, or $20,987.20 per annum.

Counsel initially submitted copies of the petitioner's 1998 and

1999 Form 1120 U.S. Corporation Income Tax Return. The 1998 tax return, covers the period from November 1, 1998 to October 31, 1999. The 1999 tax return, covers the period from November 1, 1999 through October 31, 2000.

On March 19, 2002, the Acting Director, California Service Center, in a Notice of Intent to Deny, observed that the petitioner's schedules M-2 for 1998 and 1999 show a cumulative loss of $2,066,494, and that the petitioner's liabilities dwarf his assets. Given those losses, the apparent lack of net worth, and the lack of any data pertinent to the period during which the priority date of this petition falls, the acting director observed that the petitioner had not demonstrated the continuing ability to pay the proffered wage beginning on the priority date, and accorded the petitioner another opportunity to demonstrate that ability.

In response, counsel submitted a letter from a CPA who stated that, although the petitioner had lost money during recent years, it employs 109 people at a cost of $539,436.40. In support of that statement, counsel submitted a photocopy of the petitioner's 2001 Federal Form W-3 Transmittal of Wage and Tax Statements, which shows that number of employees were paid that amount of money between January 1, 2001 and December 31, 2001. The CPA further stated that " . . . the petitioner is still a viable business that does provide employment to many people."

Counsel asserted that, because the company paid over $500,000 in wages in 2001, it is necessarily solvent. Counsel further asserted that a previous Center Director had stated that the Service will accept as financially sound any employer which is able to pay its employees.

Finally, counsel asserted:

> (T)here is a uniform policy by (the Service) in all service centers that if a C.P.A. gives a statement that the company employs more than 100 workers. (sic) The C.P.A. statement should be the governing financial document for purpose of adjudicating petition. Kindly follow your own . . . policy.

Counsel is likely referring to 8 C.F.R. 204.5(g)(2), which states, in pertinent part, that in a case where the prospective employer employs 100 or more workers, the director may accept the statement of a financial officer of the organization that the employer is able to pay the proffered wage. Here, the statement is from an accountant, rather than an officer of the petitioning corporation. Further, the accountant did not state that the petitioner has the

ability to pay the proffered wage but, rather, that the petitioner employs many people and is a viable business.

The acting director noted, again, that the 1999 Schedule M-2 stated that the petitioner's unappropriated retained earnings are a loss of $1,913,573 in 1998 and a loss of $152,921 in 1999, for a cumulative loss of $2,066,484. In addition, the 1999 return stated that the petitioner's liabilities exceed his assets by a factor of 15, not counting loans from shareholders, and that the petitioner has only $2,000 cash on hand. Further, the acting director noted that because the beneficiary is not currently working for the petitioner, the petitioner was unable to use that alternative method of demonstrating that it has been able to pay the proffered wage to the beneficiary. The acting director found that the petitioner had not demonstrated the ability to pay the beneficiary the proffered wage, and denied the petition.

On appeal, counsel argues that the losses suffered by the petitioner were due to a fire which burned down one of petitioner's restaurants. Counsel states that the tax documents reflect those losses. Counsel further argues that, because the petitioner was not able to employ the beneficiary legally, to consider that fact in this proceeding would be to penalize the petitioner for obeying the law. Finally, counsel provided a copy of the petitioner's 2000 tax return.

The 2000 tax return covers the period from November 1, 2000 through October 31, 2001. The priority date of the instant petition falls within that period. That tax return reflects gross receipts of $1,677,649; gross profit of $637,865; no compensation of officers; no salaries and wages; and a taxable income before net operating loss deduction and special deductions of $6,607.

That return does not show a profit sufficient to pay the proffered wage. However, as counsel observed, the petitioner paid its employees over $500,000 during 2001. Further, the petitioner was established in 1987. Given these circumstances, consideration of the totality of the circumstances is appropriate. During its 1998, 1999 and 2000 fiscal years, the petitioner's gross receipts exceeded $1.5 million. The magnitude of the petitioner's business and the size of its payroll suggest that, although it may suffer a loss during a given year, or during several years, the petitioner will be able to pay the beneficiary the proffered wage of $20,987.20.

Accordingly, after a review of the documentation submitted, it is concluded that the petitioner has established that it has had the ability to pay the proffered wage beginning on the priority date of

the petition and continuing to the present.

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.