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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[REDACTED]

File: WAC 02 035 53697 Office: California Service Center

Date:

JUL 16 2003

IN RE: Petitioner:
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 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
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 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 stated that the petitioner had other resources, not shown on its tax returns, which the director should have considered.

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 April 25, 2001. The proffered salary as stated on the labor certification is \$13 per hour which

equals \$27,040 annually.

With the petition, counsel submitted Schedule C of the 2000 tax return of the petitioner's owner and his wife. That Schedule C shows that the petitioner made a profit of \$24,828 during that year.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on February 21, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested, consistent with the requirements of 8 C.F.R. § 204.5(g)(2), that the petitioner prove its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. The Service Center requested that the petitioner demonstrate the ability to pay the proffered wage during both 2000 and 2001. The Service Center also requested that the petitioner submit its California Form DE-6 quarterly wage reports for the previous four quarters.

In response, counsel submitted California Form DE-6 quarterly wage reports for the second, third, and fourth quarters of 2001 and the first quarter of 2002. Those reports show that the petitioner did not employ the beneficiary during those quarters.

In addition, counsel submitted the complete 2000 and 2001 Form 1040 joint personal tax returns of the petitioner's owner and the owner's wife. The 2000 return shows that their adjusted gross income, including income derived from the petitioner's operations, noted above, was \$21,139. However, because the priority date of this petition is April 25, 2001, the petitioner's finances during 2000 are not directly relevant.

The 2001 return shows that the petitioner's owner and owner's wife declared an adjusted gross income of \$29,000 in that year. The corresponding Schedule C shows that the petitioner contributed a net profit of \$31,206 toward the owner's income. Those returns also reveal that the petitioner's owner and his wife have a dependent child.

On June 6, 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 noted that the petitioner's owner could have paid the proffered wage out of the petitioner's profits during 2001, but would not then have had sufficient resources to support his family.

On appeal, counsel stated that the petitioner's owner had additional resources with which to pay the proffered wage and support his family. Counsel did not detail the sources of those resources or the amount of funds available, and the record contains no indication of any additional funds not reflected on the tax returns submitted.

Counsel stated that he would send a brief or additional evidence within 30 days. No further information, argument, or documentation has been received from the petitioner or from anyone acting on the petitioner's behalf.

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 salary beginning on the priority date.

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.