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U.S. Department of Homeland Security

Bureau of Immigration and Citizenship Services

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ADMINISTRATIVE APPEALS OFFICE  
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BCIS, AAO, 20 Mass. 3/F  
Washington, D.C. 20536



File: WAC 02 098 51285 Office: California Service Center

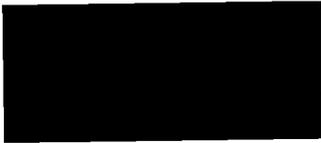
Date: **JUL 21 2003**

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. It seeks to employ the beneficiary permanently in the United States as a chef. The petition was filed pursuant to section 203(b)(3)(A)(i) of the Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i) for a skilled worker or professional. 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 demonstrated that it had the continuing ability to pay the proffered wage and had not established that the position qualifies for classification as a skilled worker position pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Act 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 wage offered 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 August 29, 1994. The proffered salary as stated on the labor certification is \$9.50 which equals

\$19,760 annually.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage and no evidence that the beneficiary had the requisite two years experience. Therefore, on April 19, 2002, the California Service Center requested evidence of the petitioner's ability to pay and of the beneficiary's previous experience. Pursuant to 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage be in the form of annual reports, federal tax returns, or audited financial statements.

As the beneficiary's prior experience, the Service Center requested evidence in letter form on the beneficiary's previous employers' letterhead.

In response, the petitioner submitted a copy of its Form 1120S income tax return of an S corporation for the 2001 calendar year. The return states that the petitioner declared a loss of \$490 during that year. The accompanying Schedule L states that the petitioner's current liabilities exceeded its current assets at the end of that year. No other financial information was submitted.

As to the beneficiary's prior work experience, the petitioner submitted a letter from the beneficiary stating that he was unable to locate his previous employers.

On July 1, 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 and did not demonstrate that the position required a skilled worker.

On appeal, counsel stated that the petition was mistakenly filed for a skilled worker, and that the petitioner was amending the petition to require "any other worker." In addition, counsel provided a letter from the petitioner's president stating that, in February 1989, when he originally hired the beneficiary, he contacted the beneficiary's previous employers to verify the beneficiary's experience. Counsel also provided a letter from one of the beneficiary's previous employers, with an English translation. That letter states that the beneficiary worked as a cook from 1985 to March of 1988.

As to the ability to pay the proffered wage, counsel submitted Form 1120S tax returns for 1994, 1995, 1996, 1997, 1998, 1999, and 2000.

On the 1994 return the petitioner declared ordinary income of \$42,686. The accompanying Schedule L shows that at the end of that

year the petitioner had current assets of \$176,870 and current liabilities of \$63,810, yielding net current assets of \$113,060.

On the 1995 return the petitioner declared a loss of \$91,430. The accompanying Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

On the 1996 return the petitioner declared a loss of \$91,036. The accompanying Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

On the 1997 return the petitioner declared a loss of \$451,564. The accompanying Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

On the 1998 return the petitioner declared a loss of \$319,593. The accompanying Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

On the 1999 return the petitioner declared a loss of \$313,350. The accompanying Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

On the 2000 return the petitioner declared a loss of \$7,904. The accompanying schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In a brief, counsel asserted that filing for a skilled worker was harmless error. Counsel also asserted that the failure to provide all of the requested tax returns earlier was harmless error. Counsel did not otherwise address the ability of the petitioner to pay the proffered wage.

The evidence submitted shows that the petitioner was able to pay the proffered wage during 1994, but not during 1995, 1996, 1997, 1998, 1999, 2000, or 2001. Given this finding, no need exists to address the issue of the beneficiary's previous experience.

The petitioner has not demonstrated the continuing ability to pay the proffered wage since 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.

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