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U.S. Department of Homeland Security

Bureau of Citizenship Services and Immigration Services

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

[redacted]

File: WAC 02 048 50786 Office: California Service Center Date: MAY 28 2003

IN RE: Petitioner: [redacted]
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: [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.

Helen E Crawford

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 dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a food service manager. 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 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 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 January 12, 1998. The proffered salary as stated on the labor certification is $2,873.86 per month which equals $34,486.32 annually.

With the petition, counsel submitted a copy of Schedule C of the 1998 Form 1040 tax return of the petitioner's owner. That schedule states that during that year the petitioner made a net profit of $9,783.

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 26, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested that the petitioner provide signed copies of its complete federal tax returns for 1999 and 2000.

In response, counsel submitted a copy of the petitioner's 2000 Form 1120 U.S. corporation income tax return. That return shows that during that year the petitioner declared a taxable income before net operating loss deduction and special deductions of $40,976.

On April 9, 2002, the Director, California Service Center, denied the petition. The director found that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage during 1998. The director further found that the petitioner had failed to provide the requested 1999 tax return and had failed, therefore, to demonstrate the ability to pay the proffered wage during 1999.

On appeal, counsel submitted a complete copy of the 1999 Form 1040 joint tax return of the petitioner's owner and the owner's wife. Schedule C of that return shows that the petitioner had a net profit of $47,788 during that year.

Counsel also submitted a copy of the 2000 Form 1040 joint tax return of the petitioner's owner and the owner's wife. No Schedule C was attached to that return as the petitioner had incorporated.

Further, counsel submitted a copy of the petitioner's 2001 Form 1065 U.S. partnership return. That return states that during that year, the petitioner declared an ordinary income of $154,786.

In the appeal brief, counsel noted that the El Pollo Loco restaurant chain is very successful. Counsel included a brief history of the chain.

As to the petitioner's net profits, counsel referred to a letter from the petitioner's accountant. That letter, dated April 19, 2002, stated that the petitioner's business has increased steadily since 1997 and that during 2001 its sales exceeded one million dollars and profits exceeded $150,000.

Counsel argued that the amounts which the petitioner has paid to employees during the pendency of this petition, $77,625 in 1998, $214,783 during 1999, $199,822 during 2000, and $206,303 during 2001, should be included in the computation of the petitioner's ability to pay the proffered wage. That the petitioner paid those amounts, however, does not demonstrate that the petitioner could, in addition, have paid the proffered wage during each of those years.

Counsel asserted that the beneficiary would replace the current administrator of the restaurant, and that the current administrator's salary would then be available to pay the proffered wage. Counsel offered no evidence of the assertion that the beneficiary would replace a current worker and did not identify the worker whom the beneficiary would allegedly replace.

An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without evidence that the beneficiary would replace another employee and the amount of that employees wages, the amount of that other employee's wages cannot be included in the computation of the petitioner's ability to pay the proffered wage.

Schedule C of the petitioner's owner's 1999 Form 1040 tax return shows that the petitioner had the ability to pay the proffered wage during that year. The petitioner's 2000 Form 1120 corporate return shows that the petitioner had the ability to pay the proffered wage during that year. The petitioner's 2001 Form 1065 partnership return shows that the petitioner had the ability to pay the proffered wage during that year.

The only evidence submitted pertinent to 1998 is Schedule C of the 1998 Form 1040 tax return of the petitioner's owner. That schedule states that during that year the petitioner earned a net profit of $9,783. That amount was insufficient to pay the proffered wage.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 1998. 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.