

U.S. Department of Homeland Security  
Citizenship and Immigration Services

Blp

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

Prevent clearly unrepresented  
Accession of personal privacy



NOV 06 2003

File: [Redacted] Office: Nebraska Service Center Date:

IN RE: Petitioner: [Redacted]  
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]

PUBLIC COPY

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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The 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 and additional evidence.

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 25, 2001. The beneficiary's salary as stated on the labor certification is \$12.25 per hour which equates to \$25,480.00 annually.

Counsel submitted a copy of the petitioner's bank statement for the

period from June 21, 2002 through July 16, 2002, and a copy of the petitioner's Internal Revenue Service (IRS) Form 1040 U.S. Individual Income Tax Return for 2001. Form 1040 showed an adjusted gross income of \$28,209.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that the petitioner is well able to pay the proposed salary to the beneficiary.

The petitioner's Form 1040 for 2001 shows an adjusted gross income of \$28,209.00. The petitioner could pay a salary of \$25,480.00 from this income.

A sole proprietorship, however, is not legally separate from its owner. Therefore, the sole proprietor's income, personal assets and liabilities may be considered when trying to determine whether the sole proprietorship can pay the beneficiary's proffered wage.

When evaluating a sole proprietor's ability to pay the proffered wage, CIS must take into consideration all of the personal income and expenses generated by the sole proprietor and his dependents.

Beyond the decision of the director, it is noted that the petitioner is in F-1 nonimmigrant status. The beneficiary, the spouse of the petitioner, is in F-2 status. As an alien in a nonimmigrant temporary worker classification, the petitioner is not competent to create a job offer for employment for another alien which would act as the basis for issuance of an immigrant visa to that person. Such a job offer must be permanent in character and not of a seasonal or temporary nature (see section 203(b)(3)(A)(i) of the Act. The present status of the petitioner is that of a nonimmigrant worker which by definition at section 101(a)(15)(F)(i) of the Act is temporary in that it requires the nonimmigrant worker to have "a residence in a foreign country which she has no intention of abandoning." See *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981).

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 (to include evidence of the petitioner's personal expenses). 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.

**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.