

Department of Homeland Security

Citizenship and Immigration Services Service

BLO
PUBLIC COPY

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



File: WAC 00 237 55540 Office: California Service Center

Date: **NOV 25 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:



*Identifying data deleted to
prevent an 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 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, 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 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. The director also determined that the petitioner had not established that the beneficiary had the requisite experience 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(1)(3) states, in pertinent part:

(ii) *Other documentation* -- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750),

filed with the Department of Labor on June 28, 1996, indicates that the minimum requirement to perform the job duties of the proffered position of cook is two years of experience in the job offered.

Counsel submitted a letter from [REDACTED] a restaurant in Jalisco, Mexico which attested to the beneficiary's experience from December 3, 1998 to January 17, 2001.

The director concluded that the evidence submitted was insufficient to establish the beneficiary's requisite training as a cook and denied the petition accordingly. The director noted that the beneficiary's experience was attained subsequent to the priority date of the petition.

On appeal, counsel states that:

After submission of INS form I-140 to the Immigration and Naturalization Service including the original of approved DOL form ETA 750 and supporting documentation, the INS requested once more to submit originals to establish that the beneficiary possesses the experience listed on form ETA 750. Since original documents were in possession of the Department of Labor, petitioner's representative requested the same from the DOL in order to be submitted to the Immigration and Naturalization Service.

In lieu of the original documents, the Department of Labor provided with a letter (included) in order to be submitted to the Immigration and Naturalization Service.

The record contains the abovementioned letter from the DOL certifying that the beneficiary had the requisite experience prior to the priority date of the petition. Therefore, the petitioner has overcome this portion of the director's decision.

The other issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage as of June 28, 1996.

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 also 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 June 28, 1996. The beneficiary's salary as stated on the labor certification is \$11.55 per hour or \$24,024.00 per annum.

Counsel submitted copies of the petitioner's 1998, 1999, and 2000 Form 1065, U.S. Partnership Return of Income. The 1998 tax return reflected gross receipts of \$105,198; gross profit of \$66,107; salaries and wages paid of \$24,136; guaranteed payment to partners of \$0; and an ordinary income (loss) from trade or business activities of -\$2,350. The 1999 tax return reflected gross receipts of \$106,764; gross profit of \$70,586; salaries and wages paid of \$25,089; guaranteed payments to partners of \$0; and an ordinary income (loss) from trade or business activities of -\$754. The 2000 tax return reflected gross receipts of \$111,017; gross profit of \$73,375; salaries and wages paid of \$24,219; guaranteed payments to partners of \$0; and an ordinary income (loss) from trade or business activities of \$8,059.

On appeal, counsel submits a copy of the petitioner's 2001 Form 1065 U.S. Partnership Return of Income which reflects gross receipts of \$129,601; gross profit of \$88,655; salaries and wages paid of \$26,289; guaranteed payment to partners of \$0; and an ordinary income (loss) from trade or business activities of \$20,779.

Counsel argues that the beneficiary will replace two part-time employees if the petitioner retains the beneficiary as a full-time employee.

Counsel's argument that the funds paid to other part-time employees could be used to pay the beneficiary's salary is not persuasive. These funds were not retained by the petitioner for future use. Instead, these monies were expended on compensating the part-time employees, and therefore, were not readily available for payment of the beneficiary's salary in 1996. Further, the petitioner has not documented the positions, duties and termination of these part-time employees who performed the duties of the proffered position. If they performed other kinds of work, then the beneficiary could not

have replaced them as suggested by counsel. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage as of the priority date of the application for alien employment certification as required by 8 C.F.R. § 204.5(g)(2). Therefore, the director's decision to deny the petition has not been overcome and the petition may not be approved.

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.