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U.S. Department of Homeland Security

Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: WAC 02 067 55041 Office: CALIFORNIA SERVICE CENTER Date: OCT 21 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]

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.

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel contends that the sole proprietor's ability to borrow against his real estate holdings should be considered when determining the petitioner's financial ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g) states in pertinent part:

> (2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon 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 September 18, 1996. The beneficiary's salary as stated on the approved labor certification is $11.55 per hour or $24,024 annually. The evidence in the record suggests that the petitioner has employed the beneficiary since 1993.

The petition was filed on December 17, 2001. The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage. On March 5, 2002, the director requested additional evidence relevant to the petitioner's ability to pay the offered wage in the form of annual reports, federal tax

returns or audited financial statements. The director also instructed the petitioner to submit copies of the beneficiary's W-2s.

Included in the petitioner's response were the sole proprietor owner's Form 1040, U.S. Individual Income Tax Returns for the years 1996 through 2000. The 2001 tax return was not yet available. The information contained in the owner's tax returns indicates the following:

Year	Business Profit	Adjusted Gross Income
1996	-$ 7,340	-$33,313
1997	-$14,714	-$4,412.48
1998	-$18,815	-$26,797
1999	-$ 4,231	-$31,143
2000	-$14,991	-$28,627

According to a letter from counsel, the owner paid the beneficiary in cash, so no W-2s were issued. Instead, the petitioner submits copies of the beneficiary's individual tax returns for the years 1999 through 2001. These tax returns fail to indicate the source of the beneficiary's income. As such, they carry little evidentiary weight in establishing the petitioner's ability to pay the offered wage.

The record also contains a letter from the sole proprietor owner indicating that his real property appreciates more than the losses shown on the tax returns. The owner states that these "losses are converted to real estate debt and the increased rental income covers the payment and interest."

The director denied the petition. He determined that the petitioner had not established its continuing ability to pay the beneficiary's proffered wage as of the priority date of the visa petition. We concur. As noted by the director, the petitioner's figures given for his adjusted gross income represent losses declared in every year. We cannot conclude that the petitioner could meet the proffered wage from these amounts.

The director also concluded that he cannot consider the sole proprietor's equity in his home because it is not reasonable to assume that the sole proprietor would sell his home in order to meet the beneficiary's proposed wage. The director determined that the petitioner had failed to show that the owner possessed sufficient net current assets to meet the proffered wage.

On appeal, counsel submits a December 16, 2002 letter from the sole proprietor that asserts that his real property holdings are valued at $2,000,000 with a total debt of $480,000. He states that he can borrow up to $300,000 on a "no shown income loan." Counsel takes issue with the director's conclusion that it would be unreasonable to assume that the owner would sell his home to meet the beneficiary's offered wage.

At the outset, we would note that real property is not representative of assets that can easily be converted to cash. Taxable income and, in some cases, net current assets can properly be considered to constitute such funds that would readily be available to establish the petitioner's ability to pay the proffered wage. The willingness of a petitioner to borrow against real property,

thereby creating a debt which must be repaid, to cover the proffered wage also does not establish a petitioner's financial ability to meet the proffered wage as of the visa priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971).

In determining the petitioner's ability to pay the proffered wage, the Bureau examines the net income figure set forth on the tax return. The tax return must reflect that the employer generates sufficient net income to cover the offered salary. *See, e.g., K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080 (S.D.N.Y. 1985). In this case, as noted by the director, the petitioner's adjusted gross income for every year fell well short of meeting the proffered wage.

Based on the financial data contained in the record, the petitioner has not demonstrated the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status.

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.