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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
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Washington, D.C. 20536



File: WAC 02 197 52743 Office: CALIFORNIA SERVICE CENTER

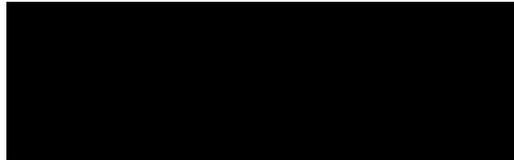
Date: **OCT 28 2003**

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 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 sustained.

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 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 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 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 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 proffered wage beginning on the priority date, the day the Form ETA 750 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 Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$600 per week, which equals \$31,200 per year.

With the petition counsel submitted the 2001 Form 1040 joint income tax return of the petitioner's owner and the owner's spouse. The accompanying Schedule C, Profit or Loss from Business (Sole Proprietorship) shows that the petitioner

generated a net profit of \$29,749 during that year. The Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income of \$51,405 during that year, including the petitioner's profit.

Counsel also provided a copy of the 2000 Form 1040 tax return of the petitioner's owner and the owner's spouse. Because the priority date of the petition is April 27, 2001, the information on that tax return is not directly relevant to the petitioner's ability to pay the proffered wage.

Further still, counsel provided copies of the petitioner's California Form DE-6 Quarterly Wage Reports for all four quarters of 2001. Those reports show that the petitioner employed between two and four workers during those four quarters and that the beneficiary was not among those workers. Those reports also show that, during 2001, the petitioner paid a total of \$42,579 in wages.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on September 4, 2002, denied the petition. The director noted that the petitioner's owner's adjusted gross income of \$51,405 during 2001, reduced by the \$31,200 proffered wage, would be insufficient to support the petitioner's owner's family of five.

On appeal, counsel declares that the director's remark that the petitioner's owner is unable to support his family of five on \$20,205 is speculative. Counsel further argues that the petitioner's owner has other assets that are sufficient, combined with the petitioner's profit, to pay the proffered wage.

Counsel notes that "(E)mployers hire employees when it is determined that the employee will generate revenues in excess of the salary paid. Counsel also states that the petitioner's owner is "hiring [the beneficiary] to free up (sic) employer's time for more productive and profitable employment."

Thus, counsel asserts two mutually consistent ways in which hiring the beneficiary might increase the petitioner's owner's adjusted gross income rather than decrease it. The beneficiary might generate more income than is required to pay his salary. In the alternative, or in addition, the petitioner's owner, freed from his chores at the restaurant, might obtain employment elsewhere or start an additional business, and be enriched in that manner.

Counsel has provided no evidence of the amounts to be derived by hiring the beneficiary and hiring out the petitioner's owner. Absent any evidence, the conclusion that hiring the beneficiary will cause the petitioning entity to thrive is certainly

speculative. Even assuming that the petitioner is hiring the beneficiary with that expectation, no evidence has been submitted that the petitioner's judgement in these matters is reliable.

Further, absent any evidence, the assumption that the petitioner's owner intends, and is able, to obtain other, more lucrative employment, or to start an additional profitable business is unwarranted. Counsel alleges, on appeal, that the petitioner's owner will do so, but submits no evidence of that assertion.

With the appeal, counsel submitted statements of the balance of the petitioner's owner's and owner's spouse's joint savings account. Those 18 monthly statements are for the months ending April 15, 2001 through September 15, 2002. The ending balances on those statements vary from a high of \$70,754.54 on January 15, 2002 to a low of \$29,698.01 on August 15, 2002.

Counsel observes, further, that the petitioner's owner had additional assets that he could have used to pay the proffered wage. Because the petitioner is a sole proprietorship, and the petitioner's owner is obliged to use his own income and assets to satisfy the petitioner's debts and obligations, the income and assets of the owner may be considered in determining the ability to pay the proffered wage. In this case, the petitioner has established that it possesses adequate income and assets to pay the proffered wage.

From April through December of 2001, the petitioner's owner's savings account balance never fell below \$50,000. Even if additional funds were necessary to pay the proffered wage during that year, the petitioner would have been able to contribute sufficiently to pay the proffered wage.

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 met that burden.

**ORDER:** The appeal is sustained.