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U.S. Department of Justice

Citizenship and Immigration Services

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

File: WAC 02 068 51804

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:



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 which 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Acting 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 chef. 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 statement and indicates that a separate brief and/or evidence is being submitted within thirty days. To date, however, no further documentation has been received. Therefore, a decision will be made based on the record as it is presently constituted.

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 September 27, 1994. The beneficiary's salary as stated on the

labor certification is \$12.00 per hour which equates to \$24,960.00 per annum.

Counsel submitted copies of the petitioner's Internal Revenue Service (IRS) Forms 1120S for the years 1994 through 2001. The Forms 1120S showed ordinary incomes of -\$40,769 for 1994; -\$15,436 for 1995; -\$40,975 for 1996; -\$18,538 for 1997; -\$7,780 for 1998; -\$2,792 for 1999; -\$14,261 for 2000; and -\$32,546 for 2001.

In determining the petitioner's ability to pay the proffered wage, the CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The director determined that the evidence submitted 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 director did not consider the totality of the financial resources of the petitioner which will be submitted with the brief within thirty days.

The petitioner's IRS Form 1120S for calendar year 1994 shows an ordinary income of -\$40,769. The petitioner could not pay a proffered wage of \$24,960.00 a year out of this income.

In addition, the petitioner's taxable income figures for the years 1995 through 2001 continue to show an inability to pay the wage offered.

Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing.

Additionally, in his decision, the director noted that:

In order for the Service (CIS) to consider a Form I-140, Immigrant Petition for Alien Worker, for substitution of

the beneficiary, the petitioner must provide a letter to withdraw the previously approved Form I-140 petition. On March 7, 2002, the Service afforded the petitioner an opportunity to submit a written notice of withdrawal of the approved Form I-140 petition initially submitted for Anacleto Dungo under receipt number WAC-96-099-50593. However, the petitioner did not comply with the Service's (CIS) request.

On appeal, counsel argues that the petitioner did notify the Service of the substitution of the alien.

The record contains a letter from the executive director of the petitioning entity, dated April 1, 2002, which states that she is substituting the beneficiary for [REDACTED]. The letter did not state, however, that the petitioner was withdrawing the previously approved Form I-140 petition.

It is further noted that the substituted alien must have met all of the minimum education, training, or experience requirements, as stated in Part A of the original Form ETA 750 filed by the employer. In this case, the petitioner has not established that the substituted beneficiary had the required qualifications as of the priority date, September 27, 1994.

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.