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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

OCT 28 2003

File: WAC 02 040 54736

Office: CALIFORNIA SERVICE CENTER

Date:

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

Robert P. Wiemann

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 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 statement 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. [Emphasis provided.]

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 December 29, 1997. The proffered wage as stated on the Form ETA 750 is \$12 per hour, which equals \$24,960 per year.

With the petition counsel submitted financial statements for the petitioner's fiscal year ending January 31, 2001. Those financial statements were not accompanied by the accountant's

report, which would have revealed whether the statements were produced pursuant to an audit, a review, or a compilation.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on February 26, 2002, requested evidence pertinent to that ability. The Service Center specifically requested evidence of the ability to pay the proffered wage during 1997, 1998, 1999, and 2000. The Service Center also requested the petitioner's quarterly wage reports for the most recent four quarters.

In response, counsel submitted a letter, dated March 7, 2002. In that letter counsel stated that he was providing the petitioner's quarterly wage reports and **audited** financial statements for 1997 through 2000. With that response, counsel provided the petitioner's quarterly wage reports for all four quarters of 2001. Counsel also provided the petitioner's financial statements for 1997, 1998, 1999, and 2000. The accountant's report which accompanies each of those financial statements declares that they were produced pursuant to **a compilation, not an audit.**

On June 7, 2002, the Director, California Service Center, issued a Notice of Intent to Deny in this matter. The director noted that, in response to the request for evidence, "the petitioner submitted **unaudited** financial statements" [Emphasis in the original.] The director requested that the petitioner:

[S]ubmit proof of ability to pay in the form of annual reports, federal tax returns with appropriate signatures, or **audited** financial statements for years 1997 to present. [Emphasis in the original.]

In response, counsel submitted a letter, dated June 26, 2002. In that letter, counsel stated, "We have enclosed copies of the petitioner's financial statements, **audited**, for the years 1997 to present." [Emphasis supplied.] With that letter, counsel provided the petitioner's **compiled** financial statements for the petitioner's five fiscal years ending January 31, 1998 through January 31, 2002.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 2, 2002, denied the petition. In the decision, the director noted that the financial statements submitted were unaudited, and did not, therefore, comply with the Service request of June 7, 2002.

On appeal, counsel states; "Enclosed please find the employer's audited financial statements (sic) for the year 1997 to present."

With the appeal, counsel provides copies of the same five financial statements previously submitted. The accountant's report that accompanies each of those financial statements makes explicit that they were all produced pursuant to a compilation, and not an audit.

8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are competent to demonstrate the petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and **audited** financial statements. The **unaudited** financial statements submitted by counsel will not be considered.

Counsel has submitted no competent evidence of the petitioner's ability to pay the proffered wage. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.