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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: [Redacted]

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

APR 05 2004

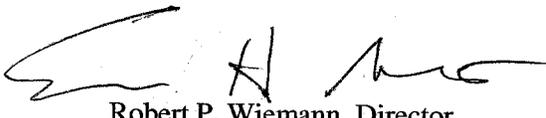
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

The regulation at 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 turns, in part, 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. The petition's priority date in this instance is November 30, 1998. The beneficiary's salary as stated on the labor certification is \$12.78 per hour or \$26,582.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's experience. In a request for evidence (RFE) dated November 29, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE also required additional evidence to establish the beneficiary's experience.

Counsel responded to the RFE with a letter accompanied by additional evidence. The evidence consisted of copies of the petitioner's signed Form 1120S U.S. federal tax returns for an S corporation for 1998, 1999, 2000 & 2001, copies of California Form DE-6 quarterly wage withholding reports for the four quarters of 2002, and a letter of work experience dated February 1, 2003 from the Pinocchio Bakery.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence, consisting of a copy of the petitioner's Form 1120S U.S. federal tax return for 2002 for an S corporation and a copy of the petitioner's California tax return for 2002.

Counsel states on appeal that CIS should look to the gross income of the petitioner, rather than only to the net profit, and that CIS should take into account the fact that the beneficiary has been employed by the petitioner since January 2003.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The AAO will then consider the evidence submitted on appeal.

The petitioner's tax returns show the following. The petitioner's ordinary income shown on Form 1120S, U.S. Income Tax Return for an S Corporation, line 21, was \$19,139 for 1998, \$25,235 for 1999, \$27,491 for 2000, and \$22,274 for 2001. Only in the year 2000 was the petitioner's ordinary income greater than the proffered wage of \$26,582.40. In 1998, 1999, and 2001 the ordinary income was insufficient to pay the proffered wage.

Calculations based on the current assets and current liabilities shown on the petitioner's Schedule L's yield the following figures for net current assets: \$33,754 for the beginning of 1998, \$49,284 for the end of 1998, \$51,195 for the end of 1999, \$10,747 for the end of 2000, and \$11,230 for the end of 2001. Only in the years 1998 and 1999 were the petitioner's net current assets greater than the proffered wage of \$26,582.40. In 2000 and 2001 the net current assets at the end of the year were insufficient to pay the proffered wage.

The petitioner's evidence includes copies of four quarterly wage reports for 2002. These reports show the number of employees as fluctuating between three and four. The beneficiary's name does not appear on the first three quarterly reports, but it does appear on the fourth quarterly report.

The petitioner's evidence also includes copies of three monthly business bank checking account statements, for the months ending January 31, 2002, March 29, 2002 (the last business day of March 2002), and April 30, 2002. Those statements show average balances of \$3,979.17, \$1,825.45, and \$2,096.08 respectively. The statements for March and April also show several instances in which the petitioner's balance was negative and seven charges coded as NSF, apparently signifying insufficient funds to cover checks received for payment.

In denying the petition the director summarized the evidence on the petitioner's ordinary income and quarterly wage reports and found that the income was insufficient for the petitioner to hire one full-time employee at the proffered wage of \$26,582.40. The director also made a close analysis of the three monthly bank statements submitted in evidence and noted the low balances, negative balances and repeated NSF charges shown on those statements. The director found the evidence insufficient to establish the petitioner's ability to pay the proffered wage.

The director's factual summaries of the evidence were accurate. However, the director failed to consider the net current assets of the petitioner during the relevant time period.

The analysis above shows that the evidence on the petitioner's net current assets fails to establish the ability of the petitioner to pay the proffered wage during the relevant time period. Therefore the director's failure to analyze net current assets was not significant, since such an analysis would not have changed the decision to deny the petition.

The evidence submitted prior to the decision of the director fails to establish the ability of the petitioner to pay the proffered wage, and the decision of the director to deny the petition was correct, based on that evidence.

The evidence submitted on appeal consists of the petitioner's federal and California state tax returns for 2002. Since the tax returns for 2002 were not due prior to the March 6, 2003 date of the director's decision, the AAO finds that they are not precluded from consideration on appeal. *See Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988).

The evidence submitted on appeal contains information for the year 2002 which is similar to that in the evidence submitted prior to the decision of the director. The petitioner's Form 1120S U.S. tax return for the year 2002 shows ordinary income of \$14,768, and a calculation based on the petitioner's current assets and current liabilities yields net current assets of \$12,860 for the end of 2002. Both of those figures are less than the proffered wage.

Nothing submitted on appeal addresses the deficiencies in the evidence relating to the years 1998 through 2001. The AAO therefore finds that the evidence submitted on appeal fails to overcome the decision of the director.

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.