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Citizenship and Immigration Services

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



File: EAC 02 139 51569 Office: Vermont Service Center

Date: APR 09 2004

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

At the outset, the AAO notes that the petitioner signed a Form G-28, Notice of Entrance of Attorney or Representative, for its purported representative, an individual who is not a lawyer or an accredited representative of an organization recognized by the Board of Immigration Appeals. Thus, a copy of this decision will be furnished only to the petitioner and not to its purported representative.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as its manager. 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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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. The petition's priority date in this

instance is January 3, 2001. The beneficiary's salary as stated on the labor certification is \$22.26 per hour or \$46,300 per year.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage. In a request for evidence (RFE) dated May 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 exacted the petitioner's federal income tax return for the year 2001, as well any W-2 Wage and Tax Statements for the beneficiary.

The petitioner submitted its Form 1120 U.S. Corporation Income Tax Return for the year 2000, not 2001. The petitioner also submitted Form NYS-45 Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return with attachments for the first two quarters of 2002 showing that during that time period it had employed two separate persons named Anna Myroni. The one was paid a total of \$23,150 for the two quarters while the other was paid \$3,900.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, the petitioner states that the decision to deny the petition is incorrect as the petitioner has the ability to pay the proffered wage. The petitioner explains that the two persons named Anna Myroni are mother and daughter, and that the beneficiary is the one who was paid \$23,150 for the first two quarters of 2002. The petitioner submits its 2001 Form 1120 U.S. Corporation Income Tax Return explaining that it thought it had been submitted in response to the director's request of May 29, 2002, when in fact it had submitted the 2000 return. The AAO will accept this explanation as plausible, and consider the 2001 return.

The tax return for 2001 shows a taxable income before net operating loss deduction and special deductions of \$35,140. This amount would not have been enough to pay the proffered wage; however, Schedule L of the return shows that the petitioner's net current assets for 2001 were \$46,884. The beneficiary's proffered wage of \$46,300 could have been met from this amount.

Accordingly, after a review of the evidence, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and thereafter.

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. The petition is approved.