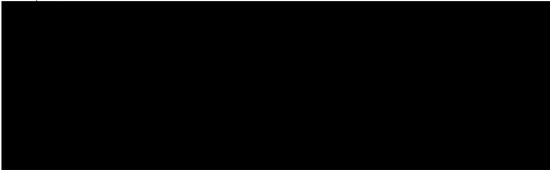




U.S. Citizenship
and Immigration
Services

BP



FILE: EAC-00-189-50602 Office: VERMONT SERVICE CENTER

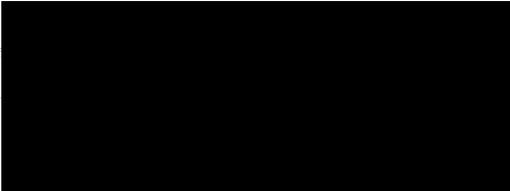
Date: APR 26 2004

IN RE: Petitioner:
Beneficiary:



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:



PUBLIC COPY

*identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy*

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

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 dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian specialty cook. 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.

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 March 26, 1998. The beneficiary's salary as stated on the labor certification is \$11.47 per hour or \$23,857.00 per year.

Counsel initially submitted the petition without an individual labor certification, the Application for Alien Employment Certification (Form ETA 750). In a request for evidence dated September 21, 2000 the director required submission of the original labor certification. Counsel responded with a letter dated December 4, 2000 stating that the petitioner was unable to locate the original ETA 750, and enclosing a letter dated November 16, 2000 from the Employment and Training Administration, U.S. Department of Labor, confirming that a labor certification had been approved for the petitioner on behalf of the beneficiary, and stating that a duplicate copy would be provided only upon request of a consular or immigration officer. The director then sent a letter dated April 16, 2001 to the Employment and Training Administration requesting a duplicate labor certification. The Employment and Training Administration responded by a letter dated November 19, 2001 and enclosed a duplicate copy of the labor certification, Form ETA 750, which is now in the file.

After receiving the Form ETA 750, in his further review of the petition the director determined that the petitioner had submitted insufficient evidence of the petitioner's ability to pay the proffered wage and insufficient evidence of the beneficiary's experience. In a request for evidence (RFE) dated January 14, 2002 the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE specifically requested copies of the 1999 and 2000 United States federal income tax returns for the petitioner's business. The RFE also requested evidence to establish that the beneficiary possessed the required experience as of the March 16, 1998 date of filing.

Counsel responded to the RFE with a letter dated April 9, 2002 accompanied by copies of the petitioner's Form 1120S, U.S. income tax return for an S corporation, for the years 1998, 1999 and 2000; an undated letter from the manager of the Hotel Madhulatha, Eleru, India attesting to the beneficiary's experience as an assistant cook and as a cook; and a letter dated April 4, 2002 from the general manager of the petitioner attesting to the beneficiary's experience as a cook working for the petitioner since February 1997.

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 in a notice of decision (NOD) dated June 27, 2002.

Under 8 C.F.R. § 103.3(a)(2)(i), the time for appeal is 30 days from the service of the NOD. An additional three (3) days are allowed for service by mail. 8 C.F.R. § 103.5a(c)(1).

The petitioner's notice of appeal, Form I-290B is date stamped as received for the first time on July 29, 2002. That date was one day before the deadline of July 30, 2002, a deadline calculated as 33 days after the NOD. In a notice dated August 23, 2002 the director rejected the notice of appeal. The rejection notice stated that the notice of appeal had not been properly signed. The notice of appeal is date stamped as received a second time on August 29, 2002.

The time during which the initial submission of the notice of appeal was pending with the director is found to stop the running of the 33-day appeal time. Moreover, pursuant to 8 C.F.R. § 103.5a(c)(1) an additional three days must be allowed beyond the August 23, 2002 date of the director's rejection notice, so that the time for filing the appeal is found to have been suspended until August 26, 2002. As of the date of the initial submission, one day remained of the 33-day period after the date of the NOD. Therefore, after taking into account the suspended time, the deadline for properly filing the appeal became August 27, 2002. That day was a Tuesday, so no further extensions were applicable by virtue of the deadline falling on a Saturday, Sunday or legal holiday. *See* 8 C.F.R. § 1.1(h). The notice of appeal is stamped as received the second time on August 29, 2002, two days after the extended deadline. The envelopes in which the notice of appeal was submitted the first and second times have not been retained in the file, therefore the file lacks evidence to confirm that the notice of appeal was date stamped on the same day that it was received by the director on each occasion. Allowing for a possible one-day delay in date stamping the notice of appeal on each submission, the AAO exercises favorable discretion to find that the second submission of the notice of appeal was timely.

On appeal, counsel states that the director erred by basing his decision solely on one corporate income tax return of the petitioner. The petitioner's Form I-290B notice of appeal states that the petitioner will submit a brief and additional documentary evidence within 30 days. Nonetheless, to date no additional documentation is in the file.

The record lacks any copies of W-2 Forms showing wages actually paid to the beneficiary, and the record contains no other evidence of the wages paid to the beneficiary by the petitioner. The record therefore lacks evidence that the petitioner was actually paying the proffered wage during the relevant time period. The AAO therefore must evaluate the petitioner's ability to pay the entire proffered wage as of the priority date and continuing to the present based on the remaining evidence in the record of proceeding.

In his decision the director found that the petitioner's tax returns showed net losses of -\$197,293 for 1998, -\$48,588 for 1999 and -\$219,796 for 2000. The director also found that the Schedule L's attached to each year's tax returns showed that the petitioner's assets had continually decreased while its liabilities had increased significantly over that three-year period.

The director's analysis of the petitioner's losses was correct. The figures cited by the director appear on line 21 of the petitioner's income tax returns for the each respective year, showing ordinary income. The director failed to make any calculations of net current assets, merely observing that the petitioner's assets had decreased while the petitioner's liabilities had increased. This observation fails to distinguish current assets from total assets and current liabilities from total liabilities. It also fails to specify whether current assets were greater than current liabilities during the relevant period.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the net current assets and net current liabilities shown on the Schedule L's attached to the petitioner's returns yield the following amounts for net current assets: -\$325,122 for the beginning of 1998, -\$476,767 for the end of 1998, -\$404,327 for the end of 1999, and -\$663,989 for the end of 2000. Therefore, although the director was incorrect in failing to calculate the net current assets, the director was correct in his conclusion that the petitioner's assets and liabilities failed to establish the petitioner's ability to pay the proffered wage at the time of filing and continuing to the present.

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.