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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
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Washington, D.C. 20536

[redacted]

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MAR 22 2004

File: WAC 01 254 52718 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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

DISCUSSION: The employment based immigrant 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 sustained.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. 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 an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence consisting of the petitioner's quarterly wage reports and asserts specific factual errors in the director's denial.

Section 203(b)(3)(A)(i) of 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) also provides in pertinent part:

> (2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The basis of the appeal is whether the petitioner has established its continuing ability to pay the beneficiary's offered wage. Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is December 12, 2000. The beneficiary's salary as stated on the approved labor certification is $1,800 per month or $21,600 annually.

A corporation, "Wes III, Inc.," operates the petitioner. This was established through the petitioner's response to the director's request for additional evidence issued May 13, 2002. The director had sent two previous requests on November 15, 2001 and March 5, 2002 in order to ascertain the beneficiary's

past employment experience as a Mexican food cook and the petitioner's ability to pay the offered wage. The only issue to be determined on appeal is the petitioner's ability to pay the offered wage. As evidence of its ability to pay, the petitioner submitted a copy of a financial statement for the period ending December 31, 2000, a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2000 and 2001, a copy of its W-3, Transmittal of Wage and Tax Statements for 2001, copies of the beneficiary's 2001 W-2, Wage and Tax Statement, and copies of the beneficiary's individual federal income tax return for 1996, 1997 and 1998, including the corresponding W-2.

The petitioner's corporate tax return showed that it declared $10,355 as ordinary income in the year 2000. Schedule L of this tax return reflects that the petitioner had -$24,561 in net current assets. The petitioner's 2001 corporate tax return indicates -$46,580 in ordinary income and -$21,862 in net current assets.

The director denied the petition on November 6, 2002. The director reviewed the information presented on the petitioner's corporate tax returns and concluded that the petitioner had failed to demonstrate that it had the ability to pay the beneficiary's offered salary of $21,600. The director noted a discrepancy between the number of employees claimed by the petitioner on the visa petition and the number of employees indicated by the copies of wage and tax statements.

On appeal, counsel asserts that the number of employees reported on the visa petition was an error and that the correct number should be eleven. Additional evidence in the form of state unemployment tax and wage reports for 2000 and 2001 is also submitted in support of the petitioner's ability to pay the proffered wage.

In this case, it is important to note that the beneficiary's W-2 indicates that the petitioner paid $22,729.97 as wages to him in 2001. Moreover, the state unemployment tax and wage reports, submitted on appeal, show that the beneficiary received $5,682.24 in wages from the petitioner for the last quarter of 2000. This equates to about $1,894 per month for those three months. As the priority date is December 12, 2000, these combined pay records demonstrate that the petitioner has been paying the offered salary to the beneficiary beginning as of the priority date of December 12, 2000. This may be accepted as credible evidence of the petitioner's ability to pay the beneficiary proffered salary of $21,600.

Accordingly, we conclude that the petitioner has established that it had the continuing ability to pay the beneficiary's wage as of 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 met that burden.

ORDER: The appeal is sustained.