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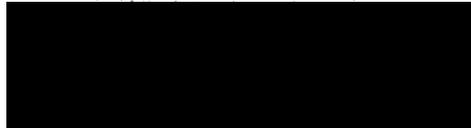


U.S. Citizenship
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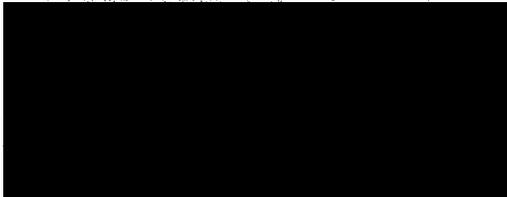
FILE: WAC 01 244 59631 Office: CALIFORNIA SERVICE CENTER Date: MAY 17 2004

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 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 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 dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), as a skilled worker. The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese style chef. 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 asserts that the director misinterpreted the petitioner's financial information and that the petitioner's evidence established its ability to pay the proffered wage.

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) provides 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. . . . 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 [CIS].

Eligibility in this case rests, in part, upon whether the petitioner's ability to pay the wage offered has been established 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 January 17, 1998. The beneficiary's salary as stated on the labor certification is \$2,525.47 per month or \$30,305.64 per year, based on a 40-hour week. The visa petition, filed in July 2001, indicates that the petitioner was established in 1980 and has ten employees.

The petitioner, through counsel, initially submitted copies of its Form 1065, U.S. Partnership Return of Income for 1998 and 1999 as evidence of its ability to pay the proffered wage. The 1998 partnership tax return shows that the petitioner declared \$12,630 in ordinary income. Schedule L of this tax return reflects that the petitioner had \$54,948 in current assets and \$2,605 in current liabilities. The difference of \$52,343 reflects the petitioner's net current assets. CIS will review a petitioner's net income as well as net current assets as part of the determination of a petitioner's ability to pay the proffered wage. Net current assets represent cash or cash equivalents that would reasonably be available to pay the wage offer during the year covered by the balance sheet as shown in Schedule L of a petitioner's federal tax return. In 1998, the petitioner's net current assets could cover the beneficiary's wage offer of \$30,305.64 per year.

The 1999 partnership tax return reflects that the petitioner had \$1,270 in ordinary income. Schedule L shows that it had \$55,715 in current assets and \$2,488 in current liabilities, resulting in \$53,227 in net current assets. The petitioner could pay the proffered wage out of its net current assets in 1999.

On July 10, 2002, the director requested additional evidence from the petitioner to support its continuing financial ability to pay the beneficiary's annual wage offer of \$30,305.64. The director instructed the petitioner to demonstrate its ability to pay the proffered wage by submitting either copies of signed federal tax returns, annual reports, or audited financial statements for 2000 and 2001. The petitioner was also advised to submit copies of its state quarterly wage report for the first quarter of 2002.

Included in the petitioner's response was a copy of its partnership tax return for 2000. It showed that the petitioner had -\$357 in ordinary income and declared no net current assets as of the end of the year. The petitioner also submitted a copy of Form 1120-A, U.S. Corporation Short-Form Income Tax Return filed in the name of "Dragon Fountain, LLC, China Gourmet Restaurant" with a slightly different address. Rather than referencing three partners as the partnership tax returns indicate, this tax return shows one principal shareholder. The return reflects a tax year beginning November 15, 2000 and running until September 30, 2001. It also shows a taxable income before net operating loss and special deductions of -\$4,480 and -\$134,144 in net current assets. The petitioner included a copy of a federal quarterly tax return filed by Dragon Fountain, LLC for the quarter ending March 31, 2002, indicating that \$38,793 in wages was paid to five employees. Finally, the petitioner submitted unaudited financial statements for the period ending August 31, 2002.

The director denied the petition, noting that the petitioner's declared net income was not sufficient to meet the proffered wage for the year 2000-2001, as shown by the partnership and corporate tax returns. The AAO also notes that even if the petitioner and Dragon Fountain were considered to be the same entity, the unaudited financial statements, submitted to represent the financial health of the petitioner as of August 2002, appear to be internally generated documents and, as such, provide little objective support of the petitioner's ability to pay the proffered salary. Unaudited financial statements are not included in the regulations governing evidence pertinent to establishing a petitioner's ability to pay at 8 C.F.R. § 204.5(g)(2).

On appeal, counsel includes a copy of Dragon Fountain's Form 1120-A, U.S. Corporation Short-Form Income Tax Return, representing the period from October 1, 2001 through September 30, 2002. It indicates that the Dragon Fountain had \$19,429 in taxable income. Schedule L shows \$58,941 in current assets and \$160,000 in current liabilities, producing -\$101,059 in net current assets.

Counsel also submits the individual income tax returns of one of the petitioner's partners, Mr. [REDACTED] and asserts on appeal that the petitioner was organized into a limited liability company and that "different from a corporation, the petitioner is a California partnership whose ability to pay is closely associated with each partner's individual income." Counsel also explains that the landlord requested the petitioner to relocate to a different part of the shopping mall where it was originally situated and that the petitioner reorganized at the same time. The corporate tax returns contained in the record, however, appear to reflect that Dragon Fountain, LLC, is composed of only one 100% shareholder and is not a partnership. It is noted that no partnership agreement has been submitted to the record to establish the nature of the current partnership or support counsel's contention that Mr. [REDACTED] individual income should be factored into the petitioner's ability to pay the proffered wage. There is also no corroboration that Dragon Fountain, LLC should be considered as the same entity as the petitioner. This would require documentary evidence that Dragon Fountain, LLC, China Gourmet Restaurant has assumed all of the rights, duties, and obligations of the predecessor partnership. See *Matter of Dial Auto Repairs*

Shop, Inc., 19 I&N Dec. 481 (Comm. 1981). The assertions of counsel in this matter cannot be considered to constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533,534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a continuing ability to pay a proffered wage, as of the visa priority date, through annual reports, audited financial statements, or federal tax returns. In the instant case, the petitioner has not persuasively established that the financial data related to Dragon Fountain, LLC or the individual income of Charles Liang should be considered as part of the petitioner's ability to pay the beneficiary's proposed wage. Absent such evidence, the AAO cannot conclude that the director erred in denying the petition, since the petitioner has failed to establish its ability to pay the proffered wage for 2000 and 2001.

In view of the foregoing, and based on a review of the financial documentation contained in the record, the AAO cannot conclude that the petitioner has demonstrated a continuing financial ability to pay the proffered wage pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2).

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.

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