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

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC-02-174-53194 Office: CALIFORNIA SERVICE CENTER Date: JUL 8 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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

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 sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican 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 January 15, 1998. The beneficiary's salary as stated on the labor certification is $13.87 per hour or $28,849.60 per year.

Counsel initially submitted insufficient evidence of the beneficiary's experience and of the petitioner's ability to pay the proffered wage. The evidence consisted of the following documents.

1. Form 1120S U.S. Income Tax Return for an S Corporation for 1998, unsigned;
2. Form 1120S U.S. Income Tax Return for an S Corporation for 1999, signed;
3. Form 1120S U.S. Income Tax Return for an S Corporation for 2000, unsigned;
4. Letter from Green Onion Mexican Restaurant, dated Dec. 28, 1997, confirming the beneficiary's experience;
5. Birth certificate of Yanin Maribel Cruz Jimenez, child of the beneficiary's spouse;
6. Birth certificate of Virginia Cruz Jimenez, the beneficiary's spouse;
7. Birth certificate of Julian Avila Contreras, the beneficiary; and
8. Marriage certificate of the beneficiary and his spouse.

In a request for evidence (RFE) dated August 19, 2002, the director required additional evidence to establish the beneficiary's experience and 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.

Concerning the petitioner's ability to pay the proffered wage, the RFE stated as follows:

> **Ability to Pay**: Provide evidence of the petitioner's ability to pay the beneficiary's 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, **signed** federal tax returns, or audited financial statements. The petitioner is requested to provide this evidence for Tax Year 1998, 2000 and 2001.
>
> The record indicates the beneficiary has been employed by the petitioner since June 1989. Submit beneficiary's W-2s from 1994 through 1997.
>
> **Tax Documentation**: Provide all schedules and tables that accompany the submitted tax return.
>
> ***Please note, in order for tax returns to be accepted as evidence of ability to pay, the tax returns must be signed.*** *The Service acknowledges receipt of your 1998, 1999 and 2000 tax returns, however, the submitted returns for 1998 and 2000 were unsigned and therefore found to be an unacceptable form of evidence.*

Director's RFE dated August 19, 2002 (emphasis in original).

In reply to the RFE, counsel submitted the following:

9. Additional copy of unsigned Form 1120S for 1998;
10. Additional copy of signed Form 1120S for 1999;
11. Additional copy of unsigned Form 1120S for 2000;
12. Copy of Form 1120S for 2001, unsigned;
13. W-2 Forms for beneficiary for 1994 through 2001;
14. Letter from Green Onion Mexican Restaurant dated October 28, 2002, detailing beneficiary's experience; and
15. Summary W-2 form for the petitioner for 2001, for all employees.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage because the petitioner failed to provide signed tax returns, and denied the petition.

On appeal, counsel submits a brief and the following documents.

16. Copy of Form 1120S for 1998, signed;
17. Copy of Form 1120S for 2000, signed; and
18. Copy of Form 1120S for 2001, signed.

Counsel states on appeal that the evidence in the record before the director was sufficient to establish the petitioner's ability to pay the proffered wage, and that the petitioner's failure to provide signed copies of tax returns was harmless error. Counsel also states that the submission on appeal of signed copies of tax returns cures any deficiency in the record.

An analysis of the evidence indicates the following.

All of the evidence submitted with counsel's Notice of Appeal, consisting of signed copies of tax returns, is being submitted for the first time on appeal. Prior submissions of tax returns for the years in question were unsigned copies. Aside from the signatures, the copies submitted on appeal are identical to the copies submitted previously.

In the RFE the director repeated relevant language from 8 C.F.R. § 204.5(g)(2) concerning the types of acceptable evidence needed to establish a petitioner's ability to pay the proffered wage. However the director added the word "signed" before the words "tax returns," and also added a notation specifically stating that the copies of unsigned tax returns previously submitted by the petitioner were not acceptable evidence.

No requirement for signed copies of tax returns is found in the regulations or in case law. In the instant case, the absence of signatures on the copies of the tax returns submitted by the petitioner was not material to any issue in the case. The director therefore erred in requiring signed copies of the petitioner's tax returns in his RFE and in failing to consider as evidence the unsigned copies of tax returns which had been previously submitted by the petitioner.

When analyzing a petitioner's ability to pay the proffered wage to a beneficiary who is already employed by a petitioner we look first to the compensation paid to the beneficiary. The petitioner submitted copies of W-2 forms for the beneficiary for the years 1994 through 2001. Since the priority date was January 15, 1998, only the figures for 1998 through 2001 are directly relevant. For those years, the beneficiary's W-2 forms show the following amounts paid to the beneficiary in wages, salaries and other compensation.

1998	23,298.02
1999	23,776.28
2000	26,647.16
2001	16,518.09

The proffered annual wage of the beneficiary is $28,849.60. The compensation received by the beneficiary in each of the above years was less than the proffered wage. But the petitioner's tax returns for those years show ordinary income of $1,811,160.00 for 1998, $2,129,210 for 1999, $2,641,768.00 for 2000 and $3,130,972.00 for 2001. These amounts were far greater than the difference between the beneficiary's actual compensation and the proffered wage. The petitioner therefore has established its ability to pay the proffered wage from the priority date through the present.

Counsel cites several cases by the Board of Alien Labor Certification Appeals (BALCA) in support of the petitioner's appeal. However, in light of the foregoing analysis, it is not necessary to address counsel's arguments based on those cases.

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.