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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

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File: WAC 01 282 53101

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Date:

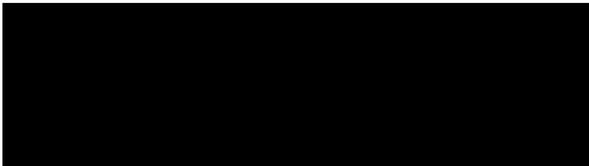
APR 09 2003

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

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 the Bureau of Citizenship and Immigration Services (Bureau) 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 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 dismissed.

The petitioner is a liquor store and deli. It seeks to employ the beneficiary permanently in the United States as a retail store 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.

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 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. *Matter of Wing's Tea House*, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is December 27, 1996. The beneficiary's salary as stated on the labor certification is \$13.05 per hour or \$27,144 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The understanding of the facts requires a definition

of the status of the petitioner.

A general partner [REDACTED] or the petitioner) executed the Form ETA 750 and the Immigrant Petition for Alien Worker (I-140) to employ the beneficiary at [REDACTED] 27985 Bradley Road in Sun City, California. For the year 2000, and attached to the I-140, was the Form 1065, U.S. Return of Partnership Income. It stated the ordinary income of the petitioner at \$96,596, more than the proffered wage. Schedule K-1 reflected [REDACTED] share at 25%, or \$24,149, less than the proffered wage. Schedule L showed net current assets of the partnership at \$33,135, more than the proffered wage. In passing, counsel refers to gross receipts or sales of \$322,303 for 2000.

In a request for evidence of January 17, 2002 (RFE), the director required from the petitioner, [REDACTED] signed and certified 1996 to 2000 federal income tax returns, with all forms, required schedules, statements, and tables, as well as the last four (4) quarterly wage reports (Forms DE-6).

Instead, counsel responded with Forms 1040, U.S. Individual Income Tax Returns of [REDACTED] and spouse. Schedules C pertained to the years 1996 through 2000, but they reported the income, not of the petitioner partnership, but of a sole proprietorship, [REDACTED] at 16987 Main Street in Hesperia, California.

Counsel offered the petitioner's Forms DE-6 for 2001 and, once again, its 2000 partnership tax return. In spite of the RFE, none was signed, dated, or executed.

Finally, the response to the RFE tendered Forms DE-6 for 2001 and, for 2000 only, Form 1065, U.S. Return of Partnership Income for yet a third firm with an employer identification number differing from the petitioner's. [REDACTED]

[REDACTED] Wildomar, California (Round-Up) offered a Schedule K-1, relating [REDACTED] share of ordinary income as \$12,497 (33.33% of \$37,483), less than the proffered wage. Schedule L reflected this firm's current assets of \$72,438, less current liabilities of \$6384, for net current assets of \$66,054, more than the proffered wage.

Counsel argued only that the 1996 to 1999 returns reflected the "employer's" tax returns. No federal tax return stated income of the petitioner except [REDACTED] for 2000.

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 (decision).

On appeal, counsel cites [REDACTED] partnership income in 2000:

In the instant case, Petitioner is complying with the [Bureau's] request and is submitting the required documents attached as Exhibit B which are signed and completed. In the year 2000 the employer had gross sales in the amount of \$322,303 and a net income of \$96,596.00 (See signed 2000 tax return, attached as **Exhibit B**). Therefore, the employer does in fact have a taxable income that is more than the beneficiary's intended salary that proves its ability to pay.

The priority date is 1996, not 2000. Counsel did not submit Exhibit B. The petitioner has never submitted a signed and dated tax return.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In the final analysis, the petitioner, not a third party, must show the ability to pay in each year, especially the priority date. The lack of Exhibit B, signed or not, is inconsequential. [REDACTED] did not submit any evidence of ability to pay except for 2000, and that evidence is insufficient.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I & N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Porgie's is neither the proposed employer nor the petitioner for this beneficiary. The assertions of counsel do not 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 record does not establish [REDACTED] relationship to the petitioner. For example, counsel's argument on appeal does not

allow one to identify [REDACTED] or the petitioner as the business in the following argument:

... the Petitioner may well have a larger profit from the valued employment of the beneficiary. In fact, Petitioner anticipates an increase in future operations and hopes for greater profits once the beneficiary is employed. The owner of the business is currently required to spend much time providing services himself. However, once the beneficiary is employed the owner plans to invest his time in pursuing the growth of the business. Hence, he anticipates continued growth in the business' income in the future.

The income of [REDACTED] the petitioner partnership, necessarily determines its ability to pay the proffered wage. It sufficed for 2000. Counsel abandoned further documentation, though the I-140 stated that the petitioner partnership had existed since 1990. Counsel, nonetheless, elected to present other entities' tax returns for the priority date and other years.

Porgie's, a sole proprietorship, is said to evidence its ability to pay from 1996 to 2000, but these individual income tax returns do not relate to [REDACTED] ability to pay. Counsel does not explain the relevance of other entities' federal tax returns.

Matter of Ho, 19 I&N Dec. 582 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

After a review of the evidence available on appeal, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.

[REDACTED]