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**U.S. Department of Homeland Security**
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

**U.S. Citizenship and Immigration Services**

[redacted]

File: WAC 00 085 53484 Office: California Service Center Date: APR 22 2004

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: SELF-REPRESENTED

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.

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center. The Director, Administrative Appeals Office, dismissed a subsequent appeal, affirming the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen. The motion will be granted, the previous decisions of the director and AAO will be affirmed, and the petition will be denied.

The petitioner appears to have retained representation. The record contains an executed Form G-28, Notice of Entry of Appearance. The ostensible representative indicates on that form that she is an authorized representative. That ostensible representative's name, however, does not appear on CIS's list of accredited representatives. The file contains no evidence that the petitioner's ostensible representative is qualified and authorized to represent the petitioner. The decision will not be furnished to the ostensible representative.

The appeal and the motion in this matter purport to have been filed by an attorney. The ostensible attorney, however, did not file a Form G-28, Notice of Entry of Appearance. As such, the record contains no evidence that the petitioner has consented to be represented by the ostensible attorney. All representations will be considered, but the decision in this matter will be furnished only to the petitioner.

The petitioner is a restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a chef. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of September 9, 1997, the priority date of the visa petition. The AAO affirmed that decision, dismissing the appeal.

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:

> *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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was filed on

September 9, 1997. The proffered salary as stated on the labor certification is $17.10 per hour, which equals $35,568 annually.

No evidence of the petitioner's ability to pay the proffered wage was submitted with the petition. Therefore, on October 13, 2000, the California Service Center requested that the petitioner submit evidence of that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the California Service Center requested that the evidence be either copies of annual reports, federal tax returns, or audited financial statements. In response, the petitioner submitted an unaudited page of its general ledger from January 2000 through September 2000. The California Service Center observed that the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and denied the petition on January 25, 2001.

On appeal, ostensible counsel asserts the following:

> 1) Applicant worker has at all times acted in good faith and any defect in his application is not due to applicant's negligence.
>
> 2) That the [petitioner] is a major corporation and Restaurant Chain [sic] which should be recognized as having the ability to hire the applicant.
>
> 3) The pursuant [sic] to the attached letter dated February 13, 2001. [sic] The petitioner (Acapulco) was notified by fax, mail and telephone call to the urgency of providing the necessary financial information.
>
> 4) That every effort is being made to secure the financial information and open receipt it will immediately be provided to [CIS].

The AAO found that the unaudited page of the petitioner's general ledger was not persuasive evidence of the petitioner's ability to pay the proffered wage and dismissed the appeal on January 11, 2002.

In his motion to reopen, ostensible counsel stated that the petitioner's audited financial statements for 1998, 1999, and 2000 were previously submitted. Counsel submitted no other information, argument, or documentation. No audited financial statements appear in the record. The AAO informed ostensible counsel by telephone on June 26, 2003, July 24, 2003, August 7, 2003, and other subsequent dates that the record did not contain the audited financial statements or counsel's entry of appearance. On each occasion, counsel assured the AAO that those documents would be sent. Those documents still have not materialized.* The AAO is neither obliged nor inclined to wait any longer and will adjudicate the motion on the evidence in the record.

The issue in this matter is not whether the beneficiary has acted in good faith, nor whether ostensible counsel has made an honest effort to obtain the appropriate information from the petitioner. Pursuant to 8

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* The AAO is exercising favorable discretion in granting the instant motion although no supporting documentary evidence has been received in contravention of the requirements set forth at 8 C.F.R. § 103.5(a)(2).

C.F.R. § 204.5(g)(2), the petitioner must submit evidence demonstrating its ability to pay the proffered wage or evidence that it employs 100 or more workers. The issue is whether the petitioner has submitted sufficient evidence on one of those two points.

The only evidence in the record pertinent to the petitioner's finances is a single page of the petitioner's general ledger from September 2000. The documentation submitted does not establish convincingly that the petitioner had sufficient available funds to pay the salary at any time since the priority date. The evidence certainly does not establish that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date. Further, no evidence was submitted to demonstrate that the petitioner employs 100 or more workers. Therefore, the petitioner has not demonstrated that the petition may be approved.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

**ORDER:** The motion to reopen is granted. The AAO's decision of January 11, 2002 is affirmed. The petition is denied.