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U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 28 2004

IN RE: Petitioner: [redacted]
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:

[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 employment based immigrant visa petition was initially approved by the Director, California Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with a notice of intent to revoke the approval of the preference visa petition, together with his reasons therefore. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner sought 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 bakery. It sought to employ the beneficiary permanently in the United States as a pastry baker. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed on September 26, 2000. It was initially approved on December 20, 2000. The alien beneficiary filed an application to adjust his status to that of lawful permanent resident. Following a review of the record, the director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition on August 9, 2002. The director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage as of the visa priority date. The director noted that the petitioner had filed multiple petitions for alien workers.

The director subsequently revoked the petition on October 24, 2002, pursuant to section 205 of the Act, 8 U.S.C. § 1155. The director based the revocation on his conclusion that the petitioner had failed to timely respond to the notice of intent to revoke the petition.

On appeal, the petitioner, through counsel, asserts that he provided a timely response to the director's notice of intent to revoke the visa petition. Counsel also maintains that the director miscalculated the petitioner's financial ability to pay the proffered wage

Section 205 of the Act, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

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)(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 upon 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. 8 C.F.R. § 204.5(d). Here, the petition's priority date is August 1, 2000. The beneficiary's salary as stated on the labor certification is $11.59 per hour based on a 40-hour week, or $24,107.20 annually. The visa petition reflects that the petitioner was established in 1990 and had twelve employees at the time the petition was filed.

The record indicates that the petitioner is organized as a sole proprietorship. Because a sole proprietorship is not legally separate from its owner, all income and expenses generated by the sole proprietor and his dependents may be taken into consideration when reviewing the petitioner's ability to pay the beneficiary's proffered salary. The sole proprietor must demonstrate that he can meet his existing business expenses as well as pay the proposed wage offer and sustain himself and his dependents until the beneficiary obtains lawful permanent resident status. Here, the sole proprietor filed a joint tax return with his spouse and claimed one additional dependent in 1999 and 2001.

Relevant to the petitioner's ability to pay the proposed annual wage offer of $24,107.20, the petitioner initially provided a copy of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for the year 1999. It indicates that the sole proprietor declared $68,217 in adjusted gross income, including $30,682 in business income, as reflected on Schedule C, Profit or Loss from Business.

In response to the director's specific instructions contained in the notice of intent to revoke the petition, counsel submitted a copy of the sole proprietor's individual tax return for 2001. A copy of a Fed-Ex tracking notice has been submitted on appeal and is sufficiently persuasive to establish that the petitioner's response to the director's notice of intent to revoke the petition was timely delivered. The 2001 tax return shows that the sole proprietor had $178,936 in adjusted gross income, including $150,246 in business income as shown on Schedule C. Counsel did not provide a complete copy of the sole proprietor's 2000 tax return. The record only contains a copy of Schedule C, which shows business net profit of $104,143.

Counsel also offered a copy of the petitioner's state quarterly wage report for the quarter ending September 30, 2000, showing sixteen employees, as well as a summary of the sole proprietor's monthly living expenses and accompanying documentation. The sole proprietor's household living expenses are presented as $3,551.67 per month or $42,620.04 per year. This means that the sole proprietor must show that he has the ability to pay his reasonable individual living expenses of $42,620.04 plus any additional proposed salaries of beneficiaries, described in pending visa petitions, that have correlating priority dates. As set forth the regulation at 8 C.F.R. 204.5(g)(2), a petitioner must establish its ability to pay the proffered wage until each beneficiary receives permanent resident status.

The petitioner additionally provided financial statements for the period ending December 31, 2001, accompanied by an accountant's statement, dated April 2, 2002, indicating that the financial statements are a compilation of the petitioner's financial data. As observed by the accountant's letter, a compilation is "limited to presenting in the form of financial statements information that is the representations of management." It is not audited or reviewed, and offers little evidentiary weight in support of the petitioner's continuing ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to provide either annual reports, federal tax returns, or *audited* financial statements as evidence of its ability to pay the proffered wage. (Emphasis added.)

The director observed in his notice of intent to revoke the petition, that the petitioner had filed multiple petitions,

representing an increase in personnel of approximately 65%. The director listed the receipt numbers and proposed wage offers of four pending petitions. The following information was noted:

WAC 00 262 52820- $11.59/$24,107- pastry baker
WAC 02 025 56053- $15.53/$32,302- pastry chef
WAC 02 035 56608- $15.53/$32,302- pastry chef
WAC 02 062 52666- $11.59/$24,107- pastry baker

Neither the director, nor the petitioner has provided documentary evidence of these other petitions. A brief review of CIS electronic records, however, indicates that WAC 00 262 52820 (priority date of 8/01/2000) was revoked on August 21, 2002. Another I-140 was filed by the petitioner for the same beneficiary under WAC 03 149 53205. WAC 02 025 56053 (priority date of April 23, 2001) was revoked on June 3, 2002. A second I-140 was filed by the petitioner for the same beneficiary under WAC 03 053 54353. WAC 02 035 56608 (priority date of April 23, 2001) was revoked on August 6, 2002. Subsequently, WAC 03 053 54411 was filed for the same beneficiary by the petitioner. Finally, WAC 02 062 52666 (no priority date given) was denied on September 13, 2002. WAC 03 053 54380 was then filed for the same beneficiary by this petitioner. Thus, if these new petitions reflect the same corresponding priority dates and proffered wages, then they have to be factored into the calculation of the petitioner's ability to provide the proposed salaries to all of the beneficiaries, at a minimum, from April 23, 2001, forward.

The director also stated that WAC 98 071 53074 and WAC 00 262 52803, as approved petitions, should also be considered in calculating the petitioner's ability to pay the proffered wage of a new petition. The record contains no documentary evidence of the proffered wage in either of these petitions, although the director estimates that these two approved petitions plus the petition in this case would add an additional $75,000 to the petitioner's obligation to pay the proffered wage. Counsel disputes this proposition and simultaneously asserts on appeal that: 1) the salaries for the beneficiaries of WAC 98 071 53074 and WAC 00 262 52803 have already been included in the sole proprietor's tax returns as expenses and shouldn't be included in any additional calculation, and 2) that they have both received permanent resident status and no longer work for the petitioner anyway. Counsel's assertions as to the length of the beneficiaries' employment with the petitioner cannot be considered evidence. *See Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988). Although the state quarterly wage report for the quarter ending September 30, 2000 do not name the beneficiary of WAC 00 262 52803 as an employee, it is unclear, along with WAC 98 071 53074, when or if they departed the petitioner's employ. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). The electronic records show that the beneficiary of WAC 00 262 52803 did not receive permanent resident status until October 18, 2001. Unless other factors mitigate this consideration, as stated above, a petitioner must establish its ability to pay the proffered wage until a beneficiary receives permanent resident status.

At a minimum, the director should consider the present petition's proffered wage of $24,107.20 in addition to the four pending petitions noted above (totaling $136,925), as well as the petitioner's living expenses of $42,620.04. The director should also consider counsel's response to his notice of intent to revoke as timely. All of the cases, including WAC 98 071 53074 and WAC 00 262 52803 should be retrieved and investigated individually and collectively to specifically corroborate the proffered wages, visa priority dates, departure from employment and other matters pertinent to adjudication, including the petitioner's complete federal tax returns. In the future, if multiple pending petitions are implicated in a decision involving an appeal, this office would ask that a copy of the related labor certifications be provided with the appeal.

In view of the foregoing, the director's decision is withdrawn. The petition is remanded to the director to request further evidence relevant to the petitioner's continuing ability to pay the proffered wage. The director may also request updated financial information pursuant to 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may also provide any further pertinent evidence within a reasonable time to be determined by the director. Upon receipt of all evidence, the director will review the record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.