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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: WAC 02 073 51955 Office: CALIFORNIA SERVICE CENTER Date: FEB 02 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 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 Citizenship and Immigration Services (CIS) 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 Mexican bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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. The petition's priority date in this instance is January 14, 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 petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated March 21, 2002, the director required

additional evidence 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. The RFE exacted the petitioner's federal income tax return, annual report or audited financial statement for 1998 to the present.

Counsel elected, instead, to submit only Schedule C, Profit or Loss from Business, for 1998-2000. Counsel made no account of the omission of the federal tax returns, as the regulation, *supra,* and the RFE specify.

Schedule C for 1998 stated a profit of $24,088, less than the proffered wage, and no wages paid at the priority date. Schedule C for 2000 reported a profit of $17,715 and no wages paid, less than the proffered wage.

For 1999, counsel offered two (2) Schedules C. One had an employer identification number (EIN) and stated a loss of ($6,675) and no wages paid. The other 1999 exemplar of Schedule C refers to no EIN. It claimed a profit of $30,153, equal to or greater than the proffered wage, and it stated wages paid of $13,591. The director discounted the evidentiary effect of those sums, since the Immigrant Petition for Alien worker (I-140) indicated that eight (8) employees would share them. No argument buttressed the evidentiary value of contradictory 1999 submissions.

The director noted, further, the absence of evidence that the petitioner paid the beneficiary's salary in any year, determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage, and denied the petition.

On appeal, counsel states:

> I am sending a brief and/or evidence to the [AAO] within 30 days.
>
> [CIS] erred as a matter of law and fact in finding that the Petitioner did not have the ability to pay the proffered wage from the priority date [to] the date of the Notice of Decision.

Counsel has filed no further brief or evidence with the director or the AAO, and more than the time allowed and requested has elapsed. 8 C.F.R. § 103.3(a)(2)(i) and (viii). Counsel does not identify, specifically, any erroneous conclusion of law or statement of fact. Hence, the appeal must be summarily dismissed. 8 C.F.R. § 103.3(a)(1)(v).

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.