U.S. Department of Homeland Security

Citizenship and Immigration Services

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[redacted]

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

PUBLIC COPY

File: WAC 02 216 50712 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

FEB 11 2004

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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner appears to have retained representation. The petitioner's putative representative filed a Form G-28, Notice of Entry of Appearance in this matter. That notice does not state that the representative is an attorney. Further, that putative representative's name does not appear on the roster of accredited representatives. The record contains no indication that the petitioner's putative representative is authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits a brief and additional evidence.

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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the 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 request for labor certification was accepted on July 10, 1998. The proffered salary as stated on the labor certification is $11.55 per hour, which equals $24,024 per year.

The petition states that the petitioner has 36 employees. With the petition, the petitioner submitted copies of the petitioner's 1998, 1999, 2000, and 2001 Forms 1065, U.S. Partnership Return of Income.

The 1998 return indicates that the petitioner declared a loss of $101,122 as its ordinary income during that year. The corresponding Schedule L states that at the end of that year the petitioner had current assets of $292,773 and current liabilities of $242,760, which yields net current assets of $50,013.

The 1999 return indicates that the petitioner declared a loss of $367,296 as its ordinary income during that year. The corresponding Schedule L states that at the end of that year the petitioner's current liabilities

exceeded its current assets.

The 2000 return indicates that the petitioner declared a loss of $109,558 as its ordinary income during that year. The corresponding Schedule L states that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 return indicates that the petitioner declared a loss of $83,193 as its ordinary income during that year. The corresponding Schedule L states that at the end of that year the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on November 6, 2002, requested additional evidence pertinent to that ability. The Service Center requested that the petitioner submit evidence demonstrating its ability to pay the proffered wage during every year since 1998 and that the evidence be in the form of copies of annual reports, federal tax returns, or audited financial statements. The Service Center also specifically requested the beneficiary's Form W-2 Wage and Tax Statements for every year since 1998. The Service Center noted that, if the petitioner employs 100 or more workers, then a statement from a financial officer of the firm that the petitioner is able to pay the proffered wage would suffice as proof of the ability to pay the proffered wage.

In response, the petitioner submitted additional copies of its tax returns for the years 1998 through 2001. The petitioner also submitted a letter, dated December 16, 2002. In that letter, the petitioner's owner stated that the beneficiary worked for the petitioner during 2000 and 2001, but not during 1998 and 1999. The petitioner provided the beneficiary's 2000 and 2001 W-2 forms, which show that the petitioner paid the beneficiary $13,636.77 and $9,655.35 during those years, respectively. The petitioner provided no other evidence of its ability to pay the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on February 14, 2003, denied the petition.

On appeal, the petitioner provides (1) copies of its menus; (2) copies of what purports to be 1999 and 2002 Form W-2 Wage and Tax Statement showing the total the petitioner paid to its employees during those years; (3) a copy of the its 1999 and 2000 Form 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return, showing the total taxable wages it paid during those years; (4) a copy of its 2001 W-3 Transmittal of Wage and Tax Statements; (5) copies of the petitioner's California Form DE-6 Quarterly Wage Reports showing the wages the petitioner paid to 71 employees during the first quarter of 1998, to 64 employees during the second quarter of 1998, to 77 employees during the third quarter of 1998, to 72 employees during the last quarter of 1998, to 76 employees during the first quarter of 1999, to 74 employees during the second quarter of 1999, to 88 employees during the last quarter of 1999, to 70 employees during the first quarter of 2000, to 63 employees during the second quarter of 2000, to 50 employees during the third quarter of 2000, and to 50 employees during the last quarter of 2000; (6) a copy of the petitioner's 1999 California Form DE 7, Annual Reconciliation Return showing the total wages the petitioner paid during that year; (7) a copy of the petitioner's 2000 California Form DE 7X, Annual Reconciliation Statement showing the total the petitioner paid in wages during that year; (8) copies of the petitioner's Form 941, Employer's Quarterly Federal Tax Returns for all four quarters of 1998, the first, second, and last quarters of 1999, and the first, third, and last quarters of 2000; (9) a compilation of the petitioner's payroll during the third quarter of 1998 from a payroll processing company; and (10) a copy of three pages of the petitioner's 2002 Form 1065, U.S. Return of Partnership Income.

The 2002 tax return shows that the petitioner declared an ordinary income of $31,261 during that year. The corresponding Schedule L was not included among the petitioner's submissions.

On the brief, the petitioner states that it has never yet failed to pay its workers. On page one of that brief, the petitioner states that it has employed between 55 and 70 employees since the priority date.

Curiously, page two of the petitioner's brief states, "The corporation employs over 350 employees."

The Form 941 Employer's Quarterly Federal Tax Returns submitted show that the petitioner employed 71 workers during the first quarter of 1998, 71 workers during the second quarter of 1998, 70 employees during the third quarter of 1998, 72 workers during the last quarter of 1998, 68 workers during the first quarter of 1999, 74 employees during the second quarter of 1999, 88 employees during the last quarter of 1999, 63 workers during the first quarter of 2000, 63 workers during the second quarter of 2000, 50 workers during the last quarter of 2000, 50 employees during the third quarter of 2000,

Further, the petitioner did not employ all of those employees during the entire quarter. The quarterly returns show that during those quarters, the petitioner employed between 38 and 68 workers during each of the months within those quarters. The quarterly returns appear to contradict the petitioner's claim on appeal that it employs over 350 workers. The petitioner provided no other evidence of the number of workers it employs. The petitioner did not explain this apparent discrepancy.

Because the petitioner is not a corporation and has provided a wealth of evidence that it has never since the priority date employed 100 or more workers, this office is inclined to believe that statement "The corporation employs over 350 employees" was included in the brief in error.

The petitioner acknowledges that it suffered losses since the priority date, which it says were,

> due to several factors, including the physical move of the baking wholesale division to a new location, a block from the original bakery/restaurant establishment, the investing of monies in the wholesale division, and remodeling and renovating the wholesale division of Pasadena Baking Company, which included purchasing the equipment for operations.

The petitioner does not indicate during what years the petitioner's relocation and the renovation of its wholesale division occurred. Further, the petitioner provided no evidence of the amount of those expenses or that they were incurred at all. The petitioner also stated that it has not failed to pay its employees since the priority. The petitioner apparently implies that its losses should be overlooked in the determination of its ability to pay the proffered wage.

The petitioner is correct that, if its losses are uncharacteristic and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining its ability to pay the proffered wage. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In this case, however, counsel has submitted no evidence to show that the relocation and renovation expenses were uncharacteristic or even that they were incurred. Merely alleging or implying that uncharacteristic losses were incurred is insufficient.

This office notes that the beneficiary's name does not appear on any one of the petitioner's California Form DE-6 Quarterly Wage Reports for 2000. This is inconsistent with the petitioner having employed the beneficiary during 2000, which the petitioner claims to have done and which the 2000 W-2 form purports to show. The

petitioner did not explain this apparent discrepancy.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Pursuant to the regulations, the petitioner must demonstrate the ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. Because the petitioner submitted no annual reports or audited financial statements, this office must rely on the petitioner's federal tax returns.

The proffered wage is $24,024. During 1998 the petitioner suffered a loss of $101,122 but had net current assets of $50,013. The petitioner was able to pay the proffered wage out of its assets during that year.

During 1999 the petitioner suffered a loss of $367,296 and had negative net current assets. The petitioner was unable to pay the proffered wage during that year either out of either income or net current assets. The petitioner has submitted no evidence of any other funds at its disposal during 1999. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

The petitioner submitted a W-2 form showing that it paid the beneficiary $13,636.77 in wages during 2000. Although that evidence conflicts with the 2000 Form DE-6 which the petitioner submitted, this office shall only require the petitioner to show that it was able to pay the $10,387.23 balance of the proffered wage during that year. During 2000 the petitioner suffered a loss of $109,558 and had negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of either its income or its net current assets. The petitioner has not demonstrated that any other funds were at its disposal during 2000. The petitioner has not demonstrated the ability to pay the proffered wage the balance of the proffered wage during 2000.

The petitioner submitted a W-2 form showing that it paid the beneficiary $9,655.35 during 2001. The petitioner is obliged to show that it was able to pay the $14,368.65 balance of the proffered wage during that year. During 2001 the petitioner suffered a loss of $83,193 and had negative net current assets. The petitioner was unable to pay the balance of the proffered wage during that year either out of income or net current assets. The petitioner has submitted no evidence of any other funds at its disposal during 2001. The petitioner has not demonstrated the ability to pay the balance of the proffered wage during 2001.

The petitioner submitted no evidence that it paid any wages to the beneficiary during 2002 and is obliged to show the ability to pay the entire proffered wage. During 2002, the petitioner declared income of $31,261. The petitioner was able to pay the proffered wage out of its income during that year.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1999, 2000, and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, this office notes that the employment history that the beneficiary provided on the Form ETA 750, Part B is different from that stated on the employment verification letter subsequently provided. On the Form ETA 750, Part B, the beneficiary stated that he had worked as a cook at the Lamplighter Restaurant, in Sherman Oaks, California, from June 1991 through June 1993.

With the application, the petitioner submitted no evidence in support of the beneficiary's claimed employment history. Therefore, in the November 6, 2002 request for evidence, the director requested that the petitioner provide evidence in support of the employment history stated on the Form ETA 750, Part B.

In a letter, dated December 16, 2002, submitted in response to the request for evidence, the petitioner stated that the previous employment verification letter was submitted in error, notwithstanding that no such letter had been submitted. With that letter, the petitioner submitted an undated letter, purportedly from the owner of the City Hall Coffee shop in Montrose, California. That letter states that the beneficiary worked as a cook at that establishment from June 1991 through June 1993. An undated letter from the beneficiary also states that the previous work history submitted was the result of a clerical error. Neither the petitioner nor the beneficiary explained how error as detailed as the beneficiary's employment history could have been included on the Form ETA 750, Part B.

No evidence was submitted in support of the beneficiary's initially submitted employment history, as stated on the Form ETA 750, Part B. The evidence in support of the beneficiary's revised employment history, submitted in response to the request for evidence, is not credible.

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.