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U.S. Citizenship and Immigration Services

**PUBLIC COPY**

[redacted]

FEB 24 2004

FILE: WAC 01 289 51214 Office: CALIFORNIA SERVICE CENTER Date:

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 preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

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 an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel 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 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. Here, the petition's priority date is April 23, 2001. The beneficiary's salary as stated on the labor certification is $10.09 per hour or $20,987.20 per annum.

Counsel submitted copies of the petitioner's 1999 and 2000 Form 1065, U.S. Return of Partnership Income.

The director determined that the documentation was insufficient to establish the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a copy of the petitioner's 2001 Form 1065 U.S. Partnership Return of Income which reflects gross receipts of $645,638; gross profit of $196,338; salaries and wages paid of $26,920; guaranteed payment to partners of $1,296; and an ordinary income (loss) from trade or business activities of $59,718.

On appeal, counsel argues that the submitted tax return shows that the petitioner has the ability to pay the wage offered at the time of filing of the petition.

The petitioner's 2001 tax return shows an ordinary income of $59,718. The petitioner could pay a salary of $20,987.20 a year out of this figure.

Based on the evidence submitted, it can be found that the petitioner has established that it had sufficient funds available to pay the beneficiary the proffered wage as of the priority date of the application for alien employment certification as required by 8 C.F.R. § 204.5(g)(2).

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 met that burden.

**ORDER:** The appeal is sustained.