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U.S. Department of Homeland Security

Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

FEB 26 2004

File: WAC 01 107 54287 Office: CALIFORNIA SERVICE CENTER Date:

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:

[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 employment based immigrant 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 seeks 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 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits copies of signed tax returns and asserts that this overcomes the grounds for the director's denial.

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) states in pertinent part:

> (2) *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 continuing 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 November 6, 1995. The beneficiary's salary as stated on the approved labor certification is $9.60 per hour or $19,968 annually.

The current petitioner is a successor-in-interest to the original petitioner. As evidence of its ability to pay, the petitioner submitted copies of Form 1120, U.S. Corporation Income Tax Return for the years 1995 through 1998 that were filed by the original petitioner. To show the continuing ability to pay the proffered wage after its acquisition of the former petitioning business, the current petitioner submitted

copies of its corporate tax returns for the years 1999 and 2000. The petitioner also submitted a copy of an extension to file its federal tax return for the tax year 2001.

The 1995 corporate tax return filed by the original petitioner covers a fiscal year from July 1, 1995 to June 30, 1996. This return indicates that the petitioner claimed a taxable income before net operating loss deduction (NOL) and other special deductions of -$767. Schedule L of the tax return also reflected that the petitioner had $71,094 in net current assets. The petitioner's net current assets would be sufficient to cover the beneficiary's offered salary for this period of time.

The 1996 corporate tax return covering the fiscal year from July 1, 1996 to June 30, 1997 shows that the petitioner declared a taxable income before the NOL and other special deductions of -$16,139. Schedule L of this tax return shows that the petitioner claimed $59,874 in net current assets. The beneficiary's salary could be met for this year out of the petitioner's net current assets.

The original petitioner's 1997 corporate tax return covering the fiscal year from July 1, 1997 to June 30, 1998 shows that its taxable income before the NOL and other special deductions was -$64,389. Schedule L of this tax return reflects that the petitioner's net current assets were $55,759. The petitioner's net current assets for this year were sufficient to meet the beneficiary's proposed salary.

The original petitioner's 1998 tax return covered a period from July 1, 1998 to February 28, 1999. Its taxable income before the NOL and other special deductions was -$67,903. Schedule L of this return reflects that the petitioner's net current assets of $189,572 were sufficient to meet the proffered salary.

The current petitioner submitted its own corporate tax return for 1999 covering a fiscal year from June 1, 1999 to May 31, 2000. Its taxable income before the NOL and other special deductions was $5,941. Schedule L shows that its net current assets were -$95,951. Neither figure is sufficient to meet the beneficiary's proposed salary of $19,968.

It is noted that CIS recognizes a petitioner's ability to pay the proposed wage offer if the petitioner has actually employed a beneficiary at the proffered wage. To the extent that a petitioner has employed an alien beneficiary at less than the proffered salary, a petitioner's net income or net current assets as shown on its federal tax return, audited financial statement, or annual report must reflect sufficient funds to cover the difference needed to meet the proffered wage. In this case, the record contains a payroll register dated January 15, 2001. It states that the beneficiary's year-to-date wages were $19,152, however, there is no credible corroboration that the payroll record is related to the beneficiary's employment with the petitioner. The only other evidence submitted relating to the petitioner's actual payment of wages to the beneficiary consists of copies of a state quarterly wage report. It shows that as of the quarter ending March 31, 2002, the petitioner had paid the beneficiary $4,788, which equates to approximately $800 less than the proffered wage on an annual basis.

The current petitioner's 2000 corporate tax return covers a fiscal year from June 1, 2000 to May 31, 2001. It shows a taxable income before the NOL and other special deductions of -$12,867. Schedule L of this return indicates that the petitioner had -$63,501 in net current assets. These figures do not demonstrate that the petitioner had the ability to pay the offered wage out of either income or assets.

The director denied the petition determining that the petitioner had not established its continuing ability to pay the proffered wage as of the priority date of the visa petition because it had not submitted signed tax returns. It is not clear how a copy of a signed tax return significantly increases the evidentiary weight of a petition. The penalties for submitting false or forged documents to Citizenship and Immigration Services set forth in section 274C of the Act, 8 U.S.C. 1324C, and 18 U.S.C. § 1546(a) do not hinge upon whether the tax return is signed or not, but whether a document or statement is false. Nevertheless, counsel submitted signed federal tax returns on appeal.

In his denial, the director also observed incidentally that the petitioner has the ability to pay the proffered wage. While the AAO agrees with the director's conclusion that the petition should be denied, as the record presently stands, the AAO does not agree that the petitioner has demonstrated its ability to pay in 2000-2001. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish its continuing ability to pay as of the visa priority date until the alien gains lawful permanent resident status. Audited financial statements, annual reports or federal tax returns must be submitted as evidence of this ability. In this case, the petitioner did not submit annual reports or audited financial statements. Its 2000 federal tax return fails to support its continuing ability to pay the offered salary. The petitioner has not offered other persuasive evidence or argument to establish its ability to pay the beneficiary's proposed wage in light of the financial data contained in the record.

In view of the foregoing, it cannot be concluded that the petitioner has demonstrated its continuing ability to pay the proffered salary as of the priority date of the petition.

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.