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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: WAC 02 169 54098 Office: California Service Center Date: JAN 09 2004

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 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 is a restaurant. The petitioner seeks to employ the beneficiary permanently in the United States as a specialty 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 and continuing.

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, and continuing. Here, the petition's priority date is April 25, 2001. The beneficiary's salary as stated on the labor certification is $12.00 per hour, which equates to $24,960.00 per annum.

Counsel submitted copies of the petitioner's 1999 and 2000 Internal Revenue Service (IRS) Forms 1040. The 1999 tax return showed an adjusted gross income of $10,695 while the 2000 return showed an adjusted gross income of $10,706.

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

On appeal, counsel argues that the petitioner did have the ability to pay the proffered wage, and submits a copy of the petitioner's 2001 Form 1040. As noted above, the priority date in this case is April 25, 2001; therefore, the petitioner's 2001 tax return would be of primary interest.

A review of the 2001 Form 1040 shows an adjusted gross income of $28,457, an amount more than the proffered wage of $24,960.00. However, the petitioner's tax return shows that he has three dependents other than himself.

The record indicates that the petitioner's adjusted gross income for 2001 was $28,457 and his net taxable income was $3,248. Subtracting the proffered wage from the adjusted gross income leaves the petitioner with $3,497 to support a family of four. In a similar case where the petitioner's adjusted gross income was $20,000, his net taxable income was $13,000, and the proffered wage was $6,000 a year, the court agreed with INS (now CIS) finding "it highly unlikely that the petitioner can, in fact, compensate the beneficiary in an amount which totals such a high percentage of his income. Clearly, the petitioner is unable to afford this rate of compensation." *Ubeda v. Palmer,* 539 F.Supp. 647 (N.D. Ill. 1982), aff'd., 703 F. 2d 571 (7th Cir. 1983).

Beyond the decision of the director, this petition is deniable for another reason. The petitioner in this case is a sole proprietorship which is not separate from its owner. CIS records indicate that petitioner/owner is neither a United States citizen nor a lawful permanent resident of the United States; rather, he is an applicant for permanent resident status whose last recorded immigration status was that of nonimmigrant student. A petitioner whose status in the United States is "neither settled, stabilized, nor permanent" is not competent to offer permanent employment to an alien beneficiary. *See Matter of Sun,* 12 I&N Dec. 800 (BIA 1968) and *Matter of Thornhill,* 18 I&N Dec. 34 (Comm. 1981).

Accordingly, after a review of the evidence, it is concluded that the petitioner has not established that it had sufficient funds to pay the salary offered as of the priority date of the petition and continuing to the present.

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.