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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, DC 20536

[redacted]

File: WAC 02 191 51117 Office: CALIFORNIA SERVICE CENTER Date: JAN 13 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 employment based immigrant 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 remanded to the director to request additional evidence and entry of a new decision.

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, the owner of the petitioning business submits additional evidence and asserts that the petitioner has demonstrated that it has the ability to pay the proffered wage.

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) provides 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 the Service.

The sole issue on appeal is whether the petitioner has established its financial ability to pay the beneficiary's offered wage. Eligibility in this case rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The priority date is the date the request for labor certification was accepted for 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 petition's priority date is September 25, 1998. The beneficiary's salary as stated on the labor certification is $11.55 per hour or $24,024 annually.

In this case, the petitioner submitted evidence of its ability to pay the proffered wage in the form of copies of its Form 1040 U.S. Individual Income Tax Return for the years 1998 through 2001

including Schedule C (Profit or Loss from Business). The sole proprietor owner filed these returns. The information provided reflects the following:

Year	Net Profit	Adjusted Gross Income
1998	$12,114	$69,473
1999	$10,034	$31,272
2000	$24,577	$71,381
2001	$1,181	$45,925

In denying the petition, the director concluded that the living expenses of the petitioning firm's owner would exceed the funds remaining after deducting the beneficiary's wage.

On appeal, counsel submits various other tax returns of other businesses in which the petitioner's owner has an interest, arguing that these holdings should be considered when evaluating the petitioner's ability to pay the proffered salary.

The petitioner is organized as a sole proprietorship. It is not legally separate from its owner. In reviewing the petitioner's ability to pay the beneficiary's proffered salary, consideration must be given to the income and expenses actually generated by the sole proprietor. The record reflects that the sole proprietor's adjusted gross income exceeded the proposed salary of $24,024 in each of the relevant years as shown on his individual Form 1040(s). He claimed four exemptions on his tax returns for each of those years. The director assumed that the petitioner could not reasonably sustain himself and his dependents as well as pay the beneficiary's proffered salary. The director, however, failed to instruct the petitioner to provide his actual monthly living expenses to justify this assumption. An evaluation of this petitioner's ability to pay the proffered wage should include this information.

In view of the foregoing, the director's decision is withdrawn. The petition is remanded to the director to request additional evidence of the petitioner's actual monthly living expenses. Similarly, the petitioner may provide any further pertinent evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.