U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

File: WAC 02 035 53902 Office: CALIFORNIA SERVICE CENTER Date: JAN 28 2003

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 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.

JW Moore for

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 specialty chef. 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 an additional tax return and bank statements 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 demonstrated that it has the ability to pay the proffered wage. Eligibility in this case rests upon whether the petitioner has shown that the petitioner's continuing 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 January 13, 1998. The beneficiary's salary as stated on the labor certification is $12.50 per hour or $26,000 annually.

As proof of its ability to pay, the petitioner initially submitted a copy of its Form 1065, U.S. Return of Partnership Income for the tax year of 2000. The federal employer identification number on this return

is 68-0117801, which matches the identification number given on the I-140, Immigrant Petition for Alien Worker. It reflected that the petitioner declared an ordinary income of -$3,494. Schedule L of this federal tax return showed that the petitioner's net current assets were -$26,381. Two Schedule Ks (Partners' Shares of Income, Credits, Deductions, etc.) submitted with the tax return indicated that Francisco Sahagun and Alicia Sahagun each held a 33% capital ownership of this partnership.

On February 20, 2002, the director requested additional evidence from the petitioner showing that it had the ability to pay the beneficiary's offered salary as of the priority date and continuing until the present. The director also instructed the petitioner to include copies of the beneficiary's W-2s and a copy of the last state quarterly wage report showing the names, social security numbers and number of weeks worked for all employees.

Included in the petitioner's response were its 1998 and 1999 federal partnership tax returns. The 1998 return showed that the petitioner declared an ordinary income of $62,570. The 1999 return indicated that the petitioner declared an ordinary income of $50,241. The petitioner also submitted its state quarterly wage reports for the year 2001; however, the beneficiary's name does not appear as one of the listed employees. The petitioner sent copies of the beneficiary's W-2s for 1998 through 2001. It is noted that the employer identification number on all of these W-2s is different than that of the petitioning business.

In denying the petition, the director noted that the petitioner's ability to pay the offered salary appeared to be met for the years 1998 and 1999, although the 2000 tax return did not demonstrate an ability to pay. We concur. The beneficiary's proposed salary of $26,000 could be covered by the petitioner's ordinary income of $62,570 and $50,241 for 1998 and 1999, respectively. Neither the petitioner's ordinary income of -$3494 nor its net current assets of -$26,381, however, could demonstrate its ability to pay the proposed wage of $26,000 in 2000. The beneficiary's 2000 W-2 and absence of his name as one of the petitioner's employees in the 2001 quarterly wage reports also raises a question as to whether the beneficiary was actually employed by the petitioning business and not one of the other restaurants mentioned in the record. The record contains no first-hand evidence of any contractual documentation establishing that the beneficiary's 2000 employer is the same entity as the petitioning business. Even if the beneficiary's 2000 salary of $21,600 were considered, the difference between this sum and the proffered wage could not be met by the petitioner's negative figures given for its net current assets or ordinary income.

On appeal, counsel submits a copy of the 2001 individual tax return of one of the petitioner's general partners. His adjusted gross income of $83,697 appears to be sufficient to cover the beneficiary's proffered wage. Counsel also offers copies of the petitioner's bank statements in support of the petitioner's ability to pay the beneficiary's proffered wage. These statements show a January 2000 beginning balance of $30,764.16 and a December 2000 ending balance of $15,424.58. There is no evidence in the record, however to indicate that these balances somehow represent funds not already reflected in the tax returns contained in the record.

Based on a review of the financial data contained in the record, we cannot conclude that the petitioner has persuasively demonstrated an ability to pay the proffered wage as of the priority date of January 13, 1998 and continuing until 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.