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U.S. Citizenship and Immigration Services

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[redacted]

MAR 22 2004

FILE: WAC 02 190 50762 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 Administrative Appeals Office (AAO) 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, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the petitioner had failed to establish that it had the continued financial ability to pay the beneficiary's proffered wage beginning at the visa priority date.

On appeal, counsel submits additional evidence and argues that the petitioner has established its financial 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) also 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.

In this case, eligibility for the visa classification is based, in part, upon whether the petitioner has demonstrated its continuing ability to pay the beneficiary's proffered salary as of the priority date of the visa petition. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is August 17, 1998. The beneficiary's salary as stated on the labor certification is $14.57 per hour for a 40-hr. week or $30,305.60 annually. The record indicates that the petitioner is organized as a partnership. The immigrant worker petition (I-140) reflects that the petitioner employs 52 people and was established in 1994.

The petitioner initially failed to submit any evidence of its ability to pay the beneficiary's proposed salary of $30,305.60.

In a request dated August 9, 2002, the director requested additional evidence to establish the petitioner's continuing ability to pay the proffered wage as of the priority date. The director specified either annual reports, federal tax returns, or audited financial statements. The director also advised the petitioner that if the petitioner's company employed at least one hundred (100) workers, then a statement from a financial officer of the organization that supports the company's ability to pay the beneficiary's prospective salary might be acceptable.

In response, counsel submitted copies of the petitioner's tax returns for 1998, 1999, 2000, and 2001. They contain the petitioner's financial information based on a regular calendar year. The tax return for 1998 is a California Form 565, Partnership Return of Income. The petitioner did not submit a federal return. The state tax return indicates that the petitioner declared ordinary income of $84,657 in 1998. The beneficiary's proposed salary of $30,305.60 could be paid out of this source in 1998.

The petitioner submitted a copy of its Form 1065, U.S. Partnership Return of Income for 1999. This tax return reveals that the petitioner declared ordinary income of -$51,013 in 1999. Schedule L indicates that the petitioner declared $-0- in current assets and $-0- in current liabilities, resulting in $-0- in net current assets. Net current assets can be considered as a resource to pay the beneficiary's salary because they represent assets that can reasonably be expected to be converted to cash or a cash equivalent within a year, less any encumbrances on the assets. The beneficiary's proffered wage of $30,305.60 could not be paid out of either the petitioner's ordinary income or its net current assets in 1999.

The petitioner's Form 1065, U.S. Return of Partnership Income filed for calendar year 2000 indicates that the petitioner began to file its taxes as a limited liability partnership. In that year, the petitioner declared -$40,052 as ordinary income. It reported $65,586 in current assets and $39,968 in current liabilities, resulting in $25,618 in net current assets.

The petitioner's 2001 limited partnership tax return reflects that the petitioner had -$86,485 in ordinary income. Its current assets and current liabilities were $33,646 and $146,085, respectively. Thus, it reported -$112,439 in net current assets.

The director reviewed the petitioner's reported ordinary income and net current assets as shown on the tax returns and concluded that the petitioner had not established its continuing ability to pay the beneficiary's proposed salary.

On appeal, counsel submits copies of the beneficiary's Form 1040A, U.S. individual Income Tax Return for the years 1998 through 2001. Counsel also submits copies of the corresponding individual Wage and Tax Statements (W-2s). Between the two, the W-2s offer more evidentiary support to the petitioner's ability to pay the proffered wage because they show the derivation of the beneficiary's income. They indicate that the petitioner has employed the beneficiary since 1998. Another related restaurant also employed the beneficiary, but it bears a different address and different employer identification number on the W-2s and will not be considered. The pertinent W-2 records indicate that the petitioner paid the beneficiary $18,805.32 in 1999, $18,727.02 in 2000, and $12,994.83 in 2001.

In 1999, the difference between the actual wages paid and the beneficiary's proposed wage offer was $11,500.28. This balance could not be paid out of either the petitioner's declared ordinary income of -$51,013 or its net current assets of $-0-.

In 2000, however, the petitioner's net current assets of $25,618 could meet the shortfall of $11,578.58, which is the difference between the actual wages paid of $18,727.02 and the proposed salary of $30,305.60.

The figures for 2001 do not support the petitioner's ability to pay the proffered salary of $30,305.60 because the difference of $17,310.77 could not be covered by either the petitioner's declared ordinary income of -$86,485 or its net current assets of -$112,439.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate continuing financial ability to pay the proffered salary. In this case, two out of the relevant four years of financial data set forth on the petitioner's tax returns do not support its ability to pay. Neither the ordinary income, nor the net current assets for 1999 and

2001 support the petitioner's ability to pay the beneficiary's wage offer of $30,305.60. The petitioner must establish the elements for approval of the petition at the time of filing. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). In this case, for the reasons discussed above, the petition may not be approved.

Beyond the decision of the director, it is noted that the minimum employment experience specified on the approved labor certification (Form ETA 750-A) is two full years in the job offered as a "cook." To be eligible for approval, the beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, it is noted that the copy of the letter from the "Restaurant Camino Viejo," located in Jalisco, Mexico, does not indicate whether the beneficiary worked full-time or part-time from January 1989 until March 1991. As such, it is unclear whether he has accrued two full years of experience as a cook prior to the priority date of August 17, 1998. It is also noted that the certification of translation is not signed by the translator consistent with 8 C.F.R. § 103.2(b).

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.