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U.S. Department of Homeland Security

Citizenship and Immigration Services

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PUBLIC COPY

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

[redacted]

File: [redacted] Office: Nebraska Service Center Date: MAR 26 2004

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director further determined that the evidence failed to establish that the position was one of a specialty cook.

On appeal, counsel argues that the evidence demonstrates the petitioner has the financial ability to pay the proffered wage at the time the priority date was established and that the position requires a cook who has at least two years experience in preparing Chinese food.

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.

The regulation at 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 petitioner'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. The petitioner's priority date in this instance is July 23, 2001. The beneficiary's salary as stated on the labor certification is $1700 per month or $20,400 per year.

With the petition, counsel submitted a copy of the first page of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, and an ETA 750 with a different employer than that shown on the Form I-140, Immigrant Petition for Alien worker. The federal tax return for 2001 reflected taxable income before net operating loss deduction and special deductions of $22,125, more than the proffered wage.

In a request for evidence (RFE) dated January 27, 2003, the director required additional evidence to establish the petitioner as successor in interest to the original employer and of the petitioner's ability to pay the proffered wage as of the priority date and continuing until present, including the full 2001 corporate tax return. In response, counsel submitted articles of incorporation, menus to establish itself as a working restaurant, and a 2001 tax return that was different than the return submitted with the petition. The second return showed an address in Eau Claire, Wisconsin and reflected taxable income before net operating loss deduction and special deductions of negative $7,119.

The director determined that the evidence presented was sufficient to establish the petitioner as successor in interest to the original employer. However, he also determined the federal income tax returns were unreliable evidence and therefore did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. He further determined that the position offered by the petitioner did not require a specialty cook.

On appeal, counsel states that the petitioner owns three Zhou's Mongolian BBQs, and the return submitted in response to the RFE was submitted in error as it was for a different restaurant that had nothing to do with the location where the beneficiary would be employed. Counsel states the tax return submitted with the petition is the correct return and shows the petitioner's financial ability to pay the proffered wage at the time the priority date was established.

With the appeal, counsel submitted a brief, petitioner's 2001 and 2002 Form 1120, and copies of the petitioner's commercial bank statements for 2002 and January of 2003. Even though the petitioner submitted its bank statements to demonstrate that it had sufficient cash flow to pay the proffered wage, there is no

proof that they somehow represent additional funds beyond those of the tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel also submitted a letter from the petitioner's accountant that included the "real" returns for calendar years 2001 and 2002.

The petitioner's tax return for calendar year 2001 shows a taxable income before deductions for net operating loss and special deductions of $22,125. The petitioner could have paid the proffered wage from net income. The petitioner's tax return for calendar year 2002 shows a taxable income before deductions for net operating loss and special deductions of $20,721. The petitioner could have paid the proffered wage from net income.

The director's objection to the experience requirements for this position cannot be sustained. The role of CIS, formerly the Service or INS, is to determine whether the beneficiary meets the qualifications for the position as stated in the job offer portion of the labor certification. It is the purview of the Department of Labor to determine if a labor certification should be issued for a particular job. *See Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir.. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Upon review, it is determined that the petitioner has provided sufficient evidence to overcome the findings of the district director in his decision to deny the petition. The petitioner has established eligibility pursuant to section 203(b)(3)(A)(i) of the Act and the petition will be sustained.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.