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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 02 065 50941 Office: CALIFORNIA SERVICE CENTER Date: MAR 29 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: SELF-REPRESENTED

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.

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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 petition 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 or professional. 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 financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner submits additional evidence and asserts that the continuing ability to pay the beneficiary's proffered wage has been established.

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 issue raised on appeal is 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 September 16, 1996. The beneficiary's salary as stated on the labor certification is $462.00 per week or $24,024.00 annually.

The petitioner initially submitted insufficient evidence of its ability to pay the proposed annual salary of $24,024.00. On March 7, 2002, the director instructed the petitioner to submit additional information to support the beneficiary's employment experience and the petitioner's ability to pay the beneficiary's

proffered wage. The director advised the petitioner that its financial information could be offered in the form of federal tax returns, annual reports, or audited financial statements. The director also observed that the immigrant visa petition (Form I-140) indicated that the petitioner was established in 1988, but that one of its corporate tax returns showed that it elected to incorporate in February 2000.

Following the petitioner's submission of incomplete copies of its tax returns for the years 1996 through 2001, the director issued a notice of intent to deny on August 20, 2002 and advised the petitioner that he had an additional thirty days to submit complete, signed tax returns for the relevant years.

The director subsequently denied the petition, determining that the petitioner had not established its continuing ability to pay the proffered wage as of the priority date of the visa petition because it had not submitted signed tax returns. It is not clear how a copy of a signed tax return significantly increases the evidentiary weight of a petition. The penalties for submitting false or forged documents to Citizenship and Immigration Services set forth in section 274C of the Act, 8 U.S.C. 1324C, and 18 U.S.C. § 1546(a) do not depend upon whether the tax return is signed or not, but whether a document or statement is false. Nevertheless, the petitioner submitted copies of signed federal tax returns on appeal.

The petitioner filed Form 1120S, U.S. Income Tax Return for an S Corporation for the period covering February 22, 2000 through December 31, 2000 and for the 2001 calendar year. It declared ordinary income of $40,877 in the year 2000 and $49,515 as ordinary income in 2001. Both figures demonstrate its ability to pay the beneficiary's proposed salary of $24,024.00 for those two years.

The tax returns for the years 1996 through 1999 indicate that the petitioner was organized as a sole proprietorship. The sole proprietor filed Form 1040, U.S. Individual Income Tax Return for each of those years. Schedule C reflects the sole proprietor's business income. During those years the tax returns contained the following information:

| | Business Income | Adjusted Gross Income |
|---|---|---|
| 1996 | $49,147 | $57,363 |
| 1997 | $50,131 | $59,280 |
| 1998 | $63,434 | $70,991 |
| 1999 | $56,207 | $65,062 |

In reviewing a sole proprietor's ability to pay the proffered wage, all income and expenses must be evaluated because a sole proprietorship is not a legally separate entity from its owner. Therefore, the sole proprietor's income, liabilities, and personal assets may be considered when looking at the petitioner's ability to pay the beneficiary's proffered salary. Here, the petitioner was operated as a sole proprietorship from 1996 through 1999. At first glance, the sole proprietor's adjusted gross income for each of these years appears to cover the beneficiary's proposed annual salary of $24,024.00. It must be noted, however, that the sole proprietor claimed four exemptions on each of his individual tax returns, indicating that his adjusted gross income included the support of a household of four. There is no information in the record relevant to the sole proprietor's household expenses that would also have to have been covered by the sole proprietor's adjusted gross income. If the remaining figure is sufficient

to meet the beneficiary's proposed annual salary of $24,024.00, then it can be concluded that the petitioner has had a continuing ability to pay the proffered wage.

Therefore, in view of the foregoing, the director's decision is withdrawn. The petition is remanded to the director to request further evidence relevant to the sole proprietor's monthly living expenses from September 16, 1996 through 1999, as well as any further pertinent financial information. We note that some of the petitioner's payroll records indicate that an individual with the same name as the beneficiary may be one of the petitioner's employees. If confirmed by the petitioner's documentation, any actual wages paid to the beneficiary as a cook may also be considered in a review of the petitioner's ability to pay the proposed salary. Similarly, the petitioner may also provide any further pertinent evidence within a reasonable time to be determined by the director. Upon receipt of all evidence, the director will review the 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.