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U.S. Citizenship and Immigration Services

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[redacted]

MAY 06 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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DISCUSSION: The preference visa petition approval was revoked by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty chef, Mexican cuisine. 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.

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 turns, in part, on the petitioner's ability to pay the wage offered as of the petition'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 petition's priority date in this instance is March 12, 1998. The beneficiary's salary as stated on the labor certification is $11.55 per hour or $24,024.00 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated February 1, 2001, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present until the beneficiary obtains lawful permanent residence.

Counsel responded to the RFE with a letter dated March 2, 2001, accompanied by additional evidence.

The director approved the petition on March 20, 2001.

The beneficiary submitted an I-485 application to adjust status to permanent resident status on April 16, 2001.

On March 26, 2003 the director issued a decision revoking the earlier approval of the I-140 petition, stating that while adjudicating the adjustment of status petition he discovered that the beneficiary did not qualify for the benefit sought under the I-140 petition. The director found that the petitioner had submitted six Form I-140 petitions for different beneficiaries and found that the evidence failed to establish the ability of the petitioner to pay the proffered wage to the beneficiary in the instant case as well as to pay the proffered wages to the beneficiaries of the other petitions. The director relied on *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988) as authority for finding that an error in judgment in initially approving a petition is sufficient cause for revoking an approval. The director failed to note, however, that in *Ho* the district director properly notified the petitioner of his intent to revoke approval of the petition.

On that same day, March 26, 2003, the director also issued a decision denying the beneficiary's I-485 application for adjustment of status, on the basis that the underlying I-140 employment petition had been revoked.

Counsel filed a timely appeal of the director's revocation decision. With the notice of appeal counsel submits additional evidence. On the Form I-290B notice of appeal counsel left blank the box for item number 3, for the reasons for the appeal. Nonetheless, the attached evidence consisting of tax and other financial documents of the petitioner indicates that the petitioner is asserting on appeal that it has the ability to pay the proffered wage.

In considering the instant appeal the AAO will first examine the procedure used by the director in revoking the prior approval of the I-140 petition.

The regulation at 8 C.F.R. § 205.1(a)(iii) provides for automatic revocation of petitions approved under section 203(b) of the Act, other than special immigrant juvenile petitions, in the following situations:

> (A) Upon invalidation pursuant to 20 CFR Part 656 of the labor certification in support of the petition.
>
> (B) Upon the death of the petitioner or beneficiary.
>
> (C) Upon written notice of withdrawal filed by the petitioner, in employment-based preference cases, with any officer of [CIS] who is authorized to grant or deny petitions.
>
> (D) Upon termination of the employer's business in an employment-based preference case under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act.

Concerning revocations other than automatic revocations, the regulation at 8 C.F.R. § 205.2 states in pertinent part:

> (a) *General.* Any [CIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of [CIS].
>
> (b) *Notice of intent.* Revocation of the approval of a petition of self-petition under paragraph (a) of this section will be made only on notice to the petitioner or self-petitioner. The petitioner or self-petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and in opposition to the grounds alleged for revocation of the approval.
>
> (c) *Notification of revocation.* If, upon reconsideration, the approval previously granted is revoked, the director shall provide the petitioner or the self-petitioner with a written notification of the decision that explains the specific reasons for the revocation. The director shall notify the consular officer having jurisdiction over the visa application, if applicable, of the revocation of an approval.

In the instant case, the director issued no notice of intent to revoke the prior approval of the I-140 petition. Rather, the director simply issued a decision revoking the prior approval. The reason cited by the director for this action was the failure of the petitioner's evidence to establish the petitioner's ability to pay the proffered wage of the beneficiary and of other beneficiaries on whose behalf the petitioner had submitted employment-based petitions. That reason is not one of the reasons listed in 8 C.F.R. § 205.1(a)(iii) for automatic revocation of a petition. The director failed to follow the procedure in 8 C.F.R. § 205.2(b) and issue a notice

of intent to revoke. For the foregoing reason the instant case will be returned to the director, who must first issue a notice of intent to revoke, pursuant to 8 C.F.R. § 205.2(b).

The AAO notes that in the director's decision revoking the approved I-140 petition, the director relied only on the taxable income information shown on the petitioner's Form 1120 U.S. corporation income tax returns. The director failed to analyze the net current assets of the petitioner in each of the relevant years. Moreover, in citing other pending or approved I-140 petitions as reasons for finding that the petitioner had not established its ability to pay the beneficiary in the instant petition, the director failed to specify the years in which those petitions had been filed or approved. Although it is reasonable for the director to consider all petitions filed by a single petitioner when evaluating the petitioner's ability to pay the proffered wage to any particular beneficiary, any such consideration must also take into account the dates such petitions were filed and, for those which were approved, the dates of such approvals. A simple adding of the proffered wages in all pending and approved petitions is an incomplete analysis, since the cost to the petitioner of paying multiple beneficiaries will vary, depending on the number of petitions which are pending each year. The petitioner must show that it had sufficient net income or net current assets to pay all the wages at the priority date of each petition and continuing until each beneficiary obtains permanent residence.

Accordingly, this matter is remanded to the director for the application of proper procedure, pursuant to 8 C.F.R. § 205.2(b).

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.