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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

Public Copy



AUG 14 2001

File: [Redacted] Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as an Other Worker Pursuant to § 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)(A)(iii).

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E. Crawford for
Robert P. Weimann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a pizzeria. It seeks to employ the beneficiary permanently in the United States as a kitchen supervisor. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, counsel submits a statement and indicates that a separate brief and/or evidence is being submitted within thirty days. To date, however, no further documentation has been received. Therefore, a decision will be made based on the record as it is presently constituted.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 petition's filing 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. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is September 10, 1996. The beneficiary's salary as stated on the labor certification is \$13.76 per hour or \$28,620.80 annually.

Counsel initially submitted copies of the petitioner's 1996 and 1997 Form 1120S U.S. Income Tax Return for an S Corporation. The 1996 federal tax return reflected gross receipts of \$434,410; gross profit of \$233,640; compensation of officers of \$18,510; salaries and wages paid of \$41,784; depreciation of \$8,640; and an ordinary

income (loss) from trade or business activities of \$8,492. Schedule L reflected total current assets of \$13,848 with \$3,848 in cash and total current liabilities of \$0. The 1997 federal tax return reflected gross receipts of \$417,086; gross profit of \$247,128; compensation of officers of \$17,085; salaries and wages paid of \$44,735; depreciation of \$4,640; and an ordinary income (loss) from trade or business activities of \$9,215. Schedule L reflected total current assets of \$11,785 with \$1,785 in cash and total current liabilities of \$0.

The director concluded that the documents submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. On July 12, 2000, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of September 10, 1996.

In response, counsel furnished copies of the 1996 and 1997 Form 1120S U.S. Income Tax Return for an S Corporation for Pizza of Bethesda. In his decision, the director noted that Pizza of Bethesda was a different corporation from Pizza Boli's and therefore the tax returns could not be taken into consideration. The petition was denied accordingly.

On appeal, counsel asserts that:

The Immigration and Naturalization Service erred in failing to consider other sources of income pledged to the employer/petitioner. Where an employer has available to him other sources from which to draw income, the Immigration and Naturalization Service must consider it. See Full Gospel Portland Church v. Thornburgh, 730 F. Supp. 441,449 (D.D.C. 1998). The Immigration and Naturalization Service erred as matter of law in failing to consider the petitioner's other business income, Pizza of Bethesda, to pay ot (sic) Pizza Bolis.

The statements and documentation provided by the petitioner on appeal do not overcome the issues raised by the director in denying the petition. The petitioner has failed to specifically address the issue presented by the director in his denial. The director stated that Pizza of Bethesda was a separate corporation from Pizza Bolis. No additional evidence has been submitted to refute this conclusion.

A review of the 1996 federal tax return shows that when one adds the ordinary income, the depreciation, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is \$20,980, less than the proffered wage.

A review of the 1997 federal tax return continues to show an inability to pay the wage offered.

Accordingly, after a review of the federal tax returns furnished, it is concluded that the petitioner has not established that it had

sufficient available funds to pay the salary offered at the time of filing of the petition..

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.