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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



File: EAC 99 206 52529 Office: Vermont Service Center Date:

MAR 12 2001

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

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:
[Redacted]

Public Copy

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.

Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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 contends that the petitioner did meet its burden to show the ability to pay the offered wage as stated in the labor certification.

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 January 27, 1999. The beneficiary's salary as stated on the labor certification is \$11.47 per hour or \$23,857.60 annually.

With the original petition, the petitioner submitted a copy of its 1998 U.S. Income Tax Return for an S Corporation which indicated gross receipts of \$219,486, gross profit of \$104,952, wages paid of \$14,042, depreciation of \$3,003, and an ordinary income (loss) from trade or business activities of -\$16,043.

On October 25, 1999, the Service requested evidence of the

petitioner's ability to pay the proffered wage as of January 27, 1999.

In response, counsel furnished a copy of the petitioner's 1997 U.S. Income Tax Return for an S Corporation which indicated gross receipts of \$187,101, gross profit of \$100,200, wages paid of \$14,660, depreciation of \$3,003, and an ordinary income (loss) from trade or business activities of -\$10,035.

In his decision, the director noted that the evidence submitted was insufficient to establish the petitioner's ability to pay the proffered wage at the time of filing and continuing until the present. The petition was denied accordingly.

On appeal, counsel asserts that:

The Vermont Service Center erroneously denied the petitioner's application since she had the ability to pay the offered wage of \$23857.60 to the beneficiary. The petitioner maintains an asset of over \$200,000.00 since 1997. The Service Center should take this into consideration. Instead, the center denied the petition just because the petitioner has shown a loss on the 1997 and 1998 income tax returns. The assets it has would allow the business to pay the proffered wage to the beneficiary.

Even though counsel claims that the petitioner has maintained assets over \$200,000 since 1997, the only assets that are liquid (available for use) are the total current assets. Total current assets equal \$10,028 and total current liabilities equal \$4,015. Therefore, the petitioner could add only \$6,013 to the depreciation and ordinary income to determine the total amount available to pay the proffered wage. A review of the federal tax record for 1998 shows that when one adds the taxable income, the depreciation, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the total equals -\$7,027, \$30,884.60 less than the proffered wage.

No additional evidence of the ability to pay the proffered wage has been submitted. The petitioner must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2).

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.