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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



MAR 12 2001

File: EAC 99 105 51147 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:



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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Acting Director
Administrative Appeals Office

Identification data deleted to
prevent clearly unwarranted
invasion of personal privacy

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 January 14, 1998, 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 14, 1998. 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 1997 U.S. Income Tax Return for an S Corporation which reflected gross receipts of \$967,714, salaries and wages paid of \$319,492, depreciation of \$20,230, and an ordinary income from trade or business activities of \$401.

On May 25, 1999, the Service requested evidence of the petitioner's

ability to pay the proffered wage as of January 14, 1998. Specifically, the director requested copies of the beneficiary's Form W-2 Wage and Tax Statements from the restaurant for 1997 and 1998.

In response, counsel stated that:

Counsel takes this opportunity to apologize for a small error on the ETA form. The beneficiary has never worked at the [REDACTED] located at 4231 [REDACTED] [REDACTED] as indicated on line 15(a) of Form ETA 750B. The main corporate office is at this address. From March 1990 to the present Mr. [REDACTED] was employed by Armand's [REDACTED] located at 500 [REDACTED]. Therefore, the applicant does not have W-2 statements for employment with [REDACTED] Corporation as he has never been employed by that particular store. Unfortunately, this cannot help you in determining the company's ability to pay the wage.

In his decision, the director denied the petition noting 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.

On appeal, counsel submits a letter from Anson B. Smith, C.P.A. which states, in pertinent part that:

Additionally, [REDACTED] Inc. paid salaries of \$319,492.00 during 1997. It is also my opinion that because operations for tax year 1997 resulted in a profit of \$401.00, to which I would add the non-cash depreciation expense of \$20,230.00, to result in available cash flow of \$20,631.00, that the financial condition of the company is very healthy.

Mr. [REDACTED] contention that adding the depreciation to the net profit would result in sufficient income to pay the proffered wage is not persuasive. The resulting available cash flow of \$20,631.00 is still less than the proffered salary of \$23,857.60. 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.