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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 98 269 53085 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 identity and 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 sustained.

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 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 filing date of the visa petition.

On appeal, counsel asserts that the "employer established the ability to pay the offered wage at the time of filing."

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.

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 April 22, 1997. The beneficiary's salary as stated on the labor certification is \$400 per week or \$20,800 annually.

The petitioner submitted a copy of its 1997 U.S. Income Tax Return

for an S Corporation which reflected gross profit of \$283,005; salaries and wages paid of \$123,590; depreciation of \$24,768; and an ordinary income (loss) from trade or business activities of -\$12,139. The director denied the petition, noting that the petitioner had not demonstrated the ability to pay the proffered wage.

On appeal, counsel argues that:

The Immigration Service determined that since employer incurred a taxable loss in 1997 and did not possess sufficient net current assets with which to compensate the beneficiary, the employer failed to establish the ability to pay the proffered wage. However, this analysis is incomplete.

The 1997 tax return indicates gross receipts of \$664,018 and total income of \$283,005. Beneficiary was paid by employer \$7,774.50 in 1997. A copy of beneficiary's W-2 is attached.

Further, employer's 1997 tax return includes a deduction in the amount of \$24,768 for depreciation. This deduction is an allowable business deduction by the IRS, but is not an actual loss. Therefore, the employer's income should include the amount of \$24,768.

Counsel's assertion that the petitioner's depreciation should be added to the net loss is correct. A review of the 1997 federal tax return shows that when one adds the depreciation, the ordinary income, and the cash on hand at the end of the year (to the extent that total current assets exceeded total current liabilities), the result is \$17,200. This amount along with the wages earned by the beneficiary in 1997 of \$7,774.50 are more than enough to pay the proffered wage of \$20,800. Based on the evidence submitted, it is 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). Therefore, the petition may be approved.

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 met that burden.

ORDER: The appeal is sustained.