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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

File: EAC 99 052 53427 Office: VERMONT SERVICE CENTER Date: **MAR 15 2001**

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

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:
[Redacted]

Identification 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

[Signature]
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 which seeks to employ the beneficiary as a cook. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director found that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of November 13, 1997, the filing date of the visa petition.

On appeal, counsel states that the petitioner had the resources to pay the offered wage.

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 November 13, 1997. The beneficiary's salary as stated on the labor certification is \$9.50 per hour or \$19,760.00 annually.

The director determined that evidence initially submitted by the petitioner included bank statements issued after the date of filing. The director found that these statements were not relevant in determining the petitioner's ability to pay the offered wage.

On April 5, 1999, the petitioner was requested to submit its 1997 tax return and other financial evidence to establish the petitioner's ability to pay the offered wage. The petitioner responded by submitting the 1997 tax return. The petitioner also provided a copy of its 1998 tax return and bank account statements.

The director found that the petitioner claimed a business loss of \$12,758.00 on its 1997 income tax return. According to the director, the beneficiary's salary of \$19,760.00 would increase the petitioner's business loss for 1997 to \$32,518.00. The director found that even including the \$12,107.00 depreciation, the loss would still be at \$20,411.00.

The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition and denied the petition accordingly.

On appeal, counsel stated that the petitioner had sufficient funds to pay the offered wage. According to the petitioner:

The petitioner had enough cash on hand on the date of filing to pay the beneficiary's salary for over half the year. Furthermore, the bank statements show that, if the beneficiary had begun working for [REDACTED] on November 13, 1997 and continued working there throughout the period which the application for labor certification and immigrant petition were pending, the restaurant would have had sufficient funds to pay his salary every month. Although the petitioner's income tax returns for 1997 and 1998 do not show taxable income of \$19,760 for the years 1997 and 1998, The Board of Immigration Appeals has recognized that, even when a company shows a loss for tax purposes, it still may show by other means that it had sufficient cash on hand to pay the proposed salary of a prospective employee. See *Matter of Sonogawa*, 121 I&N Dec. 612 (BIA 1967)...In that case, the AAU noted that, in the case of a tax loss, the petitioner must show that the losses were artificial, and that the business did have sufficient funds available to pay the beneficiary's proposed salary. In that case, the AAU determined, by examining the company's bank statements, that it did have sufficient cash on hand to pay the beneficiary's salary.

A review of the 1997 federal tax return reflects gross receipts of \$310,352; gross profits of \$122,828; compensation of officers of \$4,865; salaries and wages of \$29,326; depreciation of \$12,107; and taxable income before net operating loss deduction and special deductions of -\$12,758. Schedule L reflects total current assets of \$18,017 of which \$12,664 is in cash and total current liabilities of \$5,655. When adding the taxable income before net

operating loss deduction and special deductions, the depreciation, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is \$12,013, \$7,747 less than the proffered wage.

A review of the 1998 federal tax return reflects gross receipts of \$323,330; gross profits of \$138,939; compensation of officers of \$3,408; salaries and wages of \$32,541; depreciation of \$16,164; and taxable income before net operating loss deduction and special deductions of \$4,442. Schedule L reflects total current assets of \$43,697 of which \$20,488 is in cash and total current liabilities of \$6,020. When adding the taxable income before net operating loss deduction and special deductions, the depreciation, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is \$41,094, \$21,334 more than the proffered wage.

Since the priority date was established on November 13, 1997, the petitioner must show that it had the ability to pay the proffered wage of \$1646.66 per month for the remaining six weeks of 1997 and continuing to present.

A review of the bank statements shows that as of October 31, 1997, the petitioner possessed a balance of \$14,637.61. As of November 30, 1997, the petitioner possessed a balance of \$14,369.89. As of December 31, 1997, the petitioner possessed a balance of \$15,733.88. These amounts are each more than the \$1646.66 needed to pay the beneficiary's monthly wage.

Accordingly, after a review of the federal tax return and additional documentation furnished, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present.

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.