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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 99 026 52534 Office: VERMONT SERVICE CENTER

Date: **MAR 22 2001**

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.

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 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 May 8, 1996, the filing date of the visa petition.

On appeal, counsel submitted a statement and additional documentation.

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 May 8, 1996. The beneficiary's salary as stated on the labor certification is \$440 per week or \$22,880 annually.

On March 8, 1999, the petitioner was requested to provide additional evidence of its ability to pay the offered wages. The petitioner responded with a 1997 W-2 for the beneficiary. The

director determined that there is nothing in the record to establish that the beneficiary was employed by the petitioner. In addition, the director stated that the petitioner wished to include its depreciation in determining its ability to pay. According to the director, even taking into account the depreciation, the record would still not indicate the petitioner's ability to pay the offered wage.

On appeal, counsel states:

The petitioning employer, Giardino Cafe Ristorante, had the ability to pay the offered wage of \$440.00 per week at the time of the filing of the application for alien labor certification (May 8, 1996). Additional evidence is being submitted herewith, namely, IRS Form W-2 for 1995/96. These forms could not be located when a response to the I-797 dated March 8, 1999 was submitted. The beneficiary was paid \$7,200.00 in calendar year 1996 but did not start work with the petitioner until late-May 1995 and such employment was not full-time for that full year (as is seen in the Form ETA 750 Part B), The W-2 form for 1997 that was submitted with the response to the 3-8-99 I-797, recited total wages of \$12,607.80 for the time worked. The petitioner's accountant, Corino & Gross, CPAs, did submit a letter dated June 1, 1999 which sought to explain that notwithstanding the paper loss, there was a positive cash flow for the petitioner when the application was filed and that the petitioner is able to meet its regular business expenses. The petitioner remains a viable establishment that has sought to take the time and responsibility to enable a competent and talented cook to legally work and reside in the U.S. (see attached transmittal letter of attorney).

A review of the 1996 federal tax return reflects gross receipts of \$673,366; gross profits of \$450,361; compensation of officers of \$20,593; salaries and wages of \$59,173; depreciation of \$19,196; and taxable income before net operating loss deduction and special deductions of -\$16,552. Schedule L reflects total current assets of \$62,011 of which \$0 is in cash and total current liabilities of \$68,528. When adding 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 result is \$2,644, \$20,236 less than the proffered wage. Adding the \$2,644 income to the wages earned by the beneficiary in 1996 of \$7,200, the result is only \$9,844, still \$13,036 less than the proffered wage.

The documentation submitted by the petitioner fails to establish that the petitioner had the ability to pay the offered wage as of the filing date of the visa petition. Consequently, the petitioner has not overcome the director's denial 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.