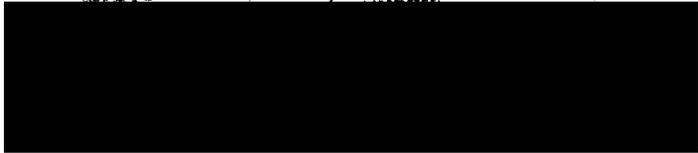




B

U.S. Department of Justice
Immigration and Naturalization Service

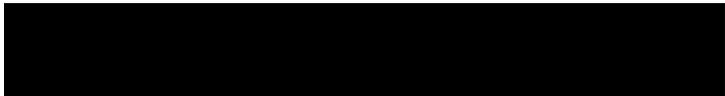
Identification data deleted to
prevent clearly unwarranted



OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 00 272 53378 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



11 APR 2002

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:



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, 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 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, the petitioner's representative submits a brief and additional evidence.

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 March 17, 2000. The beneficiary's salary as stated on the labor certification is \$476.00 per week or \$24,752.00 per annum.

The petitioner's representative submitted copies of the

petitioner's 1998, 1999, and 2000 Form 1065 U.S. Partnership Return of Income. The tax return for 1998 reflected gross receipts of [REDACTED] gross profit of [REDACTED] salaries and wages paid of [REDACTED] guaranteed payments to partners of [REDACTED] depreciation of [REDACTED] and an ordinary income (loss) from trade or business activities of [REDACTED]. Schedule L was not submitted. The tax return for 1999 reflected gross receipts of [REDACTED] gross profit of [REDACTED] salaries and wages paid of [REDACTED] guaranteed payments to partners of [REDACTED] depreciation of [REDACTED] and an ordinary income (loss) from trade or business activities of [REDACTED]. Schedule L reflected total current assets of [REDACTED] of which [REDACTED] was in cash and total current liabilities of [REDACTED].

The tax return for 2000 reflected gross receipts of [REDACTED] gross profit of [REDACTED] salaries and wages paid of [REDACTED] guaranteed payments to partners of [REDACTED] depreciation of [REDACTED] and an ordinary income (loss) from trade or business activities of [REDACTED]. Schedule L reflected total current assets of [REDACTED] of which [REDACTED] was in cash and total current liabilities of [REDACTED].

The director determined that the documentation was insufficient to establish the ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner's representative argues that:

The logic presented in your denial by using an ANNUAL salary as the basis for determining whether a petitioner can hire the services of a new employee, is FLAWED, and unacceptable in common accounting practices. Your analysis of the financials of the business for the year 2000 by merely describing net income, and then adding depreciation, and reaching the conclusion that the business was on the minus side, are also incorrect, and are not the proper tools upon which to evaluate financial ability of any petitioner to hire a new employee.

The representative further argues that "the calculation of an ANNUAL salary cannot be found in the language of the aforementioned regulation, nor can this language be found in the application for labor certification.

A review of the 2000 federal tax return shows that when one adds the depreciation and the ordinary income, the result is \$15,606, less than the proffered wage.

A review of the 1998 and 1999 federal tax returns continue to show an inability to pay the proffered wage.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing 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.