

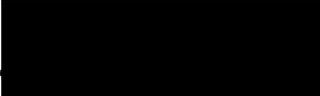


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U.S. Department of Justice
Immigration and Naturalization Service

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



AUG 11 2002

File: [Redacted] Office: Nebraska Service Center

Date:

IN RE: Petitioner:
Beneficiary:



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 that 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 that 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 that 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, Nebraska 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 chef. 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 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 May 6, 1999. The beneficiary's salary as stated on the labor certification is \$21,000.00 per annum.

Counsel initially submitted a copy of the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return which reflected gross

receipts of \$357,622; gross profit of \$224,031; compensation of officers of \$0; salaries and wages paid of \$43,693; and a taxable income before net operating loss deduction and special deductions of -\$2,700.

On May 3, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted copies of the petitioner's 2000 and 2001 tax returns for the State of Ohio and argued that "although the tax return indicates a net loss of \$2,700 for this year Akash India still had a profit."

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that:

██████████ argues that it has sufficient funds to pay the proposed salary. In addition, the employer asserts that the addition of this employee will increase its profits. The employer is branching out into the catering business and increasing the product line at the restaurant. [The beneficiary] has experience in catering. At his former employer, Parkash Sweet House, [the beneficiary] helped cater parties and functions. [The beneficiary's] experience in catering will help ██████████ develop this line of business and increase the restaurant's profitability.

Counsel's argument is not persuasive. Counsel does not explain the basis for such a conclusion. For example, counsel has not demonstrated that the beneficiary will replace less productive workers, transform the nature of the petitioner's operation, or increase the number of customers on the strength of his reputation. Absent evidence of these savings, this statement can only be taken as counsel's personal opinion. Consequently, the Service is unable to take the potential earnings to be generated by the beneficiary's employment into consideration.

The petitioner's Form 1120 for calendar year 1999 shows a taxable income of -\$2,700. The petitioner could not pay a proffered wage of \$21,000.00 a year out of this income.

Accordingly, after a review of the federal tax return submitted, 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.

In addition, a search of the Service's records reveals that the labor certification was for another person and may have been used. If that is the case, the current beneficiary could not use the labor certification.

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.