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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



File: EAC 01 150 51037 Office: Vermont Service Center

Date: AUG 12 2002

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 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, 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, 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 September 22, 2000. The beneficiary's salary as stated on the labor certification is \$18.89 per hour (35 hour week) or \$34,379.80 per annum.

Counsel initially submitted copies of the petitioner's 1998 and

1999 Form 1120 U.S. Corporation Income Tax Return.

On September 7, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage, to include the petitioner's 2000 tax return.

In response, counsel submitted a copy of the beneficiary's W-2 Wage and Tax Statement which showed he was paid [REDACTED] in 2000 and a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The 2000 federal tax return reflected gross receipts of [REDACTED] gross profit of [REDACTED] compensation of officers of [REDACTED] salaries and wages paid of [REDACTED] and a taxable income before net operating loss deduction and special deductions of [REDACTED]

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

On appeal, counsel submits copies of the petitioner's bank statements from September 16, 2000 through January 16, 2002 and argues that:

The alien's W-2 form for 2000 showed \$12,000 in salary paid. Since the employer paid the alien \$12,000 on the books and the wages offered are \$34,380 per year, the employer need only show \$22,380 per year, \$1833 per month in disposable income to pay the salary offered.

As proof of the ability to pay the difference between the monthly salary offered and the monthly salary on the books, from the filing date to the present, each monthly bank statement exceeds [REDACTED] by approximately 10x. For example in the month of September 2000 the opening bank balance was [REDACTED] and the balance on September 22, 2000 was [REDACTED]. Further, each and every month's bank balance from the date of filing to present exceeded [REDACTED] per month (the disposable income needed to pay the difference between the salary offered and the salary paid).

Counsel's argument is not persuasive. The petitioner's Form 1120 for the calendar year 2000 shows a taxable income of [REDACTED]. The petitioner could not pay a proffered salary of [REDACTED] or the difference between the salary paid and the salary offered of [REDACTED] out of this income.

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there

is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

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 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 not met that burden.

ORDER: The appeal is dismissed.