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U.S. Department of Justice

Immigration and Naturalization Service

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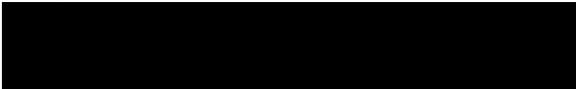


File: [Redacted]

Office: Vermont Service Center

Date: 6 DEC 2002

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:



identifying 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 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, 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 the priority date of the visa petition.

On appeal, counsel submits a brief and previously submitted 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 priority 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 priority date is July 3, 1997. The beneficiary's salary as stated on the labor certification is \$17.43 per hour or \$36,254.40 per annum.

Counsel initially submitted insufficient evidence of the

petitioner's ability to pay the wage offered. On February 12, 2002, 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 1997 and 2000 Form 1120 U.S. Corporation Income Tax Return. The tax return for calendar year 1997 reflected gross receipts of \$428,267; gross profit of \$211,888; compensation of officers of \$20,000; salaries and wages paid of \$36,331; and a taxable income before net operating loss deduction and special deductions of \$5,340. The tax return for 2000 reflected gross receipts of \$524,265; gross profit of \$261,761; compensation of officers of \$26,000; salaries and wages paid of \$45,956; and a taxable income before net operating loss deduction and special deductions of \$8,806.

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 the beneficiary has worked for the petitioner since January of 1995 and has always been paid in cash due to the fact that he had no social security number. Counsel further argues that "from 1997 to 2000, the petitioner had a considerable financial increase as follows: Assets from \$22,598 (1997) to \$108,877 (2000) & Gross Receipts from \$428,267 (1997) to \$524,265 (2000) Salaries from \$36,331 (1997) to \$45,956 (2000)."

Counsel's argument is not persuasive. The federal tax return for calendar year 1997 shows a taxable income of \$5,340. The petitioner could not pay a salary of \$36,254.40 a year from this figure.

Additionally, the tax return for calendar year 2000 continues to show an inability to pay the proffered wage. It is noted that the petitioner did not submit the corporation tax return for 1998.

The petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. 204.5(g)(2).

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 as of the priority date of the petition and continuing to present.

In addition, beyond the director's decision, 8 C.F.R. § 204.5 (e) states:

Retention of section 203 (b) (1), (2), or (3) priority date. A petition approved on behalf of an alien under sections 203 (b) (1), (2), or (3) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any classification under sections 203 (b) (1), (2), or (3) of the Act for which the alien may qualify. . . . A petition revoked under sections 204 (e) or 205 of the Act will not confer a priority date, nor will any priority date be established as a result of a denied petition. . . .

In this case, the prior petition was denied. Therefore a new labor certification is required.

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.