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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 01 231 53875

Office: VERMONT SERVICE CENTER

Date:

DEC 26 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)

PUBLIC COPY

IN BEHALF OF PETITIONER: SELF-REPRESENTED

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 Mexican 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, the petitioner submits a brief and additional evidence. An attorney at law claims to act on behalf of the petitioner and beneficiary, but the petitioner never executed a Notice of Entry of Appearance as Attorney or Representative (Form G-28) and did not authorize any appearance of counsel. Hence, the Service will consider all representations but give notice only to the petitioner. 8 C.F.R. 292.4(a) and 8 C.F.R. 292.5(a).

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 January 14, 1998. The beneficiary's salary as stated on the labor certification is \$425.60 per week or \$22,131.20 per annum.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage. The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the priority date of the petition. On September 17, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date.

In response, the petitioner submitted copies of its 1997, 1998, and 1999 Form 1120 U.S. Corporation Income Tax Returns for fiscal years beginning, respectively, on December 1, 1997. They showed taxable income before net operating loss, in the respective years, of (\$1,299), (\$2,344), and (\$7,481), all losses. Schedule L of each federal tax return presented the petitioner's net current assets in each fiscal year. They were, respectively, (\$177,445.), (\$175,273), and (\$178,238), all excesses of current liabilities over current assets. Finally, no Form W-2 evidenced that the petitioner paid any wages to the beneficiary in 1997. Forms W-2 showed the payment to him of \$390, \$14,054.25, and \$16,170.50 in the respective years 1998, 1999, and 2000.

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

On appeal, the petitioner's President says:

In regard to [the beneficiary] it is my intention to lay off two part time employees and hire [the beneficiary] at my El Bandido of Orange Inc. Restaurant....

This new evidence is unpersuasive. The petitioner did not state the compensation of the two part time employees. The Service cannot determine that their lay-off now would result in financial savings to offset the proffered wage and establish the ability to pay at the priority date of the petition. 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).

The lay-offs do not create a vacant position at the priority date.

of the petition. Funds already expended to hire the two part time employees are not readily available to compensate the beneficiary. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I & N Dec. 45, 49 (Comm. 1971). The representations on appeal made no attempt to explain the operating losses and excess of liabilities in any of the Schedules L or the effect of the 2000 federal tax return.

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.

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 met that burden.

ORDER: The appeal is dismissed.