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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 01 263 54030

Office: VERMONT SERVICE CENTER

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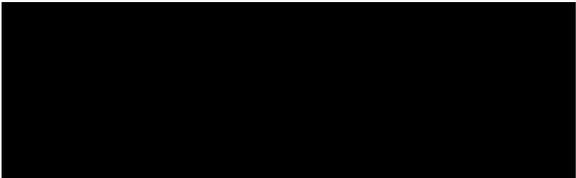
DEC 27 2002

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:



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 an international 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.

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 CFR 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 August 21, 1997. The beneficiary's salary as stated on the labor certification is \$18.89 per hour or \$39,291.20 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On November 1,

2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing to the present.

In response, counsel submitted copies of the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation for tax years 1997-2000, inclusive. The director summarized their contents:

In all four returns the net income added to depreciation is significantly less than the salary offered. Only the 2000 tax return shows enough net current assets available to pay the beneficiary's salary. Although you state the prospective employee will replace two part-time workers, the workers were not identified by name and no evidence was submitted to show wages they were paid from 1997 to 1999.

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, the petitioner's President submits a letter dated March 14, 2002 (brief). Rather than the director's computation of net current assets for 1999 and 2000 as \$29,968 and \$42,714, the brief proposes, respectively, \$43,113 and \$55,859. The brief further argues that the restaurant expanded greatly in 1998 and 1999, that the 1999 and 2000 tax returns evidence greater income, and that bank statements in 1997 and 1998 show a great cash flow to pay the difference for the proffered wage.

The petitioner's arguments are not persuasive. Net current assets are defined as the difference between current assets and current liabilities. A straightforward computation from Schedule L of the petitioner's federal tax returns for 1999 and 2000 confirms the net current assets as stated by the director.

Though the commercial bank statements are said to reveal sufficient cash flow to pay the wage, they do not. There is no evidence that they somehow reflect additional funds that the tax returns did not. 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 federal tax return for 1997 shows ordinary income of (\$282), a loss. The petitioner could not pay the wage from negative income. Moreover, ordinary income on the federal tax returns for 1998 and 1999 continues to reflect the inability to pay the proffered wage, \$39,291.20, at the priority date of the petition.

The thought that business expanded greatly and produced greater income does not address the defects specified in the director's decision. The petitioner must show that it had the ability to pay the proffered wage at the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. 8 CFR 204.5(g)(2). The 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 response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage. They are of little evidentiary value because they are based solely on the representations of management. 8 CFR 204.5(g)(2), which see *supra* p. 2. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Finally, a note on each unaudited financial statement advised, "The prospective employee will replace two part-time workers [.]". This claim incurs the objection that the petition did not establish eligibility at the priority date. See Chi-Feng Chang v. Thornburgh, 719 F.Supp. 532 (N.D. Tex. 1989). The record does not name these workers, state their wages, or evidence that the petitioner replaced them. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

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 not met that burden.

ORDER: The appeal is dismissed.