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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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File: LIN 01 082 52918

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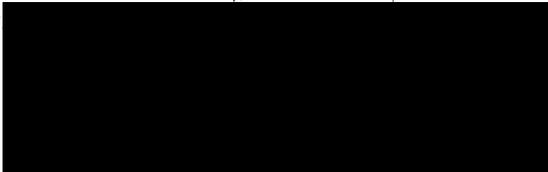
DEC 27 2002

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for an 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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted and the previous decisions of the director and the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner is a Spanish food restaurant. It seeks to employ the beneficiary permanently in the United States as an executive chef. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director denied the visa petition because 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 Associate Commissioner did not receive the brief and evidence promised in the notice of appeal, so stated, and dismissed the appeal. Counsel filed this motion to reopen and consider submissions, which the petitioner had made.

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 turns 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 November 14, 1997. The beneficiary's salary as stated on the labor certification is \$23,000 per annum.

Counsel's motion included a brief and copies of the petitioner's 2000 and 1998 Forms 1120, U.S. Corporation Income Tax Return, as well as those for 1997 and 1999 already submitted. Finally, it attached three (3) letters from investors or potential investors in the petitioner.

The Associate Commissioner's decision considered both depreciation and taxable income before net operating loss deduction and special deductions, a sum of \$23,490, concluding that the federal tax return for 1997, including the priority date, reflected sufficient income to pay the proffered wage of \$23,000. The sum, however, for 1999 was \$122, less than the proffered wage, and did not support the financial ability to continue paying the proffered wage until the beneficiary obtains lawful permanent residence. 8 CFR 204.5(g)(2). The Associate Commissioner, therefore, dismissed the appeal.

Counsel's motion puts in issue whether the petitioner had cash and other assets to pay the proffered wage at the priority date and continuing to the present.

Schedule L, the balance sheet, of the 1997 federal income tax return states cash of only \$2,592. Counsel does not show how the addition of income plus depreciation somehow reflects more cash than the 1997 balance sheet. These proceedings have mistakenly accepted counsel's assumption, viz., to add depreciation to profit to show the ability pay. Charges for depreciation, however, are not available to add back to cash to show financial ability. Chi-Feng Chang v. Thornburgh, 719 F.Supp. 532, 537 (N.D. Tex 1989). The same conclusion applies to 1998, 1999, and 2000.

Counsel relies on three (3) letters dated in 2001, in which the writers state that they would have been, would be, or are willing to invest in or pay salaries for the petitioner. Counsel notes that the writers attest to the years 1998, 1999, and 2000. The argument from the unfulfilled promises of 2001 comes too little and too late to buttress the ability to pay on the 1997 priority date of the petition. The letters' wishes reflect potential, but no asset in a financial statement or tax return. In Elatos Restaurant Corp. v. Sava, 632 F.Supp. 1049 (S.D.N.Y. 1986), the court held that the Service could rely on income tax returns as a basis for determining a petitioner's ability to pay the proffered wage. Further, in K.C.P. Food Co., Inc. v. Sava, 623 F.Supp. 1080 (S.D.N.Y. 1985), the court held that the Service had properly relied on the petitioner's corporate income tax returns in finding the petitioner could not pay the proffered wage.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate the financial ability continuing until the beneficiary obtains lawful permanent residence. See Matter of Great Wall, 16 I & N Dec. 142, 145; Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); Chi-Feng Chang v. Thornburgh, 710 F.Supp. 532 (N.D. Tex. 1989). The regulations emphasize the priority date. 8 CFR

204.5(g)(2). 8 CFR 103.2(b)(1) and (12).

Finally, counsel argues that the beneficiary's employment as executive chef would greatly increase the petitioner's profitability and would, of itself, allow the petitioner to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of the promised contribution. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers.

Accordingly, after a review of the record and 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 motion to reopen the Associate Commissioner's decision of May 3, 2002 is affirmed. The petition is denied.