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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: EAC 00 121 50595 Office: Vermont Service Center

Date: 6 FEB 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 which 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 which 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

*Helen E Crawford*  
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. The director also determined that the petitioner had not established that the beneficiary had the requisite experience as of the filing date of the visa petition.

On appeal, counsel submits a statement 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(1)(3) states, in pertinent part:

(ii) *Other documentation* -- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750),

filed with the Department of Labor on May 1, 1997, indicates that the minimum requirement to perform the job duties of the proffered position of specialty cook is two years of experience in the job offered.

Counsel initially submitted a letter of employment from Joaquin Perez, Executive Chef at harvest [REDACTED] which stated that the beneficiary worked for him for several years, however, as stated by the director, the letter did not include a specific description of the beneficiary's duties, only that he had been a kitchen worker. In response to a request for evidence that the beneficiary had the requisite two years of experience, counsel submitted a copy of a W-2 Wage and Tax Statement for the beneficiary which showed he was paid \$22,960.00 in 1997.

The director determined that the petitioner had not shown that the beneficiary possessed the requisite experience in the job offered.

On appeal, counsel submits a W-2 Wage and Tax Statement for the beneficiary which shows he was paid \$29,725.50 in 1998. The petitioner, however, must submit evidence in the form of a letter from a current or former employer as evidence of the requisite experience in accordance with 8 C.F.R. 204.5(l)(3)(ii). Therefore, the petitioner has not overcome this portion of the director's decision.

The other issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage as of the filing date of the visa petition.

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 May 1, 1997. The beneficiary's salary as stated on the labor certification is \$11.07 per hour or \$23,025.60 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On December 6, 2000 and August 22, 2000, the petitioner was requested to submit evidence of its ability to pay the proffered wage to include the petitioner's 1997 and 1998 federal tax returns.

In response, counsel submitted a copy of the beneficiary's W-2 Wage and Tax Statement which showed he was paid \$22,960.00 by Employment [REDACTED] in 1997 and a copy of the beneficiary's W-2 from [REDACTED] which showed he was paid \$29,725.50 in 1998.

The director denied the petition, noting that the petitioner had not explained the relationship between the petitioner, Trattoria, and [REDACTED]

On appeal, counsel re-submits the beneficiary's W-2 Wage and Tax Statements for 1997 and 1998, and a copy of the beneficiary's W-2 from Epix I, Inc. which showed he was paid \$27,460.80 in 1999. No further evidence as to the relationship between [REDACTED] and Trattoria has been submitted. Therefore, the petitioner has not overcome this portion of the director's decision, and the petition may not be approved.

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.