



B6

U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent disclosure of information of personal privacy

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



File: EAC 00 101 53203

Office: VERMONT SERVICE CENTER

Date: JUL 18 2002

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:



Handwritten: Original 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 for
Robert P. Wiemann, Director
Administrative Appeals Unit

DISCUSSION: The employment-based preference immigrant 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 sustained.

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 was accompanied by an individual labor certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, counsel submits a brief.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), 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 or unskilled labor, 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 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 19, 1999. The beneficiary's salary as stated on the labor certification is \$11.45 per hour or \$23,816 annually.

Counsel initially submitted a copy of the petitioner's 1999 Form 1040 U.S. Individual Income Tax Return which reflected an adjusted gross income of -\$1,470, and a copy of the petitioner's CAP account statement for the period from September 1, 1999 through September 30, 1999, which showed total holdings of \$51,454.72. The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage. On

August 25, 2000, the director requested additional evidence of the petitioner's ability to pay the proffered wage as of May 19, 1999, to include Schedule C of the 1999 income tax return.

In response, counsel submitted a copy of the beneficiary's 1998 Form 1040 U.S. Individual Income Tax Return which reflected an adjusted gross income of \$67,803, a copy of another CAP account statement, and a letter from counsel which stated, in pertinent part:

The Petitioner has already provided a copy of her personal Income Tax Returns for 1998, which indicated that she, [REDACTED] registered an adjusted gross income of \$67,803.00 in that fiscal year, a sum which was more than sufficient to pay the proffered wage of \$23,816.00. In 1999, the Petitioner registered an adjusted gross income of -\$1,470.00. However, this dramatic decrease in income is explained by the fact that, due to illness on the part of the Petitioner (who had previously been forced to be the cook at the restaurant) for the first nine (9) months of 1999, she was forced to close the petitioning business for that entire period because of her inability to work.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that the petitioner's personal assets could be used to evidence additional income to support the business.

The petitioner is a general partnership, and the income and assets of the owner are properly considered in an assessment of the ability of the business to pay the wage offered.

Counsel's argument is persuasive. A review of the record reveals that the petitioner has a CAP account with First Union Bank with a total of \$51,454.72 in holdings as of September 30, 1999.

After a review of the documentation furnished, it is determined that the petitioner had sufficient available funds to pay the salary offered at the time of filing 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 sustained.