



Blo

U.S. Department of Justice
Immigration and Naturalization Service

RECONSIDERATION DATE: 06/10/02
EXPIRES: 06/10/02
APPEALS: 1

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



File: EAC 01 014 52743 Office: Vermont Service Center Date: 01 JUN 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

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 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.

On appeal, counsel submits a statement.

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 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 September 1, 2000. The beneficiary's salary as stated on the labor certification is \$11.47 per hour or \$23,857.60 per annum.

Counsel initially submitted a copy of the petitioner's 1999 Form 1120S U.S. Income Tax Return for an S Corporation which reflected

gross receipts of \$553,421; gross profit of \$370,205; compensation of officers of \$0; salaries and wages paid of \$142,043; depreciation of \$14,138; and an ordinary income (loss) from trade or business activities of \$69,780. Schedule L reflected total current assets of \$78,703 with \$26,443 in cash and total current liabilities of \$58,450. On June 12, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of September 1, 2000, to include the petitioner's federal tax return for 2000.

In response, counsel submitted a letter from counsel which stated "[a]ttached you will find the corporation's accountant's statement for Bistro Bistro of Shirlington. As it is stated by the accountant the actual tax will not be ready until September 15, 2001."

The director determined that the submitted evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director noted that the account's statement was not in the record and that although the tax return for 1999 showed that the petitioner had the ability to pay the wage offered in 1999, counsel did not submit "a tax return, W-2 form or any other information to show that you had the ability to pay the proffered wage as of September 1, 2000 and continuing to the present."

On appeal, counsel argues:

That the Petitioner has been in business for the last five years.

That the employer has over 30 individuals in his pay role.

That for the last three years he has sponsored several individuals for various positions and has had no difficulty to prove his ability to pay the prevailing wages.

That if the 1999 tax returns demonstrate such ability the year 2000 income is equally as good.

That the corporation's accountant's statement was provided contrary to the services claim.

That we are providing you with another copy of the accountant's statement which clearly proves the employer's ability to pay the prevailing wages.

That the service erroneously denied the I140 petition. The denial was made without merit and justification. This denial; has created a tremendous delay in hiring this individual and has caused enormous business burden. That we request an immediate review of this petition and

approval to be issued upon this review.

Counsel's arguments are not convincing. The mere contention that because the 1999 tax return evidences the ability to pay the wage offered, the petitioner then had the ability to pay the wage in 2000 is not persuasive. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner failed to submit any verifiable evidence that the petitioner had the ability to pay the wage offered as of September 1, 2000. No additional evidence has been received to date. Accordingly, after a review of the federal tax return, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present.

The petitioner must show that it had the ability to pay the proffered wage at the time of filing of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. 204.5(g)(2).

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.