



1360

U.S. Department of Justice
Immigration and Naturalization Service

RECONSIDERATION CAN BE FILED IN
STATE OR FEDERAL COURT
WITHIN 60 DAYS OF DECISION

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



File: EAC 00 198 52887

Office: VERMONT SERVICE CENTER

Date: 01 JUN 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)

Public Copy

IN BEHALF OF PETITIONER:



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 employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The petition will be denied.

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 Associate Commissioner affirmed this determination on appeal.

On motion, counsel submits a brief and additional documentation.

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 March 24, 1999. The beneficiary's salary as stated on the labor certification is \$11.47 per hour or \$23,857.60 per annum.

The Associate Commissioner affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence

of its ability to pay the proffered wage as of the filing date of the petition.

On motion, counsel submits a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation which reflected gross receipts of \$163,681; gross profit of \$118,177; compensation of officers of \$23,400; salaries and wages paid of \$12,000; depreciation of \$10,262; and a taxable income before net operating loss deduction and special deductions of \$11,036. Schedule L reflected total current assets of \$12,119 with \$10,229 in cash and total current liabilities of \$3,859.

On motion, counsel reiterates her argument that:

In the present case, [REDACTED] did have sufficient assets available when the priority was established because the company maintained a certificate of deposit for \$24,088 in 1999, but the company's 1999 tax return only showed assets of \$19,927, which is \$4,161 less than the proffered wage. However, [REDACTED] year 2000 tax return show assets of approximately \$30,000 when one adds taxable income, the depreciation, and the cash on hand at year end. [REDACTED] expects to continue increasing its profits, especially when the restaurant has a qualified cook such as the beneficiary. The tax returns for 1999 and 2000 give a snapshot of the company, especially for 1999 when the certificates of deposit where (sic) recorded as off balance sheet items.

Counsel's argument is not persuasive. As stated by the Associate Commissioner, the petitioning entity in this case is a corporation. Consequently, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See Matter of M, 8 I&N Dec. 24 (BIA 1958; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Counsel further argues that the beneficiary's employment will result in more income for the business. Counsel does not explain, however, the basis for such a conclusion. For example, counsel has not demonstrated that the beneficiary will replace less productive workers, transform the nature of the petitioner's operation, or increase the number of customers on the strength of his reputation. Absent evidence of these savings, this statement can only be taken as counsel's personal opinion. Consequently, the Service is unable to take the potential earnings to be generated by the beneficiary's employment into consideration.

A review of the 1999 federal tax return shows that when one adds the depreciation, the taxable income, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is \$19,927, less than the proffered wage.

A review of the 2000 federal tax return shows that when one adds the depreciation, the taxable income, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is \$29,558, more than the proffered wage.

The petitioner, however, must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2). Therefore, 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 sustained that burden.

ORDER: The Associate Commissioner's decision of March 12, 2001, is affirmed. The petition is denied.