



Blo

U.S. Department of Justice

Immigration and Naturalization Service

RECEIVED  
JUN 11 2002  
OFFICE OF ADMINISTRATIVE APPEALS

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

[Redacted]

2 JUN 2002

File: EAC 99 248 53462 Office: VERMONT SERVICE CENTER Date:

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]

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 and caterer. It seeks to employ the beneficiary permanently in the United States as a 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 April 1, 1996. The beneficiary's salary as stated on the labor certification is \$14.25 per hour or \$29,640.00 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 copies of the petitioner's 1996 through 1999 Form 1120S U.S. Income Tax Return for an S Corporation and a copy of the petitioner's financial statement for 1999, and argues that:

In short, the enclosed documents demonstrate with clarity that sales progressed from 1996 of \$1,747,432 to \$2,664,501 in the year 2000, payroll paid to personnel accrued during this period from \$101,512 to \$402,640. The exhibit also demonstrates that though losses were shown in 1996 and 1997, the company had profits in 1999 of \$327,829 and in the year 2000 of \$336,667.

Counsel's argument is not persuasive. A review of the 1996 federal tax return shows that when one adds the depreciation and the ordinary income, the result is -\$99,753, less than the proffered wage.

Counsel submitted copies of the petitioner's 1998 and 1999 Form 1120S U.S. Income Tax Return for an S Corporation. The 1998 federal tax return reflected gross receipts of \$2,096,013; gross profit of \$992,051; compensation of officers of \$0; salaries and wages paid of \$248,769; and an ordinary income (loss) from trade or business activities of \$40,174. The 1999 federal tax return reflected gross profit of \$2,471,952; gross profit of \$1,693,208; compensation of officers of \$211,688; salaries and wages paid of \$289,746; and an ordinary income (loss) from trade or business activities of \$327,829.

A review of the 1998 and 1999 federal tax returns show that the petitioner had an ordinary income of \$40,174 in 1998 and \$327,829 in 1999, 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 August 21, 2001, is affirmed. The petition is denied.