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U.S. Department of Justice

Immigration and Naturalization Service

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

Date: JUN 19 2002

File: WAC 00 160 54145 Office: California Service Center

IN RE: Petitioner: [redacted]
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:

[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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California 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 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 brief 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(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 December 8, 1995. The beneficiary's salary as stated on the labor certification is $8.26 per hour or $17,180.80 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On November 2,

2000, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the fourth quarter of 1996, the fourth quarter of 1997, the third quarter of 1998, the fourth quarter of 1999, and the third quarter of 2000. Also submitted was a letter from the petitioner which stated "I do not like submitting our Tax Returns."

The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition.

On appeal, counsel submits copies of the petitioner's 1996 through 1999 Form 1120S U.S. Income Tax Return for an S Corporation. The 1996 federal tax return reflected gross receipts of $1,224,774; gross profit of $137,836; compensation of officers of $28,212; salaries and wages paid of $25,484; and an ordinary income (loss) from trade or business activities of -$10,725. The 1997 federal tax return reflected gross receipts of $1,295,929; gross profit of $179,602; compensation of officers of $26,000; salaries and wages paid of $45,578; and an ordinary income (loss) from trade or business activities of -$38,636.

The 1998 federal tax return reflected gross receipts of $1,282,249; gross profit of $175,757; compensation of officers of $28,212; salaries and wages paid of $42,331; and an ordinary income (loss) from trade or business activities of -$25,487. The 1999 federal tax return reflected gross receipts of $1,413,392; gross profit of $183,900; compensation of officers of $25,000; salaries and wages paid of $60,942; and an ordinary income (loss) from trade or business activities of -$44,639.

On appeal, counsel argues that:

> La Marina Inn has had the ability to pay the proffered wage from the time the priority date was established continuing to the present and beyond. It was felt at the time, that submission of the quarterly Federal Tax Returns would adequately demonstrate this fact. As the INS feels that only Federal Tax Returns are sufficient, those items have been enclosed in Appeal in this Labor Certification/I-140 Petition. I believe this will further demonstrate the willingness to comply with all regulations in this process.

Counsel's argument is not persuasive. The petitioner's Form 1120S

for the calendar year 1996 shows an ordinary income of -$10,725. The petitioner could not pay a proffered wage of $17,180.80 per year out of a negative income. Therefore, the petitioner has not established its ability to pay the proffered wage based upon its net income.

In addition, the 1997 through 1999 federal tax returns continue to show an inability to pay the proffered wage.

Accordingly, after a review of the federal tax returns furnished, 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 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.