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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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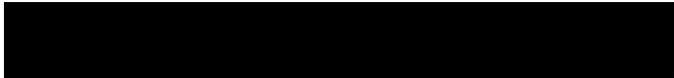


File: EAC 01 067 54473

Office: Vermont Service Center

Date: JUN 19 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)

IN BEHALF OF PETITIONER:



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 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 petitioner's filing date is January 8, 1998. The beneficiary's salary as stated on the labor certification is \$18.89 per hour or \$39,291.20 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 \$313,555; gross profit of \$121,499; compensation of officers of \$15,600; salaries and wages paid of \$0; and an ordinary income (loss) from trade or business activities of \$2,231.

On July 20, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition to include the petitioner's 1998 and 2000 tax returns.

In response, counsel requested 60 days in which to submit a brief and/or additional evidence. No evidence was received.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits copies of the petitioner's 1998 and 2000 Form 1120S U.S. Corporation Income Tax Return. The 1998 federal tax return reflects gross receipts of \$284,741; gross profit of \$104,217; compensation of officers of \$15,340; salaries and wages paid of \$0; and an ordinary income (loss) from trade or business activities of \$1,137. The federal tax return for 2000 reflects gross receipts of \$374,908; gross profit of \$221,681; compensation of officers of \$17,264; salaries and wages paid of \$73,164; and an ordinary income (loss) from trade or business activities of \$37,905.

Counsel argues that:

These tax returns reflect the following: (Exhibit F)

1. In 1998 the Petitioner gross receipts or sales totaled \$284,741.00 after expenses the Petitioner showed a gross profit of \$104,217.00.
2. In 1999, the gross receipts were \$313,555 and the gross profits for that year was \$121,499.00.
3. In 2000 the Petitioner's gross receipts totaled \$374,908.00, the gross profit for that year totaled \$221,681.00.

An analysis/review of these numbers certainly reveals the Petitioner's ability to pay the proffered prevailing wage to the beneficiary upon the issuance of his lawful permanent resident status.

The petitioner's Form 1120S for fiscal year April 1, 1998 through March 31, 1999 shows an ordinary income of \$1,137. Therefore, the petitioner has not established its ability to pay the proffered

wage based upon its net income.

In addition, the 1999 and 2000 federal tax returns for the restaurant continue to show that the petitioner lacked the ability to pay the proffered wage.

The petitioner 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.

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