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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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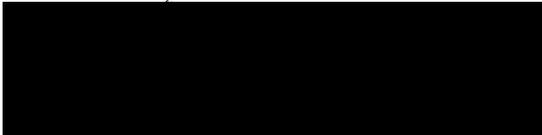
File: EAC 00 262 51308 Office: Vermont Service Center

Date: 25 MAR 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:



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 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 January 14, 1998. 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 \$1,016,128; gross profit of \$683,335; compensation of officers of \$0; salaries and wages paid of \$346,137; depreciation of \$27,162; and an ordinary income (loss) from trade or business activities of -\$30,476. Schedule L reflected total current assets of \$29,185 with \$19,628 in cash and total current liabilities of \$55,056.

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 November 30, 2000, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of January 14, 1998.

In response, counsel submitted a copy of Form 1040A U.S. Individual Income Tax Return for 1999 for [REDACTED] and a copy of the petitioner's 1998 Form 1120S U.S. Income Tax Return for an S Corporation which reflected gross receipts of \$1,029,391; gross profit of \$690,652; compensation of officers of \$0; salaries and wages paid of \$330,895; depreciation of \$19,866; and an ordinary income (loss) from trade or business activities of -\$14,004. Schedule L reflected total current assets of \$51,985 with \$40,241 in cash and total current liabilities of \$75,446.

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

On appeal, counsel submits W-2 Wage and Tax Statements for Haydee Gonzalez for 1998, 1999, and 2000, and a copy of Form 1040EZ Income Tax Return for Single and Joint Filers with No Dependents for Maria H. Lopez.

Counsel argues that:

The Service misread and misconstrued the tax returns of the petitioner. Many corporations show a loss, and/or have current liabilities which outweigh their current assets. This is simple corporate accounting. This does not mean an inability to pay their employees (sic). Taking the total amount paid to employees makes no sense. Obviously in a business such as this many of the employees are high school kids making minimum wage, while older, more experienced employees make much more. As additional evidence beneficiary's tax returns, which were not available at the time of original filing are attached, with W-2 forms as requested. Returns for years 1998, 1999 & 2000 are attached herewith. While Ms. Lopez

is actually married, her husband lives in Honduras, and they have not been together for many years, hence the representation (sic) "single" on the returns. The soc. sec. numbers are as a result of her having no number in 1998, a "tax ID number" for 1999, and a full number in 2000 after receiving her work permit.

Counsel's argument is not persuasive. As noted by the director:

Submitted were copies of U.S. Individual Income Tax Returns for 1999 for [REDACTED]. It is not clear that this is one and the same person as the beneficiary, [REDACTED]. Further, any wages earned indicated on this tax return do not indicate who the employer is, therefore it is not sufficient evidence. Also submitted is a computerized printout indicating the beneficiary, [REDACTED] earned \$17,686.00. However, this also does not indicate who paid the wages or what year they were earned. Therefore, this is also insufficient evidence.

The submitted W-2 forms also show a different address from the address listed for the beneficiary on the I-140 petition.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

A review of the 1998 federal tax return shows that when one adds the ordinary income and the depreciation, the result is \$5,862, less than the proffered wage.

A review of the 1999 federal tax return shows that when one adds the ordinary income and the depreciation, the result is -\$3,314, less than the proffered wage.

Accordingly, after a review of the federal tax returns and additional documentation 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.

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.