

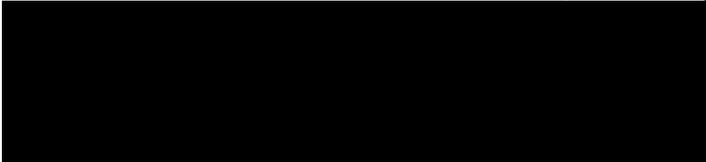


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: [Redacted] Office: TEXAS SERVICE CENTER

Date: MAY 03 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. Wiemahn
Robert P. Wiemahn, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas 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. The director also determined that the petitioner had not established that the beneficiary had the requisite experience 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 August 11, 1997. The beneficiary's salary as stated on the labor certification is \$9.00 per hour or \$18,720.00 per annum.

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

In response to a request for additional evidence to establish the petitioner's ability to pay the proffered wage as of August 11, 1997, counsel submitted a copy of an unaudited financial statement for the petitioner for the period from January 1997 through December 1997, and a copy of the petitioner's 1997 Form 1065 U.S. Partnership Return of Income which reflected gross receipts of \$1,514,026; gross profit of \$894,779; salaries and wages paid of \$340,161; guaranteed payments to partners of \$50,114; depreciation of \$56,072; and an ordinary income (loss) from trade or business activities of -\$53,923. Schedule L reflected total current assets of \$14,512 with \$6,880 in cash and total current liabilities of \$72,886. The director determined that the documentation was insufficient to establish the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a copy of the petitioner's unaudited financial statement for the period ended July 16, 1998.

Counsel requests 120 days in which to submit a brief and/or additional evidence, specifically, the petitioner's 1998 income tax return and argues that "petitioner furnished its 1997 income tax return and financial data, the most recent available. For the decision to require financial documentation or a tax return for 1998 is premature. In its 1997 return, Petitioner reported revenue of over \$1.5 million. A finding that Petitioner does not have available funds to pay the proffered wage is incongruent with the cash flow represented by such revenue."

No additional evidence of the petitioner's ability to pay the wage offered has been received. A review of the 1997 federal tax return shows that when one adds the depreciation and the ordinary income, the result is \$2,149, less than the proffered wage. Therefore, the petitioner has not overcome this portion of the director's decision, and the petition may not be approved.

The other issue in this proceeding is whether the petitioner has established that the beneficiary had the requisite experience as of the filing date of the petition.

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(l)(3) states, in pertinent part:

(ii) *Other documentation* -- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750), filed with the Department of Labor on August 11, 1997, indicates that the minimum requirement to perform the job duties of the proffered position of specialty cook is two years of experience in the job offered.

The director concluded that the evidence submitted was insufficient to establish the beneficiary had the requisite experience and denied the petition accordingly.

On appeal, counsel states that "[f]urthermore, the beneficiary has the necessary experience in cooking Mexican specialties, as evidenced by the letter from a previous employer in Mexico and the beneficiary's sworn statement on the Form ETA-750B. Additional references will be provided." No additional evidence has been received to date. Therefore, the petitioner has not overcome this portion of the director's decision, and 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 met that burden.

ORDER: The appeal is dismissed.