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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: EAC 99 232 50725

Office: VERMONT SERVICE CENTER

Date: MAY 03 2002

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 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, 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 petitioner claims to be a successorship-in-interest to the company for which the labor certification was approved. The director determined that the petitioner had not established that the original company had the financial ability to pay the beneficiary the proffered wage as of the filing date of the visa petition.

On appeal, counsel provides 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 October 22, 1996. The beneficiary's salary as stated on the labor certification is \$36,254.40 per annum.

The petitioner initially failed to submit any evidence of its ability to pay the proffered wage as of the filing date of the petition. On February 14, 2000, the director requested evidence of the petitioner's ability to pay the proffered wage as of October 22, 1996.

In response, counsel submitted a copy of the petitioner's 1999 Form 1120S Income Tax Return for an S Corporation which reflected gross receipts of \$324,571; gross profit of \$170,989; compensation of officers of \$30,862; salaries and wages paid of \$108,660; and an ordinary income (loss) from trade or business activities of -\$112,296.

The director determined that this new evidence did not establish that the original petitioner had the ability to pay the proffered wage as of the filing date of the petition and denied the petition accordingly.

On appeal, counsel provides a brief; a letter from the petitioner's accountant, a copy of the petitioner's Form 1120S Two Year Comparison Worksheet Page 1 for 1999 & 2000, a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation, and copies of the beneficiary's W-2 Wage and Tax Statement for 1999 and 2000.

The petitioner's accountant states:

Please consider that 1999 was the initial year of operations for [REDACTED]. The [REDACTED] were able to operate profitably in 2000 by increasing revenue by approximately \$88,000 and reducing expenses approximately \$47,000. The increase in gross profit of approximately \$86,000 in 2000 was due to improved controls on costs and more efficient purchasing. The most significant reduction in expenses was salaries, excluding officers, from \$108,660 to \$56,223. This was accomplished through the use of the Owners working more hours and more efficient scheduling of the staff, which includes [the beneficiary]. Also revenues for 2001 through May 31st have increased over the same period from 2000. Therefore, I anticipate that the [REDACTED] have the resources and ability to pay the wages to [the beneficiary] without eliminating other workers due to his employment.

To use the labor certification issued to [REDACTED] the petitioner must show that it is the successor in interest to the company to which the labor certification was issued. The

petitioner would then have to show that Downey's Mahopac Beach Restaurant could have paid the wage offered as of October 22, 1996. See Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm. 1986).

The 1999 federal tax return shows an ordinary income of -\$112,296. The petitioner could not pay a proffered wage of \$36,254.40 per year out of a negative income.

No evidence that the petitioner had the ability to pay the wage offered as of October 22, 1996 has been submitted.

Accordingly, after a review of the federal tax return 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.