



B6

U.S. Department of Justice
Immigration and Naturalization Service

identification data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



File: EAC 00 204 50589 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 § 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 provides a statement and indicates that a separate brief and/or evidence is being submitted within thirty days. No further documentation, however, has been received. Therefore, a decision will be made based on the record as it is presently constituted.

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 February 19, 1999. 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 income statement for the period from January 1, 1999 through March 31, 1999. 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 24, 2000, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of February 19, 1999, to include the petitioner's 1999 corporate income tax return.

In response, counsel submitted copies of the petitioner's checking account statements for 1999, and a copy of the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return which reflected gross receipts of \$147,303; gross profit of \$84,000; compensation of officers of \$19,200; salaries and wages paid of \$4,000; depreciation of \$3,306; and a taxable income before net operating loss deduction and special deductions of -\$4,901. Schedule L reflected total current assets of \$5,898 with \$2,673 in cash and total current liabilities of \$3,472.

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 states:

What is required is that the alien receive the proffered wage at the time of immigrating to the United States. In a case in which the alien is not presently employed by the petitioner, it is in all respects impossible to pay the proffered wage, as the alien is receiving no wage whatsoever, not being employed by the petitioner. The VSC argues that if petitioner were to pay the proffered wage to the alien, payment of such wage would impliedly put the petitioner out of business. This hypothesis is impossible to sustain, as it is based on an alleged fact which is to occur in the future---hence, not a fact at all. Furthermore, the decision is not predicated upon any statistical evidence to establish what the VSC is trying to prove.

A review of the 1999 federal tax return shows that when one adds the depreciation, the taxable income, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is \$831, less than the proffered wage.

No additional evidence has been received to date. 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 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.