

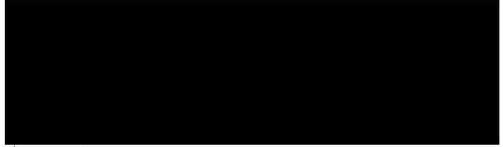


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: EAC 00 157 50740 Office: VERMONT SERVICE CENTER

Date: MAY 07 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 sustained.

The petitioner is a Halal meat and food store. It seeks to employ the beneficiary permanently in the United States as an assistant manager. 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 July 22, 1999. The beneficiary's salary as stated on the labor certification is \$450.00 per week or \$23,400.00 per annum.

Counsel submitted a copy of the petitioner's 1999 Form 1065 U.S. Partnership Return of Income which reflected gross receipts of

\$167,580; gross profit of \$69,501; salaries and wages paid of \$24,320; guaranteed payments to partners of \$0; depreciation of \$1,082; and an ordinary income (loss) from trade or business activities of \$21,651. Schedule L reflected total current assets of \$20,857 with \$7,437 in cash and total current liabilities of \$182.

The director determined that this documentation did not establish the petitioner's ability to pay the proffered wage at the time of filing the petition. On August 21, 2000, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage as of July 22, 1999.

In response, counsel submitted a letter from the petitioner which stated that "Madina Halal Food Store had a gross income of \$69,541 in 1999 and a net income of \$21,651. The business is expanding. I do not foresee any difficulty in paying the salary of \$23,400 to [the beneficiary]."

The director determined that this documentation did not establish the petitioner's ability to pay the proffered wage at the time of filing the petition. On December 15, 2000, the director again requested additional evidence to establish the petitioner's ability to pay the wage offered.

In response, counsel submitted itemized monthly expense statements for each partner and copies of each partners' 1999 Form 1040, U.S. Individual Income Tax Return. The director noted that:

The itemized monthly expense lists indicate a total monthly expense of \$1,513.99 for [REDACTED] and \$2,232.88 for [REDACTED]. This calculates to be a yearly combined total of \$44,962.44 of the partners' household expenses. The copies of the 1999 U.S. Income Tax Returns indicate a total income of \$38,455.00 for Haji Amin and \$27,961.00 for Fazal Abul for a combined total of \$66,416.00. It is noted that the tax returns indicate a combined total of eight individuals in the two households. The partners combined total income of \$66,416.00 less the combined total of household expenditures of \$44,962.44 leaves an amount of \$21,453.56. The claimed business income received was \$11,135.00 for [REDACTED] and \$1,546.00 for [REDACTED] for a combined total of \$12,681.00.

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 copies of the individual income tax returns for 2000 for each partner, and a copy of the petitioner's 2000 Form 1065 U.S. Partnership Return of Income which reflected gross receipts of \$171,460; gross profit of \$54,489; salaries and wages paid of \$600; guaranteed payments to partners of \$0; depreciation of \$745; and an ordinary income (loss) from trade or business activities of \$24,819. Schedule L reflected total current assets of \$26,536 with \$8,117 in cash and total current liabilities of \$385.

Counsel argues that:

For the year 2000, partnership had an income of \$24,819, which is more than the offered wages. Partners have individual income of \$54,123 and \$29,533. The combined income of the partners is \$83,656.00. Even if we apply INS analysis, the partners can still pay the offered wages for the year 2000. Mistakenly, we estimated the monthly expense report for the year 2000 not 1999.

A review of the 1999 federal tax return shows that when one adds the depreciation, the ordinary income, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is \$30,170, more than the proffered wage.

A review of the 2000 federal tax return shows that when one adds the depreciation, the ordinary income, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is \$33,681, more than the proffered wage.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has 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 met that burden.

ORDER: The appeal is sustained.