



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 00 277 53455 Office: Vermont Service Center

Date: MAY 14 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as an Other Worker Pursuant to § 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)(A)(iii).

IN BEHALF OF PETITIONER:
[Redacted]

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 chef. 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 December 16, 1998. The beneficiary's salary as stated on the labor certification is \$15.00 per hour or \$31,200.00 per annum.

Counsel initially submitted a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for the period from May 1, 1999

through April 30, 2000, which reflected gross receipts of \$182,070; gross profit of \$79,930; compensation of officers of \$0; salaries and wages paid of \$30,893; depreciation of \$2,017; and a taxable income before net operating loss deduction and special deductions of \$7,718. Schedule L reflected total current assets of \$7,200 of which \$5,772 was in cash and total current liabilities of \$5,552.

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 June 1, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of December 16, 1998.

In response, counsel submitted copies of the petitioner's Form 1120 U.S. Corporation Income Tax Return. The tax return for the period from May 1, 1998 through April 30, 1999, reflected gross receipts of \$165,331; gross profit of \$86,890; compensation of officers of \$0; salaries and wages paid of \$28,750; depreciation of \$842; and an taxable income before net operating loss deduction and special deductions of \$4,583. Schedule L reflected total current assets of \$9,205 with \$7,855 in cash and total current liabilities of \$5,132. The Form 1120-A tax return for the period from May 1, 2000 to April 30, 2001, reflected gross receipts of \$244,161; gross profit of \$125,004; compensation of officers of \$0; salaries and wages paid of \$25,976; depreciation of \$1,446; and a taxable income before net operating loss deduction and special deductions of \$31,248. Schedule L reflected total current assets of \$39,426 with \$17,576 in cash and total current liabilities of \$9,771.

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 argues that:

The reason for denial of the petition is that Sitar Restaurant did not make enough money in 1998, the year of filing the petition, to be able to afford to hire that beneficiary. This is admitted. However, this is a tightly knit family business. One Baldev Singh is a director of the corporation as shown by Exhibit 1. Mr. Baldev Singh is also the holder of the liquor license for this establishment. (Exhibit 2).

Mr. Baldev Singh has complete knowledge of the business operations of the Petitioner. He believes in the business plan that requires employing the beneficiary.

He has submitted an affidavit attesting to these facts. (Exhibit 3). In addition, Mr. Baldev Singh had more than sufficient income in 1998 (and all subsequent years) to allow him to pay the salary of the beneficiary to the extent necessary.

Counsel's argument is not persuasive. The petitioning entity in this case is a corporation. Consequently, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See Matter of M, 8 I&N Dec. 24 (BIA 1958; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

A review of the federal tax return for the period from May 1, 1998 through April 30, 1999, shows that when one adds the taxable income, the depreciation, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is \$9,498, less than the proffered wage.

A review of the federal tax return for the period from May 1, 1999 through April 30 2000, 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 \$11,383, less than the proffered wage.

Although the federal tax return for the period from May 1, 2000 through April 30, 2000 shows an ability to pay the proffered wage, the petitioner must show that it had the ability to pay the proffered wage at the time of filing of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. 204.5(g)(2).

Accordingly, after a review of the federal tax returns, 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.

It is noted that the petitioner has not established that the beneficiary had the requisite experience as stated on the labor certification. As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

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.