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U.S. Department of Justice  
Immigration and Naturalization Service

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Department of Justice  
Washington, D.C. 20536

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



File: EAC 01 031 52338 Office: VERMONT SERVICE CENTER Date: MAY 14 2002

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

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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner 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 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 the beneficiary had the requisite experience as of the petition's filing date. The director further 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.

The first issue to be considered in this proceeding is that to be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is September 19, 2000.

The Application for Alien Employment Certification (Form ETA 750) indicated that in order to perform the duties of the position, the beneficiary must possess three years of experience in the job offered.

The director determined that the petitioner had not shown that the beneficiary possessed the requisite experience in the job offered.

On appeal, counsel submits a letter from the Hotel Sher-E-Punjab, which attests to the beneficiary's employment as a restaurant manager from May of 1995 to May of 1998. Therefore, the petitioner has overcome this portion of the director's decision.

The other issue to be considered is whether the petitioner has established that it had the ability to pay the proffered wage.

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 September 19, 2000. The beneficiary's salary as stated on the labor certification is \$45,000.00 per annum.

The petitioner initially submitted insufficient evidence of its ability to pay the wage offered. On June 6, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of September 19, 2000.

In response, counsel submitted copies of the petitioner's 1999 and 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The federal tax return for 1999 reflected gross receipts of \$429,987; gross profit of \$224,289; compensation of officers of \$0; salaries and wages paid of \$64,104; depreciation of \$16,860; and an ordinary income (loss) from trade or business activities of \$9,697. Schedule L reflected total current assets of \$8,768 with \$4,440 in cash and total current liabilities of \$7,441. The federal tax return for 2000 reflected gross receipts of \$533,634; gross profit of \$280,187; compensation of officers of \$0; salaries and wage paid of \$97,850; depreciation of \$12,354; and an ordinary income (loss) from trade or business activities of \$12,865. Schedule L reflected total current assets of \$11,547 with \$6,872 in cash and total current liabilities of \$7,519.

The director determined that the submitted evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a letter from the petitioner's accountant who asserts that:

It is my opinion that this company was able to pay the beneficiary's proffered wage of \$45,000. This is so because of several considerations. The company did business in excess of \$530,000 and an additional employee is extremely necessary. Page 1- line 19 other deductions indicates an amount of \$86,280. These expenses are enumerated in statement 1 of the tax return (see copy attached). Included on this statement you will find a category called "weekly service fee" in the amount of \$26,148. This fee would not be necessary if the beneficiary would be working for this company at that time. This is true because the beneficiary's duties as manager includes many of the responsibilities paid for by the "weekly service fee" expense.

The accountant's assertion that the funds paid to "weekly service fee" could be used to pay the beneficiary's salary is not persuasive. These funds were not retained by the petitioner for future use. Instead, these monies were expended on compensating workers, and therefore, not readily available for payment of the beneficiary's salary in 2000. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2).

A review of the 1999 federal tax return shows that when one adds the ordinary income, the depreciation, and the cash on hand at the end of the year (to the extent that total current assets exceed total current liabilities), the result is \$27,884, less than the proffered wage.

A review of the 2000 federal tax return shows that when one adds the ordinary income, the depreciation, and the cash on hand at the end of the year (to the extent that total current assets exceed total current liabilities), the result is \$29,247, less than the proffered wage.

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.

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 sustained that burden.

**ORDER:** The appeal is dismissed.