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Immigration and Naturalization Service

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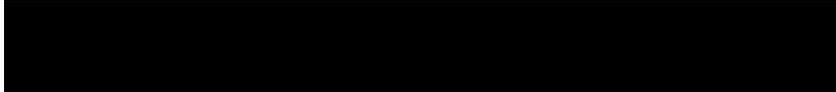


File: EAC 01 273 52256

Office: VERMONT SERVICE CENTER

Date: NOV - 4 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 that 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 that 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 that 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 business. It seeks to employ the beneficiary permanently in the United States as a cook of foreign specialty foods. 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 priority 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 priority 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 priority date is January 16, 2001. The beneficiary's salary as stated on the labor certification is \$756 per week or \$39,312 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the priority date of the petition. On November 5, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of January 16, 2001.

In response, counsel submitted on January 31, 2002 copies of the petitioner's 2000 Form 1120A U.S. Corporation Short Form Income Tax Return for the fiscal year July 1, 2000 to June 30, 2001. It reflected gross receipts of \$90,760 and a taxable income before the net operating loss deduction and special deductions of \$8,511.

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

On appeal, counsel submits rebuttal evidence and additional explanations for previous evidence. Counsel's arguments are not persuasive.

Counsel asserts that a letter from ATF Consulting Company "indicate[s] increasing gross sales and resultant net incomes." While this may, in fact, be true, the tax returns still do not show the petitioner's ability to pay the proffered wage. A New York Times review refers only to potential and contains no financial information.

Next, counsel offers Company bank statements from January 2001 through February 6, 2002 to evidence sufficient funds to pay the proffered wage. These reveal no financial resource that the tax return or credible financial statements did not reflect. See Elatos Restaurant Corp. v. Sava, 632 F. Supp. 1049 (S.D.N.Y. 1986) and K.C.P. Food Co., Inc., 623 F. Supp. 1080 (S.D.N.Y. 1985).

Further, counsel claims that the petitioner's liability on a promissory note, made March 26, 2002 in favor of SNA Knitting Mill, Inc., proves the petitioner's continuing ability to pay the proffered wage. It, too, reveals no financial resource except such as might appear in the petitioner's tax return or credible and audited financial statements. In passing, counsel contends that this note's benefits are in a provision for annual renewal and in a condition subsequent, extending it until the beneficiary attains lawful permanent residence. The promissory note in the record sets forth neither term. In any event, the assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I & N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I & N Dec. 503, 506 (BIA 1980).

In short, the petitioner could not pay the proffered wage from the taxable income shown. 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 as of the priority date 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.