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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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File: WAC 99 134 51103

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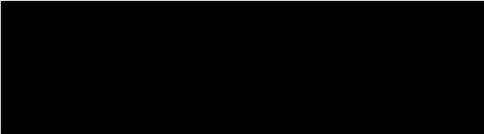
Date: OCT 10 2002

IN RE: Petitioner:
Beneficiary:



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 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

Helen E. Crawford for
Robert P. Wiemann, Director
Administrative Appeals Unit

DISCUSSION: The employment-based preference immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on certification. 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 was accompanied by an individual labor certification from the Department of Labor. On August 21, 2001, the Associate Commissioner for Examinations remanded the petition to the director for further consideration regarding the petitioner's ability to pay the proffered wage.

On certification, counsel submits a brief and additional evidence.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), 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 or unskilled labor, 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 May 21, 1996. The beneficiary's salary as stated on the labor certification is \$17.83 per hour or \$37,086.40 per annum.

Counsel submitted copies of the petitioner's 1996, 1997, 1998, 1999, and 2000 Schedule C, Profit and Loss from Business Statement. Schedule C for 1996 reflected gross receipts of \$130,577; gross profit of \$73,474; wages of \$4,500; and a net profit of \$9,284. Schedule C for 1997 reflected gross receipts of \$150,812; gross profit of \$94,200; wages of \$5,500; and a net profit of \$27,664.

Schedule C for 1998 reflected gross receipts of \$212,316; gross profit of \$137,583; wages of \$5,000; and a net profit of \$24,857. Schedule C for 1999 reflected gross receipts of \$237,777; gross profit of \$129,916; wages of \$18,255; and a net profit of \$14,248. Schedule C for 2000 reflected gross receipts of \$303,895; gross profit of \$156,388; wages of \$17,287; and a net profit of \$14,901.

On certification, counsel argues that:

Note that the tax return is often only one indication of a company's financial viability. It is a snapshot in time showing the past. It does not often reflect neither potential nor financial viability of a company. The objection of the tax return is to legally minimize taxable income. Many companies pay virtually no taxes yet are quite viable. Tax returns are prepared to minimize taxes.

Counsel's argument is not persuasive. The tax return for 1996 shows a net profit of \$9,284. The petitioner could not pay a salary of \$37,086.40 a year from this figure.

In addition, the tax returns for 1997, 1998, 1999, and 2000 continue to show an inability to pay the wage offered.

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.

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.