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U.S. Department of Justice
Immigration and Naturalization Service

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

Identifying data deleted to
prevent clearly unwarranted
in



File: [Redacted] Office: TEXAS SERVICE CENTER

Date: OCT 30 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 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

Heleen E Crawford for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas 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 specialty cook. 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 is a successorship-in-interest to the company for which the labor certification was approved. The director also determined that the petitioner had not established the ability to pay the proffered wage as of the priority date of the petition and continuing to present.

On appeal, counsel provides 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 December 21, 1999. The beneficiary's salary as stated on the labor certification is \$450.00 per week or \$23,400.00 per annum.

Counsel initially failed to submit any evidence of the petitioner's ability to pay the proffered wage as of the priority date of the petition. On June 5, 2001, the director requested evidence of the petitioner's ability to pay the proffered wage.

In response, counsel submitted a copy of Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss Statement from Business for [REDACTED] for 1999. Form 1040 reflected an adjusted gross income of \$14,588. Schedule C reflected gross receipts of \$182,124; gross profit of \$67,272; wages of \$13,552; and a net profit of \$15,697. Counsel stated that "[t]he successor in interest of the Petitioning restaurant is continuing the precise business at the same location, with the same clientele and goodwill as before, with only the benefit of from the Beneficiary's engagement as a full time cook, the restaurant functioning with a part time cook who earns \$13,552, is noted on the attached Federal Income Tax Return for the Business operation."

The director determined that this evidence did not establish that the original petitioner had the ability to pay the proffered wage as of the filing date of the petition and denied the petition accordingly. The director noted that:

The petitioner claims, through attorney, that the successor in interest of the Petitioning restaurant is continuing the precise business at the same location with the same clientele and goodwill as before. As evidence of the successor in interest, the petitioner has submitted only a copy of a four-year lease agreement beginning on 10/1/01. The lease agreement is between Hoffman's Candies, Inc. (Landlord) and [REDACTED] (Tenant). Evidence between 1999 and October 2001 is missing from the record.

On appeal, counsel argues that [REDACTED] the successor in interest "continues to operate the Jerusalem Restaurant at the same location, providing exactly the same cuisine and servicing the same market."

Counsel states on appeal that [REDACTED] is the petitioner's successor corporation. However, to maintain the original priority date, the successor in interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to have paid the certified wage at the time of filing the petition. Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm. 1986).

The petitioner has submitted no persuasive documentation to establish that it had the financial ability to pay the proffered wage as of the priority date of the petition and continuing to present nor has it provided any persuasive documentation to establish that the current petitioner is a successor-in-interest to the prior owner.

Accordingly, after a review of the documentation furnished, 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.