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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536



19 SEP 2002

File: WAC 01 138 54222 Office: CALIFORNIA SERVICE CENTER Date:

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

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, California 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 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 statement and indicates that a separate brief and/or evidence is being submitted within thirty days. No further documentation, however, has been received. Therefore, a decision will be made based on the record as it is presently constituted.

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 September 20, 1996. The beneficiary's salary as stated on the

labor certification is [REDACTED] per hour or [REDACTED] per annum.

Counsel initially submitted copies of the petitioner's 1996 through 1999 Form 1065 U.S. Partnership return of Income. The tax return for 1996 reflected gross receipts of [REDACTED] gross profit of [REDACTED] salaries and wages paid of [REDACTED] guaranteed payments to partners of \$0; and an ordinary income (loss) from trade or business activities of [REDACTED]. The tax return for 1997 reflected gross receipts of [REDACTED] gross profit of [REDACTED] salaries and wages paid of [REDACTED] guaranteed payments to partners of \$0; and an ordinary income (loss) from trade or business activities of - \$8,849.

The tax return for 1998 reflected gross receipts of [REDACTED] gross profit of [REDACTED] salaries and wages paid of [REDACTED] guaranteed payments to partners of \$0; and an ordinary income (loss) from trade or business activities of [REDACTED]. The tax return for 1999 reflected gross receipts of [REDACTED] gross profit of [REDACTED] salaries and wages paid of [REDACTED] guaranteed payments to partners of \$0; and an ordinary income (loss) from trade or business activities of [REDACTED].

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 July 17, 2001, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage.

In response, counsel submitted a copy of the petitioner's unaudited Profit and Loss Statement for the period ended 1/1/00 through 12/31/00.

The director determined that the documentation was insufficient to establish the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel merely states "[t]he Immigration & Naturalization Service incorrectly concluded that petitioner, [REDACTED] is unable to pay the prevailing wage as dictated by 8 C.F.R. 204.5(g)(2)."

The petitioner's tax return for calendar year 1996 shows an ordinary income of [REDACTED]. The petitioner could not pay a salary of [REDACTED] a year out of this figure.

In addition, the petitioner's tax returns for 1997 through 1999 continue to show an inability to pay 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 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.