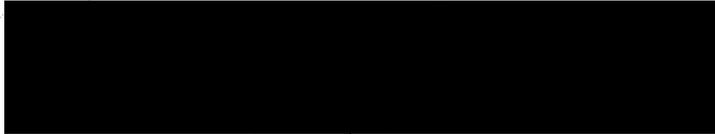


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

PUBLIC COPY

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



File: WAC 01 283 56851 Office: California Service Center

Date: APR 09 2003

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)

ON BEHALF OF PETITIONER:



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

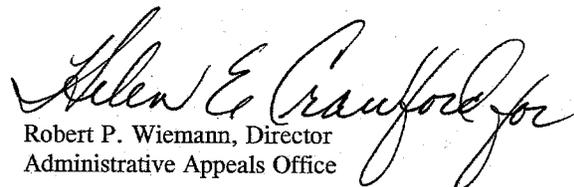
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.


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 Administrative Appeals Office on appeal. The appeal will be sustained.

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 a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on 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 continuing ability to pay the wage offered beginning on the priority date, 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 request for labor certification was accepted for processing on May 22, 2000. The proffered salary as stated on the labor certification is \$2,100 per month which equals \$25,200 annually.

With the petition, counsel submitted a copy of its 2000 Form 1120 U.S. corporate income tax return. That return showed a taxable income before net operating loss deductions of \$1,340. The corresponding Schedule L showed that the petitioner's current liabilities at the end of that year were greater than its current assets.

On February 1, 2002, the California Service Center requested additional evidence. Specifically, the Service Center requested evidence pertinent to the beneficiary's previous work experience and copies of the petitioner's four most recent California Form DE-6 quarterly wage reports and a brief job description of each of its employees. The Service Center requested no other evidence of ability to pay the proffered wage.

In response, counsel submitted the requested documents. The DE-6 forms submitted are for the four quarters of 2001.

On June 5, 2002, the Acting Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. Although the acting director acknowledged that the DE-6 forms indicate that the petitioner has been paying its employees, she noted that the petitioner's tax return does not indicate that it had funds available to pay an additional \$25,200 during 2000.

On appeal, counsel submits a brief. Counsel states that the beneficiary is to replace the current chef, who is also the petitioner's co-owner.

The quarterly wage reports show that the petitioner paid \$43,900 in wages to one of its co-owners during 2001. The job descriptions provided identify that person as the petitioner's chef. The amount of his salary, if available, would be more than sufficient to pay the proffered wage. That co-owner/chef is the person whom counsel alleges on appeal will be replaced if the petitioner is permitted to hire the beneficiary, and no evidence appears to the contrary.

The petitioner's 2000 tax return does not show an additional \$25,200 available to pay the proffered wage, and the DE-6 forms are for 2001. One might argue, therefore, that the petitioner has failed to provide evidence sufficient to demonstrate the ability to pay the proffered wage during 2000. However, the DE-6 forms are precisely what the Service Center requested, and demonstrate the petitioner's ability to pay the proffered wage during the period to which they relate.

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 met that burden.

ORDER: The appeal is sustained.