

BB

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

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
BCIS, AAO, 20 Mass, 3/F  
Washington, D.C. 20536

[Redacted]

AUG 12 2003

File: EAC 01 166 50259 Office: Vermont Service Center Date:

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)

ON BEHALF OF PETITIONER:

[Redacted]

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 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, Vermont Service Center, and is now before the Administrative Appeals Office 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 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 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 April 29, 1997. The beneficiary's salary as stated on the labor certification is \$697.20 per week or \$36,254.40 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the wage offered. On September 13,

2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage, to include the beneficiary's W-2 Wage and Tax Statement for 1997.

In response, counsel submitted copies of the petitioner's bank statements for the period from March 31 through April 30, 1997, and a copy of the petitioner's 1997 Form 1120S U.S. Income Tax Return for an S Corporation. The federal tax return reflected gross receipts of \$215,513; gross profit of \$200,406; compensation of officers of \$0; salaries and wages paid of \$125,968; and an ordinary income (loss) from trade or business activities of -\$16,416.

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

You submitted documentation relating to the shareholders of the Subchapter S Corporation that is the petitioner. You have requested consideration of the assets of the shareholders in support of the petitioner's ability to pay the proffered wage. You indicate that the beneficiary does not have a Form W-2 or a Form 1099 for the year 1997.

An S Corporation is a separate, legal entity apart from the owner in which the personal assets of the owner may not be used to support the ability of the corporation to pay the proffered wage.

On appeal, counsel re-submits the petitioner's bank statements and 1997 tax return and argues that "[a]s soon as the alien has adjusted his status to that of a lawful permanent resident of the US, the employer will put him on the payroll for the full proffered wage of \$36,254.40 annually from the payroll of \$125,968-currently being paid to other employees." Counsel further argues that the bank statement for the month of March to April of 1997 "shows an average monthly balance of \$5,992.91 under the name of the corporation.

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

A review of the federal tax return for 1997 shows an ordinary income of -\$16,416. The petitioner could not pay a salary of \$36,254.40 a year from this figure.

Accordingly, after a review of the evidence submitted, 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.