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

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536



File: EAC 01 278 52931 Office: VERMONT SERVICE CENTER

Date: **DEC 05 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:



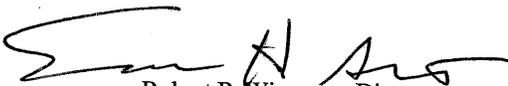
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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 employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. 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 asserts that the evidence submitted to the record establishes the petitioner's financial ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g) states in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The only issue on appeal is whether the petitioner has established that it has the ability to pay the beneficiary's offered wage. Eligibility in this case rests upon the petitioner's ability to pay the wage as of the visa priority date. The priority date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 17, 2001. The beneficiary's salary as stated on the approved labor certification is \$11.90 per hour or \$24,752 annually. Evidence in the record indicates that the petitioner has employed the beneficiary since September 2000.

The petitioner initially submitted insufficient evidence to support its ability to pay the beneficiary's proposed wage. On January 25, 2002, the director requested further evidence related to this issue as well as evidence related to the beneficiary's work experience. Part of the petitioner's response

included a copy of the beneficiary's 2000 W-2 issued by [REDACTED]. Its address on the W-2 is the same as the petitioner's, but its federal tax number is different from the one used by the petitioner on the visa petition. This W-2 showed that the beneficiary received \$18,450.11 in wages in 2000. The petitioner's response also included a number of financial statements from [REDACTED]. These statements failed to indicate whether they were reviewed or audited.

In the denial, the director noted that he had requested the petitioner to only submit audited or reviewed financial statements. The director stated that the documentation submitted failed to establish that the petitioner had established its ability to pay. The W-2 that the beneficiary received for 2000 reflected that he was paid \$6,301.89 less than the proposed wage. The director also recognized that the petitioner had submitted copies of the beneficiary's individual 2000 tax return accompanied by W-2s issued to him and other members of his family, but concluded that this does not establish the petitioner's ability to pay the offered wage. We concur.

On appeal, counsel characterized the financial statements submitted as also being an annual report. Assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N 533, 534 (BIA 1988). The copies of documents submitted do not indicate that they are audited financial statements, nor do they clearly establish that they represent the financial data of the petitioner. It is noted that annual reports, such as one related to the entity represented in the financial data, would generally be required to be filed on a Securities and Exchange Commission form and include a narrative discussion about the financial health of the company.

Based on the evidence presented, we concur with the director's conclusion that the petitioner has not demonstrated its ability to pay the proffered wage. The evidence submitted related to the petitioner's financial status raises more questions than it answers, as to the exact relationship between the petitioner, [REDACTED] and [REDACTED].

Based on the evidence contained in the record, we cannot conclude that the petitioner has submitted sufficient persuasive evidence to establish its ability to pay the beneficiary's offered wage as of the visa priority date of April 17, 2001 and continuing until the 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.