

**PUBLIC COPY**

identifying data deleted to  
prevent clearing unwaranted  
invasion of personal privacy

U.S. Department of Homeland Security

Citizenship and Immigration Services

B6

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

[REDACTED]

File: EAC 02 099 50280 Office: VERMONT SERVICE CENTER

Date: DEC 05 2003

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]

**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 an Italian 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. The director also determined that the petitioner had not established that the beneficiary possessed the qualifications required by the terms of the labor certification.

On appeal, counsel asserts that the evidence submitted to the record establishes the petitioner's financial ability to pay the proffered wage and demonstrates that the beneficiary has the required qualifications for the job offered.

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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The petitioner's ability to pay the wage offered must also be established. The filing date or 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 30, 2001. The beneficiary's salary as stated on the approved labor certification is \$12.09 per hour or \$25,147.20 annually. Evidence in the record indicates that the petitioner has employed the beneficiary since July 2000.

The petitioner initially submitted insufficient evidence to support its ability to pay the beneficiary's proposed wage. On March 11, 2002, the director requested further evidence related to this issue as well as evidence that the beneficiary has had at least two years experience as an Italian cook. In response, the petitioner submitted copies of its 2000 and 2001 Form 1065, U.S. Return of Partnership Income, affidavits from the beneficiary and his brother describing the beneficiary's work record, and statements from two individuals also describing the beneficiary's work experience.

The information contained in the 2000 tax return shows that the petitioner claimed \$473,051 in gross receipts/sales, no salaries and wages, \$199,822 in labor costs, and -\$156,546 in ordinary income. Schedule L attached to this return shows that the petitioner had -\$39,803 in net current assets.

The 2001 tax return revealed that the petitioner had \$1,423,956 in gross receipts/sales, no salaries and wages, \$355,575 in labor costs, and an ordinary income of -\$5965. Schedule L shows that petitioner had -\$76,041 in net current assets.

The director denied the petition. He determined that the 2001 tax return failed to demonstrate that the petitioner had established its ability to pay the beneficiary's proffered wage as of the priority date of April 30, 2001 to the present. We concur. The negative figures for both ordinary income and net current assets in both 2000 and 2001 do not indicate that the petitioner had available funds to cover the beneficiary's proffered wage.

On appeal, counsel resubmits copies of the tax returns and also includes the beneficiary's 2001 W-2 issue by the petitioner. It shows that the petitioner paid \$21,641.29 in wages to the beneficiary that year. The proposed wage as set forth on the approved labor certification exceeds this amount by \$3,505.91. It remains, however, that the petitioner's 2001 tax return does not reveal how this amount can be covered by either the petitioner's net current assets or its ordinary income.

Counsel asserts on appeal that the financial statements attached to the petition indicate a solid financial status of a business that has been in existence for a number of years. We cannot agree. The petitioner's tax returns indicate that the business started in June 2000, less than one year before the visa priority date. Counsel also states that the substantial labor costs that the petitioner has incurred show that it has the ability to pay the proffered wage. The fact that the petitioner incurs substantial labor costs does not support any conclusion other than the generation of the petitioner's revenue requires significant labor expense.

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.

In his denial, the director also noted the deficiencies of the statements submitted to document the beneficiary's work experience. Here, the approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience

requirements for applicants. In this case, Block 14 states the applicants must have two years experience in the job offered. Block 15 also states that the special requirement for the job is that an applicant must have "two years experience as Italian cook."

The regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence relevant to qualifying experience or training be submitted in the form of letters from current or former employers or trainers and must include the name, address, and title of the writer and a specific description of the alien's duties. If this evidence is unavailable, other documentation will be considered. Here, the director noted that the beneficiary's affidavit provided sufficient explanation of the difficulties he had in obtaining letters from past employers. The director's principal objection to the information submitted by the beneficiary's brother is that his brother did not describe the beneficiary's specific job duties at Guilford Tavern, one of the beneficiary's past employers. Similarly, the remaining two statements submitted by co-workers also described the beneficiary as a "line cook" rather than characterizing him as an "Italian cook," which the labor certification specifically requires. We concur with the director's finding that the evidence did not sufficiently establish that the beneficiary has the requisite two years experience as an Italian cook. Counsel generally asserts that the evidence supports the beneficiary's qualifications as an Italian cook, but does not specifically offer rebuttal to the director's observations about the submitted evidence.

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 30, 2001 and continuing until the present. Additionally, the evidence does not establish that the beneficiary has completed the requisite two years as an Italian cook as required by the terms of the approved labor certification.

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.