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

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[Redacted]

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

DEC 09 2003

File: EAC 01 225 58791 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)

**PUBLIC COPY**

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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center. In response to a subsequent motion to reopen, the director affirmed his decision to deny the petition. The matter 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 specialty cook. The Application for Alien Employment Certification (Form ETA 750), filed with the Department of Labor on October 3, 1997, indicates that the minimum requirement to perform the job duties of the proffered position is two years of experience in the job offered. 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 written statement 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 October 3, 1997. The beneficiary's salary as stated on the labor certification is \$25,292.80 per annum.

With the petitioner's initial filing, counsel submitted copies of the petitioner's Internal Revenue Service (IRS) Forms 1040 for 1998 through 2001 and Schedule C and other attachments to Form 1040 for 1997. Schedule C for 1997 showed net profit of \$3,095. Form 1040 for 1998 showed an adjusted gross income of \$17,601.00. Form 1040 for 1999 showed an adjusted gross income of \$14,197.00. Form 1040 for 2000 showed an adjusted gross income of \$8,508.00.

On September 8, 2001, the director requested additional evidence of the petitioner's ability to pay the proffered wage, to include an itemized list of all monthly expenses, including rent or mortgage payments, food, utilities, clothing, transportation, insurance, medical costs, etc. The petitioner failed to respond to this request.

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

On appeal, counsel submits copies of the petitioner's 1999 and 2000 IRS Forms 1040X which shows an amended adjusted gross income of \$46,443.00 and \$35,715.00, respectively. Counsel further submits a copy of the petitioner's IRS Form 1040 for 2001 which shows an adjusted gross income of \$67,545.00. Counsel asserts that the petitioner has the ability to pay the wage offered.

Counsel's assertion is not persuasive. The petitioner failed to submit Form 1040 for calendar year 1997. Thus, CIS is unable to determine the petitioner's ability to pay the proffered wage in 1997. In addition, the petitioner's Form 1040 for 1998 shows an adjusted gross income of \$17,601.00. A proffered wage of \$25,292.80 could not be paid with \$17,601.00 and thus, the petitioner failed to establish its ability to pay the proffered wage in 1998. Additionally, the petitioner failed to provide a breakdown of his monthly expenses which would enable CIS to determine whether or not he could afford to support himself, his wife, and four children and still pay the wage offered to the beneficiary. The petitioner's amended tax returns for 1999 through 2001 may show the ability to pay the wage offered, however, a concrete determination is impossible to make without evidence of the petitioner's expenses. Regardless of the petitioner's ability to pay from 1999 to 2001, the petitioner must show that it had the ability to pay the proffered wage as of the priority date of the

petition and continuing until the beneficiary obtains lawful permanent resident status. (Emphasis added.) See 8 C.F.R. § 204.5(g)(2).

Accordingly, after a review of the federal tax returns 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, October 3, 1997, and continuing.

Beyond the decision of the director, it is noted that the labor certification requires two years of experience as an Ecuadorian cook. The record contains conflicting evidence of the beneficiary's experience. On the ETA-750 the beneficiary states he worked for Restaurant Guayaquil Ecuador from June 1989 through January 1992. However, the letter of experience from the restaurant indicates he was employed from 1993 through 1995. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

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.