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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

*BP*



File: LIN 02 091 53829

Office: Nebraska Service Center

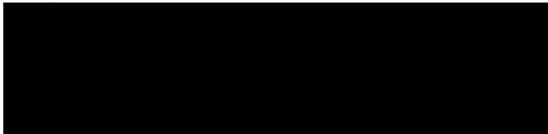
Date: DEC 10 2003

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.

*Helen E. Crawford-Joe*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska 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 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 September 23, 1996. The beneficiary's salary as stated on the labor certification is \$1,200 per month or \$14,400.00 per annum.

Counsel submitted copies of the petitioner's 1996 through 2001 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income

Tax Return. The tax returns reflected taxable incomes of \$24,116; \$7,681; -\$14,839; -\$4,308; \$10,436; and -\$8,238 respectively.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director noted that the petitioner submitted income tax returns for another restaurant with a different employer identification number.

On appeal, counsel submits copies of the petitioner's W-3 forms and copies of W-2 forms for the years 1997 through 2001 and argues that:

Factually, the year 1996 is not in issue and the subsequent years similarly reflect positive figures beyond the salary commitment to this alien. See the letter of Jerry D. Dunn, the restaurant's Certified Public Accountant who stated that his firm prepared the income tax returns for the restaurant throughout the years and that year-end bonuses, amounting between a low of \$40,000 in 2001 to a high of \$75,000 in 1998, to the stockholders/officers resulted in the negative profits for the years questioned by the Center.

Counsel's assertion that the bonuses paid to stockholders could be used to pay the beneficiary's salary is not persuasive. These funds were not retained by the petitioner for future use. Instead, these monies were expended on compensating the stockholders, and therefore, not readily available for payment of the beneficiary's salary in 1996, or any year.

The petitioner's Form 1120 for calendar year 1996 shows a taxable income of \$24,116. The petitioner could pay a proffered salary of \$14,400.00 out of this income. It is noted that the petitioner had sufficient net current assets in 1997, 1998, 1999 and 2000 to pay the proffered salary.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has 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 met that burden.

**ORDER:** The appeal is sustained.