

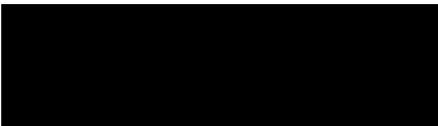
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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

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DEC 17 2003

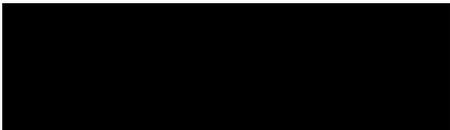
File: EAC 01 236 53546 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



Identifying data deleted to
prevent unauthorized disclosure
invasion of personal privacy

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 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 Chinese Nepalese restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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). The petition's priority date in this instance is November 19, 1998. The beneficiary's salary as stated on the labor certification is \$8.50 per hour \$17,680 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. In a request for evidence dated September 18, 2001

(RFE), the director required the petitioner's federal income tax returns or other evidence from the priority date and continuing until the present, as well as Forms W-2 evidencing wage payments, if any, to the beneficiary at any time.

Counsel submitted the petitioner's 1998 and 1999 Forms 1065, U.S. Partnership Return of Income. The legend "1998" was handwritten in the title of the 1998 exemplar. The preparer's date of signature was altered so clumsily as to obscure reference to 1998. This offering omitted any balance sheet (Schedule L). The 1999 return, on the other hand, included a blank Schedule L. The petitioner signed and dated neither return. Each, respectively, reflected an ordinary loss, respectively, of (\$12,561) and (\$14,574).

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present and denied the petition.

On the appeal dated March 2, 2002, counsel and the petitioner's partner (JS) concede that the petitioner did not prosper from the priority date to the present. Instead, the petitioner submits personal bank statements of JS showing an average monthly balance of \$9,718, less than the proffered wage. About the priority date, the balance was \$3,322.93, less than the proffered wage. The bank statements end in 1998 and offer no evidence of the continuing ability to pay the proffered wage until the beneficiary obtains lawful permanent residence.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I & N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Also, counsel says that 1998 interest calculations relate to a security deposit with interest for a total of \$18,927.71. JS says in a letter dated March 6, 2002 (JS letter) that it is a security deposit with Amoco Corporation. Counsel says that it is available to pay the proffered wage. On the contrary, the record contains no evidence of any term or condition of the deposit and nothing of the status of JS as a partner. Assets once pledged to another purpose are not available to pay the proffered wage.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I & N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I & N Dec. 503, 506 (BIA 1980)

The 1998 and 1999 tax returns, bank statements, and security deposit undermine counsel's averments that:

The owner/petitioner of [petitioner] is principally, [JS]. [JS] is also the principal owner of First Avenue Service LLC in West Haven, Conn, (sic) as the owner of several business, [JS] can establish that in 1998 his companies had sufficient assets and finances to pay an employee in this position a salary of \$17,880.... Therefore, the [petitioner], owned by [JS] was indeed able to pay the proffered wage at the time of the filing.

No tax returns, annual reports or audited financial statements of any company or companies support these sweeping assertions. See 8 C.F.R. § 204.5(g)(2).

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).

After a review of the federal tax returns and submissions of JS, 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 until the beneficiary obtains lawful permanent residence.

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.