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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 01 270 53730 Office: Vermont Service Center Date: JAN 13 2003

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

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 the Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Ellen E. Crawford for
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 Associate Commissioner for Examinations 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 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 July 16, 1997. The beneficiary's salary as stated on the labor certification is $17.43 per hour or $36,254.40 per annum.

Counsel initially submitted a copy of the petitioner's unaudited financial statement dated August 16, 2001. On November 2, 2001,

the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted copies of the petitioner's 1997 through 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The tax return for 1997 reflected gross receipts of $478,096; gross profit of $265,470; compensation of officers of $20,800; salaries and wages paid of $63,859; and an ordinary income (loss) from trade or business activities of -$31,192. The tax return for 1998 reflected gross receipts of $557,160; gross profit of $328,985; compensation of officers of $41,040; salaries and wages paid of $70,751; and an ordinary income (loss) from trade or business activities of -$12,546.

The 1999 federal tax return reflected gross receipts of $692,307; gross profit of $398,135; compensation of officers of $34,700; salaries and wages paid of $104,655; and an ordinary income (loss) from trade or business activities of $8,613. The 2000 tax return reflected gross receipts of $826,805; gross profit of $486,674; compensation of officers of $99,228; salaries and wages paid of $79,043; and an ordinary income (loss) from trade or business activities of $838.

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.

On appeal, counsel re-submits copies of the petitioner's 1997 through 2000 Form 1120S U.S. Tax Return for an S Corporation and argues that:

> Among those receiving compensation in 1997 from the $63,859 salaries and wages were numerous part time workers. The petitioner's intention since 1997 has been to eliminate part time workers from his payroll upon hiring the beneficiary full time. By thusly consolidating his staff, the petitioner would assure himself of being able to afford the beneficiary's $36,254 salary without exceeding his salaries and wages of $62,859 for 1997 as well as all years to follow.

Counsel's assertion that the funds paid to part time workers could be used to pay the beneficiary's salary is not persuasive. Counsel has not documented the position, duty and termination of the part-time workers who performed the duties of the proffered position. If they performed other kinds of work, then the beneficiary could not have replaced them as suggested by the petitioner.

The petitioner's Form 1120S for the calendar year 1997 shows an ordinary income of -$31,192. The petitioner could not pay a salary of $36,254.40 a year out of this figure.

Accordingly, after a review of the federal tax for 1997, 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 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 not met that burden.

ORDER: The appeal is dismissed.