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



File: EAC 02 002 51689 Office: Vermont Service Center

Date: **JAN 31 2003**

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)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
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 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.

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 priority date, 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 request for labor certification was filed on March 26, 2001. The beneficiary's salary as stated on the labor certification is \$12.59 per hour for a 35 hour week, which equals \$22,913.80 annually.

With the petition, counsel submitted a letter from one of the two

officer/shareholders of the petitioner corporation. That letter, dated September 12, 2001, states that the petitioner employed the beneficiary full-time from September 1995 through the date of that letter.

Counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, on November 19, 2001, the director requested evidence to establish that the petitioner had the ability to pay the proffered wage as of March 26, 2001, the priority date. In addition, the director requested the petitioner's 2000 income tax return. Finally, the director requested that, if the petitioner employed the beneficiary during 2000, that the petitioner submit 2000 Federal W-2 forms showing the wages paid to the beneficiary.

In response, counsel submitted a copy of the petitioner's Form 1120 corporate income tax returns. That return is nominally a 1999 return, but covers the petitioner's fiscal year running from August 1, 1999 to July 31, 2000. That federal tax return reflected gross receipts of \$73,688; gross profit of \$54,817; compensation of officers of \$20,400; salaries and wages paid of \$1,938; and a taxable income (loss) before net operating loss deduction and special deductions of (\$1,315). Schedule L reflected total current assets of \$3,913 with (\$1,305) in cash and total current liabilities of \$851.

Counsel also submitted a letter, dated February 6, 2002, from the other officer/shareholder of the petitioner/corporation, husband of the writer of the previous letter. That letter states that he has been working full-time as the petitioner's cook, but wishes to vacate that position. He noted that, were the petitioner able to retain the services of the beneficiary permanently, he would cease working for the petitioner, which would make his wages, \$14,000 in 2001, available to pay the beneficiary. That letter further states that the beneficiary has been working for the petitioner since 1995, but did not become a "payroll employee" until July 6, 2001.

Further, counsel submitted three 2001 Federal W-2 Wage and Tax Statements. Two of those statements show the wages paid by the petitioner to the two previously mentioned officers during that year. They were paid \$14,000 and \$3,605. The other shows that the corporation paid the beneficiary \$7,119 during 2001.

The director noted that counsel had not submitted the petitioner's 2000 income tax return, although it should have been available when it was requested. The director noted that the 1999 tax return showed a loss, rather than income, and showed that the amount by which the petitioner's current assets exceeded its current

liabilities was insufficient to pay the proffered wage. 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 a copy of the petitioner's 2000 Form 1120, covering the fiscal year running from August 1, 2000 to July 31, 2001. That return shows gross receipts of \$67,832; gross profit of \$48,128; compensation of officers of \$12,400; salaries and wages of \$4,493; and a taxable income (loss) before net operating loss deduction and special deductions of (\$1,190). Counsel did not submit Schedule L with that return.

Counsel argues that the decision below was flawed, in that it failed to consider the evidence. Specifically, counsel notes that the director did not address the February 6, 2002 letter from the petitioner's officer/shareholder/cook stating that, if the beneficiary were a permanent employee of the petitioner, he could vacate his position as cook and use the \$14,000 paid to him annually to pay the beneficiary's wages.

The current cook might feasibly be relieved of his duties if the beneficiary were a permanent employee. That would make \$14,000 available to pay the beneficiary's wage. The proffered wage, however, is \$22,913.80. Counsel has not made clear how the petitioner would obtain the balance of \$8,913.80. During both of the fiscal years shown on the petitioner's 1999 and 2000 tax returns, the petitioner suffered a loss. None of the proffered wage could have come from income. During 1999, current assets exceeded current liabilities by only \$3,062. During that fiscal year, the value of the current assets of the corporation, and the wages which would have been available if the current cook had relinquished his position, added together, were insufficient to pay the proffered wage.

Because counsel did not provide the 2000 Schedule L, whether or by how much the petitioner's current assets exceeded current liabilities during the associated fiscal year is unknown. No reason exists to believe, based on the evidence provided by counsel, that those assets, added to the \$14,000 which would be available by relieving the current cook of his duties, would have been sufficient to pay the proffered wage. In addition, the \$7,119 paid to the beneficiary during 2001, added to the \$14,000 which would become available still falls \$1,794.80 short of the proffered wage.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage as of March

26, 2001. Therefore, the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date and continuing to the 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.