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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[REDACTED]

JUL 16 2003

File: LIN 02 047 50322 Office: Nebraska 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)

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 the Bureau of Citizenship and Immigration Services (Bureau) 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 for
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 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 a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on 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 continuing ability to pay the proffered wage beginning on 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 accepted for processing on October 30, 2000. The proffered salary as stated on the labor certification is \$12 per hour which equals \$24,960 annually.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120 U.S. corporation income tax return. That return states that the petitioner declared a loss of \$47,691 during that year. The accompanying Schedule L shows that, at the end of that year, the petitioner had \$6,500 in current assets and no current liabilities, which yields net current assets of \$6,500. Counsel also provided the petitioner's checking account statements and payroll statements.

On February 16, 2002, the Director, Nebraska Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director observed that the petitioner was unable to pay the proffered wage out of its income during 2000 because it sustained a loss during that year.

On appeal, counsel submitted a letter, dated March 19, 2002, from a business consultant who stated that he had assisted the petitioner's owner in starting her restaurant business. He further stated that he had reviewed the petitioner's 2000 tax return and that the petitioner is a viable business. The consultant stated that part of the petitioner's substantial loss during its first year of operation was due to the petitioner declaring as current certain expenditures which it could have amortized.

In a brief, counsel argued that the petitioner need not necessarily be able to pay the proffered wage out of its profits, but did not suggest what alternative test should be applied to determine the petitioner's ability to pay the proffered wage. Further, in that brief, counsel refers to the business consultant who wrote the letter of March 19, 2002, described above, as an "independent accountant," though the business consultant did not state that he was an accountant.

Pursuant to 8 C.F.R. § 204.5(g)(2) the petitioner is obliged to demonstrate its ability to pay the proffered wage. The regulation further states that the proof of the ability shall be copies of annual reports, federal tax returns, or audited financial statements. The petitioner has submitted no annual reports and no audited financial statements. The only tax return the petitioner submitted was for the 2000 calendar year.

The return, the only evidence in this case competent to show the petitioner's ability to pay the proffered wage, demonstrates that the petitioner suffered a loss of \$47,691 during that year. The petitioner had net current assets at the end of that year, but those net current assets were insufficient to pay the proffered wage.

Although counsel urges that some other figures should be used in the calculation of the petitioner's ability to pay the proffered wage, counsel points to no figure on that tax return as indicative of that alleged ability and submits no other competent evidence.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2000. No evidence pertinent to any other year was submitted. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

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.