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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



JUL 16 2003

File: EAC 01 235 54191 Office: Vermont Service Center

Date:

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 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*  
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 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 argues that the evidence submitted is sufficient to show the petitioner's ability to pay the proffered wage.

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 January 7, 1998. The proffered salary as stated on the labor certification is \$17.43 per hour which equals \$36,254.40 annually.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on September 18, 2001, requested evidence pertinent to that ability. Specifically, the Service Center requested the petitioner's 1998, 1999, and 2000 federal tax returns. The Service Center also requested that if the petitioner employed the beneficiary during 1998, 1999, or 2000 that it submit Federal Form W-2 wage and tax statements showing the amount the beneficiary was paid.

The petitioner responded to that notice on December 26, 2001. However the petitioner's response was misplaced at the Service Center. Because no response to the Service Center's request was noted in the record of proceedings, the Director, Vermont Service Center, issued a notice on January 17, 2002 declaring the petition to be abandoned and denying the petition.

On February 6, 2002, the petitioner's response to the September 18, 2001 request was discovered and the matter was reopened. That response included a copy of the petitioner's 1998 Form 1120 U.S. corporation income tax return covering its fiscal year from November 1, 1998 to October 31, 1999, an accountant's compilation of the petitioner's income tax basis balance sheet as of October 31, 1998, an accountant's compilation of the petitioner's income tax basis statement of operations for the fiscal year ending October 31, 1998, and a cover letter from the petitioner.

The nominal 1998 tax return shows that the petitioner declared a loss of \$25,834 as its taxable income during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner had \$10,828 in current assets and \$5,992 in liabilities, which yields net current assets of \$4,836.

In the cover letter, the petitioner stated that it was unable to submit any more recent tax returns or financial statements.

Because the evidence submitted failed to demonstrate the petitioner's ability to pay the proffered wage, the Vermont Service Center, on February 7, 2002, requested additional evidence pertinent to that ability. That request, however, incorrectly stated that the pertinent regulations require the petitioner to show its ability to pay the proffered wage **prior** to the priority date and requested evidence pertinent to 1997, although the priority date of the petition is January 7, 1998.

On February 20, 2002, the petitioner submitted a Motion to Reopen

in response to the director's January 17, 2002 decision denying the petition as abandoned. In that response, counsel argued that the original submissions with the petition were sufficient to render the petition approvable, and that the request for evidence pertinent to the petitioner's ability to pay the proffered wage was inappropriate.

On March 26, 2002, the Director, Vermont Service Center, issued a decision denying that motion, finding that the requested additional evidence was material to the issue of eligibility.

On April 26, 2002, the petitioner's response to the February 7, 2002 request was timely received. Counsel provided copies of the accountant's compilations of the petitioner's income tax basis balance sheet as of October 31, 1998 and income tax basis statement of operations for the fiscal year ending October 31, 1998.

On May 7, 2002, the Director, Vermont Service Center, denied the petition, finding that the evidence submitted was insufficient to establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director noted that, because the financial statements are compilations of the representations of management, they are of little evidentiary value.

On appeal, counsel asserts that the beneficiary would replace a current cook at the petitioner's restaurant, and that the salary of that current cook would then be available to pay the proffered wage. Counsel also urged that the financial statements submitted should be accepted as competent evidence.

Counsel submitted no evidence of the assertion made on appeal, and never made previously, that the petitioner would replace a current employee. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, counsel submitted no evidence that the wages of the current employee whom the beneficiary would allegedly replace are sufficient to pay the proffered wage.

The accountant's report submitted with the petitioner's balance sheet and operating statement emphasizes that it is a compilation report, not an audit report. The putative accountant specified that he or she compiled information submitted by the petitioner and presented it in the form of a financial statement, but that he or she had not audited or reviewed the financial statements and that he or she expressed no opinion or any other form of assurance pertinent to the accuracy of the information. As such, the

unaudited balance sheet merely restates the petitioner's representations, and is not evidence of their veracity.

The report also notes that,

Management has elected to omit substantially all of the disclosures and statement of cash flows as required by generally accepted accounting principles. If the omitted disclosures and statement of cash flows were included in the financial statements, they might influence the user's conclusions about the company's assets, liabilities, equity, revenue and retained earnings.

On appeal, counsel urges that,

Financial statements for any company or business are always based to some degree upon the representations of management. It is an error to consider these statements to be of "little evidentiary value." They were reviewed by an outside accountant for accuracy.

The accountant, however, made explicit that he or she **did not** review the financial statements for accuracy, but merely compiled the representations of management into the form presented.

In any event, 8 C.F.R. § 204.5(g)(2) makes explicit that evidence of the petitioner's ability to pay the proffered wage shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. The accountant's report which accompanied the financial statements makes explicit that those financial statements were compiled, not audited. Therefore, pursuant to 8 C.F.R. § 204.5(g)(2), they are not competent evidence of the petitioner's ability to pay the proffered wage.

The petitioner submitted no evidence of its ability to pay the proffered wage from January 7, 1998 to October 31, 1998. The only competent evidence pertinent to the petitioner's ability to pay the proffered wage from November 1, 1998 to October 31, 1999 is the petitioner's tax return, which indicates that the petitioner suffered a loss during that year and ended the year with net current assets far too small to cover the proffered wage. The petitioner submitted no evidence of its ability to pay the proffered wage after October 31, 1999.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage at any time from the priority date to the present. 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.