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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted] B6

File: LIN 01 239 50403 Office: Nebraska Service Center Date: JUL 17 2003

IN RE: Petitioner: [redacted]
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:

[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.

Helen E. Crawford 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 sustained.

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 April 21, 1999. The beneficiary's salary as stated on the labor certification is $8.00 per hour or $16,640.00 per annum.

Counsel submitted copies of the beneficiary's W-2 Wage and Tax Statement for 1999 and 2000 and copies of the petitioner's Form

1120S U.S. Income Tax Return for an S Corporation. The tax return for fiscal year from July 1, 1998 through June 30, 1999 reflected gross receipts of $1,042,071; gross profit of $690,011; compensation of officers of $0; salaries and wages paid of $260,222; and a taxable income before net operating loss deduction and special deductions of -$42,224. The tax return of fiscal year from July 1, 1999 through June 30, 2000 reflected gross receipts of $1,038,133; gross profit of $719,290; compensation of officers of $0; salaries and wages paid of $258,612; and an ordinary income (loss) from trade or business activities of $901.

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. The director noted that "the W-2's submitted as evidence of his employment show the employer to be [redacted] a company with a totally different Employer Identification Number than the petitioner."

On appeal, counsel submits copies of the 1999 and 2000 Form 1120S U.S. Income Tax Return for an S Corporation for A&P Inc. and argues that:

> Exhibit H contained more pages in it than what was mailed to you. We had inadvertently omitted 22 pages from exhibit H and hereby submit them. They demonstrate that A&P Inc. is wholly owned by Philip Lo, the operator of Petitioner, [redacted] who uses A & P, Inc. to receive funds from petitioner to make payroll and pay associated taxes.

The Forms W-2 for the beneficiary for 1999 and 2000 show that the beneficiary earned $32,144.57 in 1999 and $23,200 in 2000, more than the proffered wage.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has 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 met that burden.

ORDER: The appeal is sustained.