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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]

JUL 17 2003

File: WAC 02 051 51540 Office: California 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]

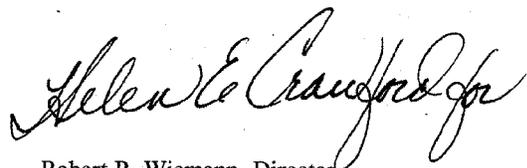
INSTRUCTIONS:

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California 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 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 August 12, 1997. The beneficiary's salary as stated on the labor certification is \$11.55 per hour or \$24,024.00 per annum.

Counsel submitted copies of the petitioner's 1999 and 2001 Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit

and Loss from Business Statement and copies of the petitioner's 1997, 1998, and 2000 Schedule C, Profit and Loss from Business Statement. The petitioner's 1997 Schedule C reflected gross receipts of \$23,591; gross profit of \$15,606; wages of \$0; and a net profit of \$864. Schedule C for 1998 reflected gross receipts of \$48,478; gross profit of \$31,619; wages of \$0; and a net profit of -\$3,736.

The petitioner's 1999 Form 1040 reflected an adjusted gross income of \$19,400. Schedule C reflected gross receipts of \$74,748; gross profit of \$52,649; wages of \$0; and a net profit of \$6,872. Schedule C for 2000 reflected gross receipts of \$59,533; gross profit of \$39,935; wages of \$0; and a net profit of \$3,215. Form 1040 for 2001 reflected an adjusted gross income of \$27,709. Schedule C reflected gross receipts of \$61,404; gross profit of \$51,067; wages of \$0; and a net profit of \$22,705.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel re-submits the petitioner's 1997 through 2001 federal tax returns and argues that the restaurant's "annual income has grown by 61% in its four years of operation."

Counsel further argues that the beneficiary's employment will result in more income for the business. Counsel does not explain, however, the basis for such a conclusion. For example, counsel has not demonstrated that the beneficiary will replace less productive workers, transform the nature of the petitioner's operation, or increase the number of customers on the strength of his reputation. Absent evidence of these savings, this statement can only be taken as counsel's personal opinion. Consequently, the Service is unable to take the potential earnings to be generated by the beneficiary's employment into consideration.

The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The tax return for 2001 shows an adjusted gross income of \$27,709. The petitioner could pay a salary of \$24,024.00 a year out of this figure. The tax returns for 1997 through 2000, however, fail to show the ability to pay the wage offered.

The petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and

continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. § 204.5(g)(2).

Accordingly, after a review of the evidence submitted, 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.