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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



File: EAC 02 062 52789 Office: Vermont Service Center

Date:

JUN 19 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as Other Worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii)

ON BEHALF OF PETITIONER:



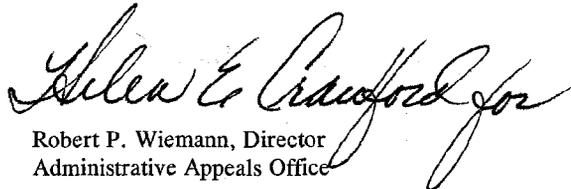
INSTRUCTIONS:

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, 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 matter will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a manager. 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 during 1998.

On appeal, counsel submits additional evidence.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, 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 14, 1998. The proffered salary as stated on the labor certification is \$41,163.20 per year.

With the petition, the petitioner submitted photocopies of its 1998, 1999, and 2000 Form 1120-A U.S. corporation short form income

tax returns.

The 1998 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$2,862 during that year. The return also shows that at the end of that year, the petitioner had current assets of \$18,450 and current liabilities of \$6,174, which yields net current assets of \$12,276.

The 1999 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$7,007 during that year. The return also shows that at the end of that year, the petitioner had current assets of \$26,093 and current liabilities of \$5,499, which yields net current assets of \$20,594.

The 2000 tax return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$12,470 during that year. The return also shows that at the end of that year, the petitioner had current assets of \$39,901 and current liabilities of \$5,525, which yields net current assets of \$34,376.

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 March 12, 2002, requested additional evidence pertinent to that ability. The Service Center also requested that if the petitioner employed the beneficiary during 1998, it provide a copy of the Form W-2 wage and tax statement showing the amount it paid the beneficiary during that year.

In response, counsel submitted 1999, 2000, and 2001 Form W-2 wage and tax statements. Those statements show that the petitioner paid the beneficiary \$14,400, \$19,200, and \$23,340 during those years, respectively. Counsel submitted no 1998 W-2 form. Counsel submitted no other evidence of the petitioner's ability to pay the proffered wage.

On August 5, 2002, the Director, Vermont Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage during 1998.

On appeal, counsel submitted a copy of a 1998 Form 1120-X, amended U.S. corporation income tax return, and a copy of a 1998 Form CT-1120X, Connecticut amended corporation business tax return. Those documents purport to show that the petitioner filed an amended return for 1998 significantly increasing its declared receipts and

taxable income. The taxable income shown on the Form 1120-X is \$42,907. Counsel argued that the amended return demonstrates that the petitioner had the ability to pay the proffered wage during 1998.

In support of the proposition that those amended returns were filed, counsel submitted (1) a letter from the petitioner's accountant stating that it prepared the amended tax return, (2) copies of checks drawn on the petitioner's bank account to the Treasury of the United States and to the Connecticut Commissioner of Revenue Services, and (3) a letter from the petitioner's president stating that he certifies those returns as having been filed. All of those documents bear a stamp and counsel's signature declaring that they are true and complete copies of the originals.

Counsel also submitted copies of 1998 monthly statements of the petitioner's bank account and the petitioner's unaudited 1998 financial statements.

Counsel certifies that the photocopies are accurate copies of the original documents, but not that the amended tax returns were filed. The accountant states that he prepared the amended tax returns, but not that they were filed. The record contains no evidence that the checks of which photocopies were submitted were ever negotiated. The only evidence in the record that those amended returns were filed is the statement of an interested party, the petitioner's president. That evidence is insufficient to demonstrate that the amended returns were filed. As such, the amended returns are insufficient evidence of the earnings they show, and insufficient evidence of the petitioner's ability to pay the proffered wage during 1998.

8 C.F.R. § 204.5(g)(2) makes clear that evidence other than tax returns may be submitted and, in fact, enumerates the other acceptable types of evidence. Bank balances are not among the types of evidence enumerated, and are not competent evidence of the petitioner's ability to pay the proffered wage. Even if they were acceptable, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the tax return. The copies of the petitioner's bank account statements shall be accorded no weight.

The financial statement submitted on appeal is unaudited. 8 C.F.R. § 204.5(g)(2) makes clear that only audited financial statements are competent evidence of the petitioner's ability to pay the proffered wage. The unaudited financial statement shall be accorded no weight.

No 1998 W-2 form was submitted to show that the petitioner paid the beneficiary any wages during that year. The petitioner is obliged to show the ability to pay the entire proffered wage, which is \$41,163.20. The taxable income shown on the petitioner's original 1998 tax return is \$2,862. The same form shows year-end net current assets of \$12,276. That return does not show that the petitioner was able to pay the proffered wage during 1998.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 1998. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

Beyond the decision of the director, this office notes that the Service Center requested, on March 12, 2002, evidence of the petitioner's ability to pay the proffered wage from the priority date "to the present." As to 2001, the petitioner submitted a Form W-2 wage and tax statement showing that it paid the beneficiary \$23,340 during that year, but no evidence that it was able to pay the additional \$17,823 which is the balance of the \$41,163 proffered wage.

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.