

BLO

U.S. Department of Homeland Security  
Citizenship and Immigration Services

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

File: EAC-02-093-52927 Office: Vermont Service Center

Date: MAR 31 2004

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 Citizenship and Immigration Services (CIS) 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

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**PUBLIC COPY**

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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 foreign food 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 the evidence submitted on appeal demonstrates 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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 wage offered 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. Here, the request for labor certification was accepted for processing on February 26, 2001. The proffered salary as stated on the labor certification is \$35,000 annually.

With the petition, counsel submitted the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return for fiscal year April 1,

1999 through March 31, 2000. The return showed that the petitioner had "taxable income before net operating loss deduction & special deductions" of \$12,517.

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 13, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested, consistent with the requirements of 8 C.F.R. § 204.5(g)(2), that the petitioner prove its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. The Service Center requested that the petitioner demonstrate the ability to pay the proffered wage from February 2001 to the present. The Service Center also requested that the petitioner submit the beneficiary's Form W-2 Wage and Tax Statements.

In response, the petitioner submitted a photocopied bi-weekly payroll sheet for the period ending March 29, 2001 and April 5, 2001. The petitioner also submitted a photocopied Quarterly Wage Summary for the period ending December 31, 2001. The wage summary listed the names of only four employees whose year-to-date taxable income totaled \$75,909. None of the individuals named was the beneficiary. In a letter accompanying the aforementioned documents, counsel stated that one of the individuals named on the wage survey (Vito Candela) had retired and was no longer on the payroll leaving \$36,000 in additional funds to pay the beneficiary.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

With the appeal, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return for fiscal year April 1, 2001 through March 31, 2002. The return showed that the petitioner had "taxable income before net operating loss deduction & special deductions" of \$7,989.

Counsel's claim that Vito Candela has retired thereby releasing additional funds is not corroborated by any documentary evidence. In addition, the date of his retirement has not been given nor a description of his job duties. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return showed that the petitioner had "taxable income before net operating loss deduction & special deductions" of \$12,517. The petitioner's

2001 Form 1120 U.S. Corporation Income Tax Return showed that the petitioner had taxable income before net operating loss deduction & special deductions of \$7,989. The 1999 taxes are of limited probative value to this proceeding. However, the petitioner's 2001 federal tax return clearly shows an inability to pay the wage offered.

Form ETA-750 reveals that the beneficiary has worked for the petitioner since 1993. The record, however, does not reflect any payments made to the beneficiary either through W-2 Wage and Tax Statements, payroll summaries, or cancelled checks. Furthermore, the wages paid in fiscal year 1999 were only \$9,000 and in fiscal year 2001 only \$13,039, both well below the proffered wage.

Accordingly, after a review of the federal tax returns, 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.