



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: [Redacted] Office: Texas Service Center

Date: AUG 10 2000

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:



Public Copy

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a catering company which 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 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 January 29, 1997, the filing date of the visa petition.

On appeal, counsel provides a statement 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 filing 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 filing date is January 29, 1997. The beneficiary's salary as stated on the labor certification is \$8.89 per hour or \$18,491.20 annually.

The petitioner initially submitted its 1998 Form 1120 U.S. Corporation Income Tax Return. The federal tax return reflected gross receipts of \$155,735; gross profit of \$155,735; compensation of officers of \$0; salaries and wages of \$20,911; depreciation of \$16,375; and taxable income before net operating loss deduction and special deductions of \$0. Schedule L reflected total current assets of \$286 in cash and total current liabilities of \$0. This documentation was considered insufficient and the director requested additional evidence of the petitioner's ability to pay the proffered wage at the time of filing.

In response, counsel submitted a copy of the petitioner's 1997 Form 1120 U.S. Corporation Income Tax Return; copies of the 1997 and 1998 Forms W-2 Wage and Tax Statement for two employees; copies of Form 941 Employer's Quarterly Federal Tax Return; a letter from the petitioner's accountant; a copy of the 1999 financial statement for the petitioner; copies of the 1996, 1997, and 1998 Form 1096 Annual Summary and Transmittal of U.S. Information Returns; and a copy of the petitioner's bank statements for the period January 1, 1999 through August 31, 1999. The federal tax return reflected gross receipts of \$86,913; gross profit of \$86,913; compensation of officers of \$0; salaries and wages of \$6,306; depreciation of \$7,027; and taxable income before net operating loss deduction and special deductions of -\$26,303. Schedule L reflected total current assets of -\$1,004 in cash and total current liabilities of \$0. The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition and denied the petition accordingly.

On appeal, counsel provides another letter from the petitioner's accountant regarding the errors and omissions in Form 941; a letter from [REDACTED] who corrected the errors and omissions and assisted the petitioner to file amended tax returns; copies of the petitioner's 1997 and 1998 Form 1120X Amended U.S. Corporation Income Tax Return; copies of amended Form 941 for the first three quarters of 1999; a copy of the beneficiary's 1998 Form 1099 Miscellaneous Income; and copies of the beneficiary's paychecks for 1999.

Counsel states:

. . . because there were errors and omissions made in the preparation of the Corporate Federal Tax Returns and the Employer's Quarterly Federal Tax Returns, the income did not appear sufficient to show the company's ability to pay the offered wage. These errors were first discovered by your office and brought to the attention of the

petitioner, which it sought to immediately correct. . .

In addition, we would also like to note that the company has the ability to pay the beneficiary his salary and has been doing so. However, this salary is not reflected on the Forms 941, but in the Annual Summary and Transmittal of U.S. Information Returns Form 1096. The form summarizes the amounts of salary paid to contract employees who are then issued Form 1099 for tax purposes.

. . . The above referenced Form 1099's are additional evidence to establish that the petitioner has the ability to pay the proffered wage, because they have been actually paying the wage since the beginning of Mr. [REDACTED] employment.

After reviewing the new documentation and information provided, we are confident that you will agree that the petitioner has proven its ability to pay the proffered wage of \$18,491.20. In fact, the company has been paying this salary since the beginning of Mr. [REDACTED] employment.

A review of the petitioner's 1997 amended federal tax return shows a taxable income of \$86,013. A review of the petitioner's 1998 amended federal tax return shows a taxable income of -\$70,903. There is no evidence in the record which verifies that the Form 1120X was actually filed with the Internal Revenue Service. Absent verification that the Form 1120X was filed with the Internal Revenue Service as an amended return, it has simply been altered rather than amended. The petitioner has not shown how the initially submitted return was in error and has not explained the basis for the changes to the return. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

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.