



U.S. Department of Justice

Immigration and Naturalization Service

134

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



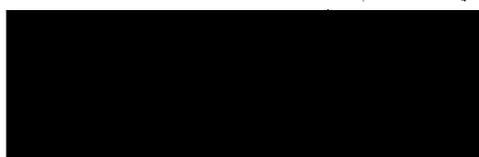
File: EAC 99 105 53526 Office: Vermont Service Center

Date: JAN 30 2001

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

identification 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

Mary C. Mulrean, Acting Director
Administrative Appeals Office

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

The petitioner is a restaurant 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 12, 1998, the filing date of the visa petition.

On appeal, counsel provides 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 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 12, 1998. The beneficiary's salary as stated on the labor certification is \$11.47 per hour or \$23,857.60 annually.

The petitioner initially submitted a 1998 compiled income statement as evidence of its ability to pay the proffered wage.

On June 2, 1999, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of January 12, 1998.

In response, counsel submitted a copy of the petitioner's 1998 Form 1120S U.S. Income Tax Return for an S Corporation. The 1998 federal tax return reflected gross receipts of \$226,596; gross profit of \$124,772; compensation of officers of \$22,800; salaries and wages of \$10,300; depreciation of \$13,126; and ordinary income of -\$944. Schedule L reflected total current assets of \$5,672 with \$2,372 in cash and total current liabilities of \$3,877.

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.

On appeal, counsel provides a copy of the principal stock holder's 1998 Form 1040 U.S. Individual Income Tax Return and a compiled balance sheet for the period ending June 30, 1999.

Counsel states:

Employer does not deny that it reported a loss of \$944.00 on its 1998 year-end tax return (Form 1120S); however, that reported loss is not an accurate reflection of the Employer's ability to pay the beneficiary the offered wages. First, Employer's 1998 financial numbers only reflect approximately nine (9) months of operations. . . . As most of 1998 was a start-up year for the Employer's Kabuki Restaurant business, the Employer, like any other start-up company, expected to have, and did have, a large amount of start-up expenses and depreciable items which could be and were deducted from income as reported on its tax returns. However, it had full and reasonable expectation to be financially able to pay the beneficiary's wages when filed the Form ETA 750. . . . In fact, for the first six (6) months of 1999, the Employer has more than enough profits (\$25,507.32) to pay the beneficiary's wages (\$23,857.60). (Refer to the financial statements for period ending June 30, 1999, enclosed herewith.)

As for the large amount of expenses deducted on Employer's tax return, some of those items consisted of one-time expenses; such as corporate organization costs

totaling \$7,870.00, and closing costs on a business loan totaling \$3,500.00.

Another reason why Employer expected to be able to pay the proffered wages is that the majority shareholder of the Employer, who owns ninety percent (90%) of the outstanding stock of the Employer, had more than enough income from other sources to cover the expense created by the beneficiary's wages, and to sustain the livelihood of the shareholder and his family. . . .

Additionally, this office previously filed the 1998 Income Tax Return for [REDACTED] Inc. [REDACTED]. As stated in Schedule K for [REDACTED] tax return, [REDACTED] is also the controlling shareholder for that company, owning seventy percent (70%) of the outstanding stock thereof. Because [REDACTED] is the controlling shareholder for both companies, he could easily arrange for an inter-company transfer, infusion or loan of additional operating capital when and as needed; and for the reasons stated above, [REDACTED] certainly would have had an interest in doing so.

Although counsel states that the non-recurring start up expenses and non-cash expenses should be included as evidence of the ability to pay the proffered wage, this expenditure was already expended and those funds were not readily available to pay the wage of the beneficiary as of the filing date of the petition. Funds spent elsewhere may not be used as proof of ability to pay the proffered wage.

Counsel also claims that the owner of the corporation is in a financial position to be able to fund the corporation with additional capital should it be needed to pay for the new position. A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, any assets of its stockholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Therefore, the owner's personal income and the income from [REDACTED] may not be used as proof of the petitioning corporation's ability to pay the proffered wage. See Matter of M, 8 I&N Dec. 24 (BIA 1958; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

The compiled income statements which were submitted as proof of the petitioner's ability to pay the proffered wage are in the record. However, they have little evidentiary value as they are based

solely on the representations of management. 8 C.F.R. 204.5(g) (2), already quoted above in part, states that:

Evidence of this ability [to pay the proffered wage] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence . . . may be submitted by the petitioner.

This regulation neither states nor implies that an unaudited statement may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

A review of the 1998 federal tax return shows that when one adds the ordinary income, the depreciation, and the cash at the end of the year (to the extent that total current assets exceed total current liabilities), the result is \$13,977, \$9,880.60 less than the proffered wage.

Accordingly, after a review of the federal tax return and additional documentation furnished, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition.

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.