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

[redacted]

File: EAC 00 123 50435 Office: VERMONT SERVICE CENTER Date: JAN 11 2002

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

PUBLIC COPY

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

Helen E Crawford for

Robert P. Weimann, 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. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, the petitioner submits a statement and 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 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 October 20, 1999. The beneficiary's salary as stated on the labor certification is $11.00 per hour or $22,880.00 per annum.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage. On August 21, 2000, the Service requested evidence of the petitioner's ability to pay the proffered wage as of October 20, 1999 to include the petitioner's 1999 federal tax return and evidence that the beneficiary had the requisite experience as of the filing date of the petition.

In response, the petitioner furnished a partial copy of its 1999

Form 1120S U.S. Income Tax Return for an S Corporation which reflected gross receipts of $274,186; gross profit of $135,739; compensation of officers of $16,900; salaries and wages paid of $39,162; depreciation of $0; and an ordinary income from trade or business activities of $12,929. Schedule L was not provided.

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 submits a letter from the petitioner's accountant and a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The federal tax return reflected gross receipts of $574,261; gross profit of $537,132; compensation of officers of $61,380; salaries and wages paid of $159,370; depreciation of $0; and a taxable income before net operating loss deduction and special deductions of $67,298. Schedule L reflected total current assets of $8,501 with $6,308 in cash and total current liabilities of $2,730.

The petitioner argues that "back in 1999, didn't matter what I made, I only hired workers in 2000, and I made more than enough, please take this evidence and decide on this case, thank you."

A review of the 1999 federal tax return shows the ordinary income is $12,929. This amount is not sufficient to pay the proffered salary as of the filing date of the petition.

A review of the 2000 federal tax return shows that when one adds the ordinary income and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is $73,606, more than enough to pay the proffered wage.

The petitioner has not established that it had sufficient income to pay the proffered wage; and the petitioner has failed to establish that the beneficiary had the requisite experience, despite a Service request for such evidence. Therefore, the petition must be dismissed.

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.