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U.S. Department of Justice

Immigration and Naturalization Service

identification data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: EAC 01 085 51192 Office: Vermont Service Center Date: MAY 29 2002

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[redacted]

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

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 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 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 the filing date of the visa petition.

On appeal, counsel requests 60 days in which to submit a brief and/or additional evidence. To date, however, no further documentation has been received. Therefore, a decision will be made based on the record as it is presently constituted.

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 July 17, 2000. The beneficiary's salary as stated on the labor certification is $18,866.00 per annum.

Counsel initially submitted a copy of the petitioner's checking account statement for the period ended July 31, 2000, and a copy of the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return. The federal tax return reflected gross receipts of $327,150; gross profit of $171,173; compensation of officers of $19,387; salaries and wages paid of $64,418; and a taxable income before NOL deduction and special deductions of -$1,459.

On June 29, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage to include the petitioner's 2000 tax return.

In response, counsel submitted copies of the petitioner's checking account statements for August, September, and October of 2000, and a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return which reflected gross receipts of $343,048; gross profit of $191,151; compensation of officers of $22,400; salaries and wages paid of $72,813; and a taxable income before NOL deduction and special deductions of $0.

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

On appeal, counsel states:

> The Notice stated that the tax returns and bank statements submitted in support of the petition were insufficient to show that Mi Pueblo was able to pay the proffered salary over an extended period of time. In fact, Mi Pueblo has employed [the beneficiary] for the past year in addition to the normal expenditures common to a fast-paced restaurant. In light of the fact that [the beneficiary] has in fact been receiving a paycheck from Mi Pueblo and that Mi Pueblo continues to be a viable restaurant venture, please grant the appeal.
>
> The additional tax return for 2001 and [the beneficiary's] W-2 will verify Mi Pueblo's ability to pay the proffered salary,but will be unavailable until January 2002. Therefore, we request an additional sixty (60) days to obtain and submit this supporting evidence.

To date, no additional evidence has been received. Therefore, the director's decision to deny the petition has not been overcome and the petition may not be approved.

The petitioner's Form 1120 for calendar year 2000 shows a taxable

income of $0. Therefore, the petitioner has not established its ability to pay the proffered wage based upon its taxable income.

It is noted that the petitioner has not established that the beneficiary had the requisite two years of experience as stated on the labor certification. It appears the beneficiary only worked part-time for two years. As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

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.