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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: EAC 00 282 55469 Office: Vermont Service Center Date: MAY 29 2002

IN RE: Petitioner:
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:

[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 French bistro. It seeks to employ the beneficiary permanently in the United States as a director culinary operations, chief executive chef. 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 submits 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 October 6, 1997. The beneficiary's salary as stated on the labor certification is $55,000 per annum.

The petitioner initially submitted insufficient evidence of its

ability to pay the proffered wage. On May 18, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage, to include the petitioner's 1997 through 1999 federal tax returns.

In response, counsel submitted copies of the petitioner's 1997, 1998, and 1999 Form 1120S U.S. Income Tax Return for an S Corporation. The federal tax return for 1997 reflected gross receipts of $718,809; gross profit of $346,531; compensation of officers of $63,625; salaries and wages paid of $80,260; and an ordinary income (loss) from trade or business activities of $14,390. The federal tax return for 1998 reflected gross receipts of $653,383; gross profit of $319,556; compensation of officers of $15,000; salaries and wages paid of $80,195; and an ordinary income (loss) from trade or business activities of $23,783.

The federal tax return for 1999 reflected gross receipts of $568,441; gross profit of $307,075; compensation of officers of $39,380; salaries and wages paid of $79,720; and an ordinary income (loss) from trade or business activities of $918.

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 argues that the majority shareholders presented an affidavit which attested to their intent to guarantee payment to the beneficiary.

Counsel's argument is not persuasive. The petitioning entity in this case is a corporation. Consequently, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining 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).

Counsel further argues that the salaries paid to other chefs at the bistro could have been used to pay the salary of the beneficiary.

Counsel's assertion is not persuasive. These funds were not retained by the petitioner for future use. Instead, these funds were expended on compensating other chefs and therefore not readily available for payment of the beneficiary's salary in 1997. Funds spent elsewhere may not be used as proof of ability to pay the proffered wage.

Counsel further states that the facts of this case are similar to several unpublished Service decisions. It should be noted that while 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner's Form 1120S for calendar year 1997 shows an ordinary income of $14,390. The petitioner could not pay a proffered wage of $55,000 from this income.

In addition, the federal tax returns for 1998 and 1999 continue to show an inability to pay the wage offered.

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 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.