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U.S. Department of Justice

Immigration and Naturalization Service

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



Public Copy

File: [Redacted]

Office: Texas Service Center

Date:

AUG 14 2001

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other Worker Pursuant to § 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)(A)(iii).

IN BEHALF OF PETITIONER:



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

Helen E Crawford for
Robert P. Wiemann, Acting 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 construction company. It seeks to employ the beneficiary permanently in the United States as a drywall finisher. 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 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 December 5, 1996. The beneficiary's salary as stated on the labor certification is \$12.00 per hour or \$24,960 annually.

Counsel submitted copies of the beneficiary's 1996, 1997, 1998, and 1999 tax returns; copies of the petitioner's 1998 and 1999 personal tax returns.

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 copy of the petitioner's 1996 Form 1120S U.S. Income Tax Return for an S Corporation, another copy of the petitioner's personal tax return for 1998, and a letter from the petitioner's accountant. The 1996 federal tax return reflected gross receipts of \$320,304; gross profit of \$95,692; compensation of officers of \$9,750; salaries and wages paid of \$24,664; depreciation of \$0; an ordinary income (loss) from trade or business activities of \$41,285. Schedule L reflected total current assets of \$11,938 in cash and total current liabilities of \$0.

The petitioner's accountant states:

[REDACTED], former president of the corporation [REDACTED] Inc., has asked us to prepare the company's 1997 and 1998 corporate tax returns. Right now, we are waiting on documentation we have requested from the Internal Revenue Service before we can complete the process.

I understand that the Immigration & Naturalization Service has asked for verification of the company's 1997 revenues. While I do not have the exact amounts available to me now, I understand from Mr. Miles that gross revenue for [REDACTED] Inc., for 1997 will exceed \$150,000.

Similarly, Mr. Miles has asked that I write a letter saying that the tax returns will be prepared in the next few weeks, as soon as the Internal Revenue Service sends us the requested information. I gather that this issue will impact an application for United States citizenship for Mr. [REDACTED] and his family.

Even though the petitioner's accountant stated that the petitioner had sufficient gross income in 1997 to pay the proffered wage, there is no evidence that this is in fact the case. No additional evidence has been submitted. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

A review of the 1996 federal tax return shows that when one adds the ordinary income and the cash at the end of the year (to the extent that total current assets exceed total current liabilities), the result is \$53,223, more than the proffered wage. However, as stated in the regulations, the petitioner must establish that it had the ability to pay the proffered wage at the time of filing of the petition and continuing to the present. The petitioner has not submitted sufficient evidence to establish that ability.

Accordingly, after a review of the federal tax return, 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 and continuing to the present.

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.