U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

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

[redacted] B2

AUG 2 1 2001

File: [redacted] Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted] 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 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, counsel submits a brief and additional documentation.

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 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 through 1999 individual income tax returns and copies of the petitioner's 1998 and 1999 personal income tax return with attached Schedule C. The director noted that:

> The Petitioner did not submit copies of the petitioner's tax returns for 1996 and 1997. The tax return for 1998 shows that the profit was $3,000 and that $32,200 was paid in wages. It is noted that the petitioner has filed

four petitions, all with the same proffered wage. The tax return for 1999 shows that the profit was $3,502 and that the wages paid were $100,078. The tax returns do not indicate that the petitioner has the ability to pay the proffered wage. The ETA-750 indicates that the beneficiary has worked at the petitioner since 1994 but the petitioner has not submitted evidence to show that the petitioner has been paying the beneficiary the proffered wage.

On appeal, counsel submits a copy of the petitioner's 1996 Form 1120S U.S. Income Tax Return for an S Corporation 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; wages and salaries paid of $24,664; depreciation of $0; and an ordinary income (loss) from trade or business activities of $41,285.

Counsel argues that the petitioner has always reported a positive net income for the years 1996 through 1997.

While it has been established that the petitioner could have paid the proffered wage in 1996, the petitioner has not submitted, even though requested, a copy of its 1997, 1998, or 1999 business income tax returns. The statements and documentation provided by the petitioner on appeal do not overcome the issues raised by the director in denying the petition. The petitioner has failed to specifically address the issues presented by the director in his denial. The director stated that the petitioner had not established its ability to pay the wages of all of the beneficiaries for which the petitioner filed petitions. Evidence in the record supports the director's decision.

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.