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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



File: EAC 99 011 54526 Office: VERMONT SERVICE CENTER Date: MAR 12 2001

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:



Identification data deleted to prevent identity unsecured 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.

**Public Copy**

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

*Robert P. Wiemann*

Robert P. Wiemann, Acting 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 meat processing company. It seeks to employ the beneficiary permanently in the United States as a Halal butcher. 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 he had the financial ability to pay the beneficiary the proffered wage as of the filing date of the petition.

On appeal, counsel submits a statement. Counsel further states that he will submit a brief and/or evidence to the AAU within 30 days. To date, more than nineteen months later, no additional documentation has been received.

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 May 28, 1996. The beneficiary's salary as stated on the labor certification is \$12 per hour or \$24,960 annually.

The petitioner initially submitted a copy of its 1997 U.S. Income Tax Return for an S Corporation which reflected gross profit of \$137,100; salaries and wages paid of \$17,942; no depreciation; and an ordinary income (loss) from trade or business activities of -\$489.

On February 16, 1999, the Service requested evidence of the petitioner's ability to pay the proffered wage as of May 28, 1996.

In response, counsel furnished copies of the petitioner's U.S. Income Tax Return for an S Corporation for 1996, 1997, and 1998. The 1996 tax return reflected gross profit of \$100,766; salaries and wages paid of \$23,829; depreciation of \$1,658; and an ordinary income (loss) from trade or business activities of \$3,621. The 1998 tax return reflected gross profit of \$156,237; salaries and wages paid of \$41,570; depreciation of \$12,390; and an ordinary income (loss) from trade or business activities of \$8,657.

In the decision, the director noted that the evidence submitted was insufficient to establish the petitioner's ability to pay the proffered wage at the time of filing and continuing until the present. The petition was denied accordingly.

On appeal, counsel asserts that:

The Immigration and Naturalization Service erred in denying the I-140 petition in that the record submitted including taxes 1996 1997 and 1998 as well as bank statements evidenced sufficient funds to pay the proffered wage. Additionally, the employer intends to replace the existing butcher whose income is reflected on the corporate returns and schedules upon his ability to employ the sponsored alien.

Counsel's assertion that the funds paid to another employee could be used to pay the beneficiary's salary is not persuasive. These funds were not retained by the petitioner for future use. Instead, these monies were expended on compensating a worker, and therefore, were not readily available for payment of the beneficiary's salary in 1996. Further, the petitioner has not documented the position, duties and termination of this worker who performed the duties of the proffered position. If he/she performed other kinds of work, then the beneficiary could not have replaced them as suggested by counsel. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2). Therefore, the petition may not be approved.

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.