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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 99 174 53652 Office: VERMONT SERVICE CENTER

Date: MAR 22 2001

IN RE: Petitioner:
Beneficiary:



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:



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.

Identification data deleted to prevent clearly unwarranted disclosure of personal privacy.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

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 an automotive core supplier which seeks to employ the beneficiary as a warehouse manager. 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 July 10, 1997 filing date of the visa petition.

On appeal, the petitioner provides a statement and indicates that a brief will be submitted within ninety days. 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 10, 1997. The beneficiary's salary as stated on the labor certification is \$15.82 per hour or \$32,905.60 annually.

In the current proceeding, the petitioner submitted 1997 and 1998 Forms 1120 U.S. Corporate Income Tax Return. The 1997 tax form

indicated a taxable income before net operating loss deduction and special deductions of \$1,459.91, and a taxable income of a net loss of \$1,737.19. The director found that even if the claimed depreciation of \$6,658.26 and the cash on hand of \$3,543.12 were added to the taxable income it would equal \$8,464.19, or \$24,441.41 less than the offered wage. Consequently, the director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition and denied the petition accordingly.

On appeal, the petitioner stated:

The evaluation of the employer's obligation was incorrectly calculated by the Immigration and Naturalization Service. The salary requirements outlined in the attached decision are based upon a calculation of the entire year of 1997; however, the period in question commenced on July 10, 1997 which is less than a six(6) month period. Therefore, the calculation of salary should be adjusted to reflect the correct salary the employer was obligated to pay the beneficiary.

Additionally, the income tax information provided does not accurately reflect the salary employer paid the beneficiary. A review of the record reveals that the employer apparently failed to segregate the beneficiary's salary from the total salary listed. Therefore, additional time is required for review and amendment by employer's accountants.

The petitioner makes the argument that it was not required to establish that it could pay the annual salary offered since the filing date was in July. According to the petitioner, this would mean that it only had to establish that it could pay the salary for the remaining months of the year.

The petitioner is incorrect in its assumption. As discussed previously, the petitioner is required to show that it can pay the entire amount of the offered wage, not just for the first year but until the beneficiary obtains lawful permanent residence. There is nothing in the regulations that allows the petitioner to pro-rate the offered wage. In addition, there is no evidence in the record which reflects the wages paid to the beneficiary in 1997. Therefore, it is impossible to determine if the beneficiary was paid the proffered wage in 1997.

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.