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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: EAC 99 155 53141 Office: VERMONT SERVICE CENTER

Date: MAR 22 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 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

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 construction company which seeks to employ the beneficiary permanently in the United States as a painter/decorator. 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 January 28, 1997, the filing date of the visa petition.

On appeal, counsel states that the director was incorrect in basing his decision on the petitioner's failure to comply with the request for 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 January 28, 1997. The beneficiary's salary as stated on the labor certification is \$25.50 per hour (35 hour week) which translates to \$46,410.00 per year.

The director determined that the petitioner's 1996 Form 1120 U.S. Corporation Income Tax Return showed a taxable income of (\$7,831.00). The director determined that this amount is insufficient to pay the proffered wage. The director requested that the petitioner provide additional evidence to demonstrate that it had the ability to pay the offered wage as of January 28, 1997. In response, the petitioner resubmitted the 1996 income tax return. In addition, the petitioner provided the Form W-2, Wage and Tax Statement, and the Form 1099-Misc, Miscellaneous Income, for seventeen of its employees.

The director determined that although the documentation demonstrated what the petitioner paid in wages in 1997, it did not indicate that the petitioner had the resources with which to pay the beneficiary from the filing date until he receives lawful permanent status. In addition, the director stated that the documentation did not show that the beneficiary was paid from January 28, 1997 to the present.

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 requests a review of the case. The petitioner contends that it provided the director with the evidence that was requested. According to the petitioner, the director requested that the petitioner provide its 1997 tax return. The petitioner states that it responded by sending a letter explaining that the 1996 tax return had been attached to the original petition because it was based on a fiscal year elective tax period that covered the initial filing date. However, the director did request that the petitioner provide the 1997 tax return; implicit in that request was that the petitioner provide any and all documentation to support its claim that it was able to pay the offered wage. In addition, the director requested that if the petitioner employed the beneficiary in 1997 that the petitioner also provide the 1997 W-2 Wage and Tax Statement. No such statement was provided.

The petitioner claims that \$297,319.00, which represents net assets of \$47,836.00, labor expenses of \$71,740.00 and subcontractor expenses of \$177,743.00 is the best illustration of its ability to pay the proffered wage.

According to the petitioner, the director also failed to take into account the amounts paid to subcontractors and that the beneficiary would take the subcontractors' place. The petitioner's contention is not persuasive. Although counsel states that the salary paid to contract workers could be used to pay the beneficiary, this expenditure was already expended and those funds were not readily available to pay the wage of the beneficiary as of the filing date

of the petition. Funds spent elsewhere may not be used as proof of ability to pay the proffered wage. In addition, the petitioner has not documented the contract workers' positions. If they performed other kinds of work, then the beneficiary could not replace them as suggested by the petitioner.

A review of the federal tax return for the fiscal year October 1, 1996 through September 30, 1997 shows a taxable income before net operating loss deductions and special deductions of \$7,831. Schedule L shows no cash at year end and total current liabilities exceed total current assets by \$81,727. In addition, while the petitioner claims that the beneficiary worked for him, he has offered no supporting documentation showing either that the beneficiary was actually employed as a painter/decorator and/or that he was paid the offered wage.

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.