



Blo

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

[REDACTED]

File: [REDACTED]

Office: NEBRASKA SERVICE CENTER Date:

MAR 22 2001

IN RE: Petitioner:  
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:

[REDACTED]

**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, Nebraska 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 as a supervisor of house restorations. 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 May 13, 1996, the filing date of the visa petition.

On appeal, counsel states that the petitioner had provided adequate information to support its claim of ability to pay the proffered wage. According to the petitioner, the director did not consider all of the pertinent documentation submitted by the petitioner.

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 May 13, 1996. The beneficiary's salary as stated on the labor certification is \$25.84 per hour or \$53,747.20 annually.

The director determined that the petitioner's 1996 Form 1120 U.S. Corporation Income Tax Return showed a taxable income of \$15,162.

In addition, the 1997 Form 1120 showed a taxable income of only \$707. The petitioner also submitted an estimated income statement for 1998, issued by the petitioner's president which presented a projected gross profit of \$80,000. The petitioner also provided an unaudited profit and loss statement covering January 1, 1999 to June 30, 1999 showing a net profit of \$50,447.

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 had submitted evidence to support its claim that it could pay the proffered wage. According to the petitioner, the director did not take into account the amounts paid to subcontractors and that the beneficiary would take the subcontractors place.

The petitioner's contention is not persuasive. These funds were not retained by the petitioner for future use. Instead, these funds were expended on compensating workers and, therefore, not readily available for payment of the beneficiary's salary in 1996. Funds spent elsewhere may not be used as proof of ability to pay the proffered wage. Further, the petitioner has not documented the positions, duties and termination of the workers who performed the duties of the proffered position. If they performed other kinds of work, then the beneficiary could not have replaced them as suggested by counsel.

Although counsel states that the salary paid as compensation to officers was discretionary, 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.

A review of the 1996 federal tax return shows that taxable income before net operating loss deduction and standard deductions is \$15,162, \$38,585.20 less than the proffered wage. There is no depreciation or cash on hand at year end which could be added to the taxable income to overcome the more than \$38,000 deficit.

The petitioner has submitted no persuasive documentation to establish that it had sufficient available funds to pay the salary 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.