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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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ULLB, 3rd Floor
Washington, D.C. 20536



PUBLIC COPY

File: WAC 00 042 51274

Office: CALIFORNIA SERVICE CENTER

Date: 06 NOV 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: SELF-REPRESENTED

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

Robert P. Wiemann
Robert P. Wiemann, Acting Director
Administrative Appeals Unit

DISCUSSION: The employment-based preference immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an auto shop. It seeks to employ the beneficiary permanently in the United States as a transmission rebuilder. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director determined that 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, the petitioner submits a letter and additional evidence.

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 July 8, 1996. The beneficiary's salary as stated on the labor certification is \$17.81 per hour which equates to \$37,044.80 annually.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage. On September 5, 2000, the director requested additional evidence of the petitioner's ability to pay the proffered wage as of July 8, 1996.

In response, the petitioner submitted a copy of Schedule C Profit or Loss from Business for 1998 and 1999 for Christine Clarizio, a copy of Schedule C Profit or Loss from Business for 1999 for the current owner, and an unaudited profit and loss statement for the year 2000.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director noted that:

The ETA-750 indicates that the beneficiary will be paid \$17.81 per hour or \$37,044 annually. The petitioner's 1998 tax return indicates that the petitioner paid \$24,400 in wages but showed a profit of only \$6359. In 1999 the business was transferred to a new owner. Between both owners, they paid \$28,725 in wages and showed a profit of \$4872. In both years the amount paid in wages and total profits do not add up to the amount the beneficiary will be paid. Additionally the petitioner failed to provide evidence for the years 1996 and 1997.

On appeal, the petitioner submits a copy of Schedule C Profit or Loss from Business for 2000 and states:

I purchased Quality Clutch from Christine Clarizio in November, 1999. The Profit Loss statements that you received from Christine did not show enough net income to pay [the beneficiary] the salary that is required, (\$37,044.). Christine was not running the shop at it's full potential.

As you will see from the attached Schedule C for 2000, I am showing a profit of \$41,567.00 in my first year of business. I know that my profits for the following years will be more if I am able to hire qualified help.

In an unincorporated association or sole proprietorship, the assets and income of the owner can be considered in determining the petitioning business' ability to pay the wages offered. In this case, however, the record does not contain any evidence of the prior owner's ability to pay the proffered wage as of the petition's filing date, July 8, 1996. See 8 C.F.R. 204.5(g)(2).

The petitioner has submitted no persuasive documentation to establish that the prior owner had the financial ability to pay the proffered wage at the time of filing of the petition.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to 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.