



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

File: EAC 01 226 55582 Office: VERMONT SERVICE CENTER

Date: **AUG 19 2002**

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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 that 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 that 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 that 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, 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 HVAC & refrigeration repair company. It seeks to employ the beneficiary permanently in the United States as a refrigeration mechanic. 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 filing date of the visa petition.

On appeal, counsel submits a brief.

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 March 11, 1996. The beneficiary's salary as stated on the labor certification is \$800.00 per week or \$41,600.00 annually.

Counsel initially submitted a copy of the petitioner 1997 Form 1065

U.S. Partnership Return of Income which reflected gross receipts of \$471,368; gross profit of \$250,256; salaries and wages paid of \$0; guaranteed payments to partners of \$8,620; and an ordinary income (loss) from trade or business activities of \$19,793.

On September 24, 2001, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage.

In response, counsel submitted a copy of the petitioner's 1996 Form 1065 U.S. Partnership Return of Income which reflected gross receipts of \$398,102; gross profit of \$218,557; salaries and wages paid of \$0; guaranteed payments to partners of \$32,165; and an ordinary income (loss) from trade or business activities of -\$2,024. The director determined that the documentation was insufficient to establish the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that:

The petitioner absolutely had the ability to pay the offered salary of \$41,600.00 at the time the job was offered. In fact, the petitioner closed the year with \$43,131.00 in cash. The petitioner had the ability to write a check for the entire salary. This is shown on page 4 of the annexed 1996 1065 tax return.

Further the 1065 at line 10 shows a \$32,165.00 draw to the partners which is further evidenced on line 5 of the K-1 as \$16,082.00 paid to each partner. This is a discretionary profit which created the "tax" loss at line 22 of the 1065. When the profit paid to partners of \$32,16.005 (sic) is added to the cash on hand of \$43,131.00 plus the non-cash deduction of \$5,171.00 for depreciation; the result is that the petitioner had \$80,466.00 from which to pay the salary of \$41,600.00. The above stated analysis was provided on December 12, 2001 along with the supporting material. However, the reviewer rendered a decision by incorrectly looking only at the tax loss of line 22.

Counsel's argument is not persuasive. The petitioner's 1996 tax return for calendar year 1996 shows an ordinary income of -\$2,024, and the tax return for calendar year 1997 shows an ordinary income of \$19,793. The petitioner could not pay a salary of \$41,600.00 a year from these figures.

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.