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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: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: 06 DEC 2002

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:



*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 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, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a dry cleaners. It seeks to employ the beneficiary permanently as an alteration tailor. 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 the beneficiary had the requisite experience as of the petition's filing date. The director further determined that the petitioner had not established that it had the financial ability to pay the proffered wage as of the priority date of the petition.

On appeal, counsel submits a brief and additional documentation.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 153(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.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date which is the date on which any office within the employment system of the Department of Labor accepted the request for labor certification. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, the priority date of the petition is September 10, 1996.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of alteration tailor required two years of training in the job offered. The director determined that the petitioner had not established that the beneficiary had the required two years of training and denied the petition.

On appeal, counsel argues that "due to the political changes in the former Soviet Union, the beneficiary's former employers are no longer in business." Counsel submits a translated copy of the beneficiary's Labor Book which documents her experience, verifying and documenting the dates and places worked in the Soviet Union.

Therefore, the record establishes that the beneficiary had the requisite training as required on the labor certificate. Consequently, the petitioner has overcome this portion of the director's decision.

The other issue in this proceeding is whether the petitioner has the ability to pay the proffered wage of \$24,960.00 annually as of September 10, 1996, the petition's priority date.

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.

Counsel submitted a copy of the petitioner's 1997, Schedule C, Profit and Loss from Business Statement, a copy of the petitioner's 1998 and 1999 Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss from Business Statement, and a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's 1997 Schedule C reflected gross receipts of \$134,526; gross profit of \$120,516; wages of \$5,920; and a net profit of \$19,044. The 1998 Form 1040 reflected an adjusted gross income of \$30,480. Schedule C reflected gross receipts of \$154,041; gross profit of \$144,530; wages of \$12,200; and a net profit of \$32,746.

The 1999 Form 1040 reflected an adjusted gross income of \$30,345. Schedule C reflected gross receipts of \$161,302; gross profit of \$149,183; wages of \$14,200; and a net profit of \$35,209. The 2000 Form 1120S reflected gross receipts of \$176,873; gross profit of \$176,873; compensation of officers of \$0; salaries and wages of \$17,400; and an ordinary income (loss) from trade or business activities of \$42,765.

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.

On appeal, counsel argues that:

Statutorily mandated, any petition filed must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. In the case at bar, an assessment notice was issued on November 10, 1997. Said notice was complied with as a revised ETA 750A and 750B dated and signed on December 20, 1997 was submitted. (Exhibit G). As such, any inquiry vis-a-vis petitioner's ability to pay the

proffered wage should be viewed as of 1998, given the date of the revised assessment.

Counsel's argument that the Service should consider only the 1998 through 2000 income tax returns in establishing the petitioner's ability to pay the wage offered is not persuasive. The petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. 204.5(g)(2).

The petitioner's tax return for calendar year 1997 shows a net profit of \$19,044. The petitioner could not pay a salary of \$24,960.00 a year from this figure.

No additional evidence of the ability to pay the proffered wage has been received. Therefore, the petitioner has not overcome this portion of the director's decision.

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.