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U.S. Department of Justice  
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
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Washington, D.C. 20536

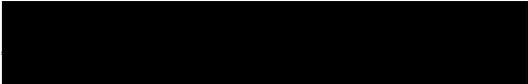
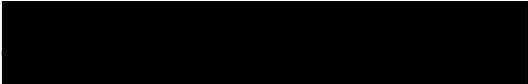
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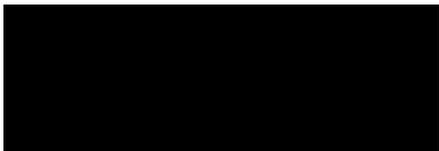
File:  Office: Vermont Service Center

Date:

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:



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prevent identity unsecured  
invasion of personal privacy**

**INSTRUCTIONS:**

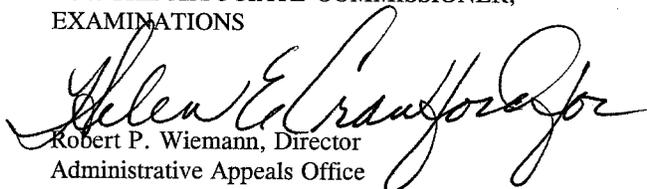
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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, 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. It seeks to employ the beneficiary permanently in the United States as a cabinet maker. 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 priority 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 priority 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 priority date is December 16, 1996. The beneficiary's salary as stated on the labor certification is \$18.33 per hour or \$38,126.40 per annum.

Counsel submitted copies of the petitioner's 1996 through 2000 Form 1120 U.S. Corporation Income Tax Return. The tax return for 1996

reflected gross receipts of \$406,492; gross profit of \$69,295; compensation of officers of \$9,960; salaries and wages paid of \$0; and a taxable income before net operating loss deduction and special deductions of -\$23,784. The tax return for 1997 reflected gross receipts of \$735,678.01; gross profit of \$64,520.85; compensation of officers of \$18,520.00; salaries and wages paid of \$0; and a taxable income before net operating loss deduction and special deductions of -\$30,414.11. The tax return for 1998 reflected gross receipts of \$779,602.27; gross profit of \$79,402.07; compensation of officers of \$10,400.00; salaries and wages paid of \$0; and a taxable income before net operating loss deduction and special deductions of \$6,341.42.

The tax return for 1999 reflected gross receipts of \$1,118,102.71; gross profit of \$115,643.75; compensation of officers of \$12,480.00; salaries and wages paid of \$0; and a taxable income before net operating loss deduction and special deductions of \$12,997.66. The tax return for 2000 reflected gross receipts of \$955,778.97; gross profit of \$125,987.19; compensation of officers of \$14,440.00; salaries and wages paid of \$0; and a taxable income before net operating loss deduction and special deductions of \$19,055.34.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits bank statements for the petitioner for the period from November 29, 1996 through January 31, 1997, copies of Form 1099-MISC which shows the beneficiary was paid \$10,738.00 in 1996 and \$25,037.00 in 1997, and a copy of the beneficiary's W-2 Wage and Tax Statement which shows he was paid \$3,595.68 in 1997.

Counsel argues that "the employer is not obligated to pay the prevailing wage until the employee has entered US as an immigrant or adjusted status under 245 Section."

Counsel's argument is not persuasive. The petitioner must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. 204.5(g)(2).

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's Form 1120 for calendar year 1996 shows a taxable income of -\$23,784. The petitioner could not pay a proffered wage of \$38,126.40 a year out of this income. The tax return does, however, show net current assets of \$58,917 which is enough to pay the proffered wage.

Although counsel has sufficiently established the petitioner's ability to pay the wage in 1996, the tax returns for calendar years 1997 through 2000 do not show an ability to pay the wage offered.

In addition, it is noted that in 1996 and 1997 the taxable income and the wage paid to the beneficiary does not equal the amount of the proffered wage.

Furthermore, while counsel argues that the "Cost of Labor" shown on the corporate tax returns for 1996 through 2000 indicate the petitioner's ability to pay the proffered wage, the Service will not accept this simple statement as valid evidence of the petitioner's financial viability. Counsel has provided no documentation of the wages paid to the beneficiary each year, and it cannot be assumed that the entire amount was available to pay the proffered wage.

The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1988); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage as of the priority date of filing the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2). Therefore, the petition may not be approved.

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.