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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 60347

Office: VERMONT SERVICE CENTER

Date: DEC 27 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: SELF-REPRESENTED

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 garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a sewing room supervisor. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

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 CFR 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 January 5, 1998. The beneficiary's salary as stated on the labor certification is \$27.09 per hour or \$56,347.20 per annum.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage as of the priority date of the petition. On September 10, 2001, the director requested additional evidence of the ability to pay the proffered wage from the priority date and continuing until the present.

In response, the petitioner submitted a copy of the 1998 Form 1065 U.S. Partnership Return of Income of the petitioner and its sole partner. It reflected an ordinary (loss) of (\$1,768).

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage from the priority date and continuing to the present. Also, the director determined that the petitioner did not employ the beneficiary in 1998. The director denied the petition accordingly.

On appeal, the petitioner submits the 1999 Form 1120 U.S. Corporation Income Tax Return of the petitioning organization. It shows a taxable income before net operating loss deduction and special deductions of \$376,380.

The petitioner concedes in a letter that:

... I am aware that my Income Tax for the year 1998 does not confirm my ability to pay offered rate of pay to the alien... Please be so kind and accept the Income Tax Return for the year 1999 instead of for 1998 as evidence that shows company's ability to pay proffered [sic] wage to the beneficiary...

The petitioner must demonstrate the ability to pay the proffered wage with particular reference to the established priority date of the petition. In addition, the petitioner must continue to demonstrate the ability to pay the proffered wage until the beneficiary obtains lawful permanent resident status. See Matter of Great Wall, 16 I & N Dec. 142, 145; Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); Chi-Feng Chang v. Thornburgh, 719 F. Supp. 532 (N.D. Texas 1989). The regulations require the same result. 8 CFR 204.5(g)(2), 8 CFR 103.2(b)(1), and 8 CFR 103.2(b)(12).

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 as of the priority date of the petition and continuing until the beneficiary attains lawful permanent resident status. 8 CFR 204.5(g)(2).

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.