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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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File: EAC 00 047 53812

Office: Vermont Service Center

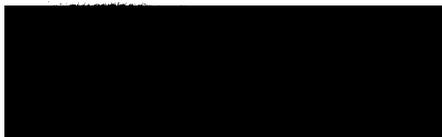
Date: 06 FEB 2002

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 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, 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 marble setter. 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 statement and additional evidence.

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 November 8, 1995. The beneficiary's salary as stated on the labor certification is \$28.64 per hour (35 hour week) or \$52,124.80 per annum.

Counsel initially submitted copies of the beneficiary's 1995 and

1998 Form 1120S U.S. Income Tax Return for an S Corporation. The 1995 federal tax return reflected gross receipts of \$360,759; gross profit of \$105,742; compensation of officers of \$0; salaries and wages paid of \$46,440; depreciation of \$2,642; and an ordinary income (loss) from trade or business activities of \$8,327. Schedule L reflected total current assets of \$27,327 in cash and total current liabilities of \$457. The 1998 federal tax return reflected gross receipts of \$627,036; gross profit of \$251,688; compensation of officers of \$30,000; salaries and wages paid of \$77,424; depreciation of \$793; and an ordinary income (loss) from trade or business activities of \$29,304. Schedule L reflected total current assets of \$77,668 in cash and total current liabilities of \$0.

The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. On August 10, 2000, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of November 8, 1995.

In response, counsel submitted a copy of the petitioner's 1994 Form 1120S U.S. Income Tax Return for an S Corporation which reflected gross receipts of \$291,117; gross profit of \$106,524; compensation of officers of \$0; salaries and wages paid of \$54,740; depreciation of \$4,404; and an ordinary income (loss) from trade or business activities of \$16,706. Schedule L reflected total current assets of \$3,208 in cash and total current liabilities of \$869.

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

On appeal, counsel submits a banking statement for the petitioner dated December 20, 1995 and states that "I am appealing the decision of the Director of Immigration of Vermont Service, because the Office of Immigration never reviewed properly (sic) the proof that it was sent on October 31, 2000."

Counsel submits a letter from the petitioner which states, in pertinent part:

At the end 1995 I had in my personal bank account a total balance of \$15,000.00 (see attached copy of bankbook and a statement) and owned two houses with a total value of \$380,000.00. Based on these facts the company could easily afford to hire [the beneficiary] who would be a dedicated asset to [REDACTED] at a cost of

\$1002.40 weekly by my putting up additional capital of \$50,000.00 easily.

The petitioner's statement is not persuasive. The petitioning entity in this case is a corporation. Consequently, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See Matter of M, 8 I&N Dec. 24 (BIA 1958; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

A review of the federal tax return for 1994 shows that when one adds the depreciation, the ordinary income, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is \$23,449, an amount less than the proffered wage.

A review of the federal tax return for 1995 shows that when one adds the depreciation, the ordinary income, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is \$37,839, an amount less than the proffered wage.

While the 1998 federal tax return shows an ability to pay the proffered wage, the petitioner must establish that it had the ability to pay the proffered wage at the time of the filing of the petition. See 8 C.F.R. 204.5(g)(2).

Accordingly, after a review of the petitioner's 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.