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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



08 JUL 2002
Date:

File: EAC 00 078 50495 Office: Vermont Service Center

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The petition will be denied.

The petitioner is a real estate development firm. It seeks to employ the beneficiary permanently in the United States as a real estate investigator. 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. The Associate Commissioner affirmed this determination on appeal.

On motion, 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 December 8, 1997. The beneficiary's salary as stated on the labor certification is \$22.50 per hour (35 hour week) or \$40,950.00 per annum.

The Associate Commissioner affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence of its ability to pay the proffered wage as of the filing date of the petition.

On motion, counsel argues that:

The date of financial viability in question is 12/07/1998. Since [REDACTED] prepares its financials on a cash accrual basis, accordingly, a business uptick in December of 1997 and thereabouts might not be reflected in the financial reports, statements and tax returns until the first two quarters of 1998 are examined. Accordingly, the proper framework to use would be that data surrounding December of 1997 and twelve months on either side. In short, when [REDACTED] hired the alien in December 1997, it had begun its uptick in business operations which were reflected in the 1998 tax year given that [REDACTED] operates on a cash accounting type basis. It would follow then that [REDACTED] would report hirer (sic) income earnings in 1998 than 1997. The INS had this information and indeed the 1998 return and the accompanying schedules do reflect much higher income for 1998.

Counsel's argument is not persuasive. While the 1998 tax return shows an adjusted gross income of [REDACTED] the adjusted gross income for 1997, the year of filing, was [REDACTED]. The petitioner could not pay a salary of [REDACTED] per year from this figure.

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. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time 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 sustained that burden.

ORDER: The Associate Commissioner's decision of October 24, 2001, is affirmed. The petition is denied.