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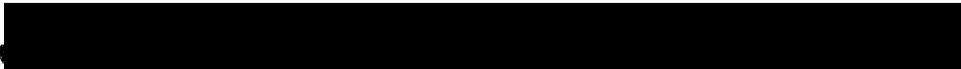
U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 01 143 51377 Office: Vermont Service Center Date: 02 JUN 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
Helen E Crawford for
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 an international tour operator. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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 brief 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 January 6, 1998. The beneficiary's salary as stated on the labor certification is \$52,621.00 per annum.

Counsel submitted copies of the beneficiary's Form 1099-MISC which

showed he was paid \$22,681.00 in 1998, \$29,991.40 in 1999, and \$27,638.60 in 2000, copies of the petitioner's bank statements for the period from January 1998 through December 1999, and copies of the petitioner's 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Return. The federal tax return for 1998 reflected gross receipts of \$210,843; gross profit of \$87,235; compensation of officers of \$12,500; salaries and wages paid of \$0; and a taxable income before net operating loss deduction and special deductions of -\$1,216.

The 1999 federal tax return reflected gross receipts of \$465,005; gross profit of \$155,953; compensation of officers of \$30,329; salaries and wages paid of \$6,443; and a taxable income before net operating loss deduction and special deductions of -\$1,404. The federal tax return for 2000 reflected gross receipts of \$501,194; gross profit of \$209,325; compensation of officer's of \$30,329; salaries and wages paid of \$4,861; and a taxable income before net operating loss deduction and special deductions of -\$698.

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

On appeal, counsel argues that:

The analysis set forth in the Service' decision of 11/16/01 is flawed. Petitioner's average monthly balance would have been more than sufficient to pay the proffered wage even if no payment was made to the beneficiary in 1998. The argument is even more flawed by taking into account that beneficiary was paid \$22,681 in 1998 and the average monthly balance would more than cover and offset the difference with the proffered wage.

Counsel's argument is not persuasive. 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 the 1998 calendar year shows that its taxable income was -\$1,216. The petitioner could not pay a proffered wage of \$52,621.00 per year out of a negative income. Even if one considers the salary paid to the beneficiary of

\$22,681.00, the petitioner has not demonstrated that it had sufficient funds to pay the wage offered.

In addition, the 1999 and 2000 federal tax returns continue to show that the petitioner lacked the ability to pay the proffered wage.

Accordingly, after a review of the federal tax returns and other documentation submitted, 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.

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.