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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: EAC 01 070 50749 Office: VERMONT SERVICE CENTER Date: JUN 18 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted]

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 Unit

DISCUSSION: The employment-based preference immigrant 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 renovates and sells antiques. It seeks to employ the beneficiary permanently in the United States as a furniture and antiques restorer. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), 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 or unskilled labor, 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 May 9, 1997. The beneficiary's salary as stated on the labor certification is $20.00 per hour or $41,600.00 per annum.

Counsel submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On July 25, 2001, the Service requested evidence of the petitioner's ability to pay the proffered wage.

In response, counsel submitted copies of the petitioner's 1997 and 1999 Form 1040 U.S. Individual Income Tax Return including Schedule

C, Profit and Loss from Business Statement. The petitioner's 1997 Form 1040 reflected an adjusted gross income of $21,180. Schedule C reflected gross receipts of $341,427; gross profit of $87,065; wages of $0; and a net profit of $11,150. The petitioner's 1999 Form 1040 reflected an adjusted gross income of $38,957. Schedule C reflected gross receipts of $630,724; gross profit of $178,227; wages of $0; and a net profit of $41,143.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a copy of the petitioner's 2000 Form 1040 U.S. Individual Income Tax Return including Schedule C Profit or Loss From Business and a letter from the petitioner's CPA which states, in pertinent part:

> In 1997 the cost of goods sold amounted to $252,657 and the total business expenses amounted to $75,915. If the owner allocated his resources differently have (sic) could have afforded the cost of an additional employee.

The CPA's assertion that the petitioner could have allocated his resources differently is not persuasive. These funds were not retained by the petitioner for future use. Instead, those monies were expended, and therefore, not readily available for payment of the beneficiary's salary in 1997. 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).

The petitioner's 1997 federal tax return shows that the adjusted gross income is $21,180. This amount is not sufficient to pay the proffered wage of $41,600.00 per year.

In addition, the 1999 federal tax return also shows that the petitioner lacked the ability to pay the proffered wage.

While the federal tax return for 2000 shows an adjusted gross income of $60,571, an amount sufficient to pay the proffered wage, the petitioner must show that it had the ability to pay the proffered wage at the time of filing of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. 204.5(g)(2).

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 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.