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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: EAC 01 006 53874 Office: VERMONT SERVICE CENTER Date: JUN 19 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 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 software systems and consulting firm. It seeks to employ the beneficiary permanently as a programmer analyst. 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 the beneficiary met the petitioner's qualifications for the position as stated in the labor certification as of the petition's filing date. The director also found that the petitioner had not established that it had the financial ability to pay the proffered wage as of the filing date of the petition.

On appeal, counsel submits a statement. Counsel further states that he will submit a separate brief and/or additional evidence to the AAU within 30 days. To date, however, no additional evidence has been received. Therefore, a decision will be made based on the record as it is presently constituted.

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.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is May 17, 2000.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of programmer analyst required a Bachelor's degree in any field, and two years of experience in the job offered.

The director determined that the petitioner had not established that the beneficiary had the required Bachelor's degree and denied the petition.

On appeal, counsel does not address this issue.

The record contains an educational evaluation from ICES, which states that the beneficiary has completed three years of academic study towards a baccalaureate degree and with his four years and nine months of experience, he has completed similar requirements to

the completion of a Bachelor of Science Degree in Management Information Systems from an accredited or tertiary education in the United States. While this evaluation states that the beneficiary has attained the equivalency of a bachelor's degree, the petitioner had not indicated that a combination of education and experience can be accepted as meeting the minimum educational requirements stated on the labor certification. Therefore, the combination of education and experience may not be accepted in lieu of education.

The three year experience for one year of education rule used in the evaluation is applicable to nonimmigrant H1B petitions, not immigrant petitions. The beneficiary is required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

The issue here is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a bachelor's degree on May 17, 2000. Therefore, the petitioner has not overcome this portion of the director's decision.

The other issue is whether the petitioner has established its ability to pay the proffered wage as of the filing date of the petition.

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 17, 2000. The beneficiary's salary as stated on the labor certification is $75,000 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On June 11, 2001, the petitioner was requested to submit evidence of its ability to pay the proffered wage, to include the petitioner's 1999 and 2000 tax returns.

In response, counsel submitted a copy of the petitioner's unaudited income statement for the period ended December 31, 2000, a copy of the beneficiary's W-2 Wage and Tax Statement which showed he was paid $30,746.23 in 1999, and a copy of the petitioner's 1998 Form 1120S U.S. Income Tax Return for an S Corporation. The federal tax return reflected gross receipts of $288,720; gross profit of $288,720; compensation of officers of $95,000; salaries and wages paid of $57,352; depreciation of $150; and an ordinary income (loss) from trade or business activities of $16,981. Schedule L reflected total current assets of $5,752 in cash and total current liabilities of $10,940.

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 fails to address this issue.

A review of the 1998 federal tax return shows that when one adds the ordinary income and the depreciation, the result is $17,131, less than the proffered wage.

No additional evidence has been submitted. Accordingly, after a review of the documentation furnished, 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.