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U.S. Department of Justice

Immigration and Naturalization Service

Identification data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

File: EAC 00 241 50022 Office: VERMONT SERVICE CENTER Date: 11 MAR 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 computer company. It seeks to employ the beneficiary permanently as a service technician. 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 he had the financial 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 February 7, 2000. The beneficiary's salary as stated on the labor certification is $21.86 per hour or $45,468.80 per annum.

The director's denied 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 appeal, counsel submits a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 1999 which reflects gross receipts of $3,597,519; gross profit of $540,540; compensation of officers of $102,231; salaries and wages paid of $158,810; depreciation of $3,200; and a net profit loss (NOL) deduction of $75,072. Schedule L reflects total current assets of $369,168 with $119,406 in cash, and total current liabilities of $200,479.

A review of the 1999 federal tax return shows that when one adds the depreciation, the taxable income, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is $197,678, more than the proffered wage. The petitioner has overcome this portion of the director's decision.

The other issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated on the labor certification as of the filing date of the petition.

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 February 7, 2000.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of service technician required two years of experience in the job offered.

The director denied the petition, noting that the petitioner had not established that the beneficiary had the required two years of experience.

On appeal, counsel submits a letter from the General Manager of Dar Al Sudani which attest to the beneficiary's experience as a computer system administrator from May 1994 to July 1996; however, the letter does not state the beneficiary's past duties, nor does it specify any training the beneficiary received. Therefore, the petitioner has not overcome this portion of the director's decision.

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 met that burden.

ORDER: The appeal is dismissed.