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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 00 180 50252 Office: Vermont Service Center

Date: 5 MAR 2002

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:
[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

Robert P. Wiemann
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 factory authorized electronic service repair depot. It seeks to employ the beneficiary permanently in the United States as an electronic bench mechanic. 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 November 19, 1999. The beneficiary's salary as stated on the labor certification is \$19.80 per hour or \$41,184.00 per annum.

Counsel initially submitted a copy of the first page of the

petitioner's 1998 Form 1120S U.S. Income Tax Return for an S Corporation. The federal tax return reflected gross receipts of \$712,619; gross profit of \$712,619; compensation of officers of \$107,538; salaries and wages paid of \$245,807; depreciation of \$8,094; and an ordinary income (loss) from trade or business activities of \$1,091.

The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. On September 13, 2000, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of November 19, 1999, to include the tax return for 1999.

In response, counsel submitted a copy of the beneficiary's W-2 Wage and Tax Statement which reflected he was paid \$20,660.00 in 1999. Counsel stated that "[a]s of today the company has not filed the 1999 return. The 1998 returns, previously submitted, amply prove the petitioner's ability to pay the proffered wage."

The director determined that the additional evidence did not establish that the petitioner had the ability to pay the proffered wage. On January 3, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage, to include the petitioner's complete 1998 federal tax return.

In response, counsel submitted a copy of the beneficiary's W-2 Wage and Tax Statement which reflected he was paid \$17,504.97 in 1998. Counsel also submitted a complete federal tax return for 1998. Schedule L reflected total current assets of \$8,347 with \$2,616 in cash and total current liabilities of \$123,554.

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

On appeal, counsel states:

The evidence does support the employer's ability to pay the required salary, especially with the attached profit and loss statement and balance sheet. The profit and loss statement reflects that for the period January 1999 through December 1999 the gross profit was \$791,821.89. It reflects payroll expense of \$330,995.10 with a net income of \$145,451.32. The 1999 income tax returns are to be filed within approximately 30 days and will be submitted to INS when received.

Unaudited profit and loss statements cannot be considered credible evidence of the petitioner's ability to pay the wage offered. No additional evidence has been received to date.

A review of the federal tax return for 1998 shows that when one adds the depreciation and the ordinary income, the result is \$9,185, an amount less than the proffered wage. Even if one were to consider the salary already paid to the beneficiary of \$17,504.97, the result is \$26,689.97, an amount still less than the proffered wage.

In addition, the salary paid to the beneficiary in 1999 is less than half the proffered wage as stated on the labor certification.

Accordingly, after a review of the federal tax return and additional 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 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.