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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.
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Washington, D.C. 20536



File: WAC 99 249 54963 Office: CALIFORNIA SERVICE CENTER Date: 25 MAR 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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: SELF-REPRESENTED

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 Unit

DISCUSSION: The employment-based preference immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an auto repair and diagnostic center. It seeks to employ the beneficiary permanently in the United States as a mechanic. 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, the petitioner submits a statement and indicates that a separate brief and/or evidence is being submitted within thirty days. To date, however, no further documentation has been received. Therefore, a decision will be made based on the record as it is presently constituted.

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 July 8, 1996. The beneficiary's salary as stated on the labor certification is \$36,000 per annum.

The petitioner submitted copies of its 1996 through 1999 Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss from Business Statement. The petitioner's 1996 Form 1040

reflected an adjusted gross income of \$30,190. Schedule C reflected gross receipts of \$110,546; gross profit of \$44,809; depreciation of \$2,786; wages of \$0; and a net profit of \$12,588. The petitioner's 1997 Form 1040 reflected an adjusted gross income of \$24,930. Schedule C reflected gross receipts of \$101,018; gross profit of \$58,225; depreciation of \$0; wages of \$0; and a net profit of \$15,564.

The petitioner's 1998 Form 1040 reflected an adjusted gross income of \$38,180. Schedule C reflected gross receipts of \$169,220; gross profit of \$86,221; depreciation of \$0; wages of \$0; and a net profit of \$19,028. The petitioner's 1999 Form 1040 reflected an adjusted gross income of \$35,931. Schedule C reflected gross receipts of \$280,520; gross profit of \$154,928; depreciation of \$847; wages of \$0; and a net profit of \$19,961.

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, the petitioner merely states that:

Due to latest changes in the human resources department, the person in charge of this department has been removed from his position, therefore, it is impossible to determine the current situation of this particular employee, [REDACTED]

I am requesting for an extension in order to be able and provide you plenty of information. As soon as possible, we will file the brief.

In an unincorporated association or sole proprietorship, the assets and income of the owner can be considered in determining the petitioning business' ability to pay the wages offered. In this case, however, the record does not contain any evidence of the petitioner's personal expenses nor does it show that the petitioner had other income or assets not included on Form 1040 with which to pay the proffered wage. Therefore, it is impossible to determine if the petitioner had income sufficient to pay the beneficiary and meet any expenses incurred by the petitioner and his family.

A review of the 1996 federal tax return shows that the adjusted gross income is \$30,190 which includes the net profit of \$12,588 from the business. If one includes the depreciation, the total is \$32,976.

In addition, the 1997 through 1999 federal tax returns continue to show that the petitioner lacked the ability to pay the proffered wage.

The petitioner has submitted no persuasive documentation to establish that it had the financial ability to pay the proffered

wage at the time of filing of the petition.

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.