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U.S. Department of Justice
Immigration and Naturalization Service

Public Comment

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



File: EAC 00 272 51580 Office: Vermont 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 § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:
[Redacted]

identification data deleted to prevent clearly unwarranted invasion of personal privacy.

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 remanded for further consideration.

The petitioner is a janitorial cleaning and maintenance service. It seeks to employ the beneficiary permanently in the United States as a operations manager/maintenance. 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 documentation.

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 January 14, 1998. The beneficiary's salary as stated on the labor certification is \$700.00 per week or \$36,400.00 per annum.

Counsel submitted a copy of the petitioner's 1998 Form 1040 U.S.

Individual Income Tax Return including Schedule C, Profit and Loss from Business Statement. The petitioner's Form 1040 reflected an adjusted gross income of \$23,049. Schedule C reflected gross receipts of \$243,528; gross profit of \$243,528; depreciation of \$9,800; wages of \$0; and net profit of \$24,801.

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. The director noted that:

As proof of your ability to pay the proffered wage, you submitted your owner's 1998 federal income tax return and a miscellaneous income statement for money you paid the beneficiary in 1998. A review of the documents indicates that you had a profit of \$24,801. In addition, you claimed \$9,800 in depreciation and you paid the beneficiary \$5,420 for a total of \$40,021 which would appear to cover the proffered wage of \$36,400. However, a review of your owner's complete federal income tax return indicates that your \$24,801 profit was your owner's only source of income to support three people. In fact, your owner's taxable income of \$7,849 was so low that she qualified for an earned income credit in 1998.

On appeal, counsel argues that:

Where the petitioner is substituting the services of a worker whether an employee or a subcontractor, the monies paid to that/those worker(s) are properly included as disbursements to the beneficiary for purposes of determining the petitioner's ability to pay the proffered salary as set forth in the Application for Alien Employment Certification.

Since the issue is one of cash flow, an employer can "add back" any one-time or extraordinary (i.e. non-recurring) expenses and/or paper losses such as losses carried forward from a previous year or depreciation.

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 her family.

A review of the 1998 federal tax return shows that when one adds the depreciation and the net profit, the result is \$34,601, less than the proffered wage.

Counsel also argues that the Service did not request further documentation regarding the petitioner's personal expenses before categorically denying the petition. Counsel's argument is persuasive. The petitioner should be afforded an opportunity to provide any additional evidence in support of her petition.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which if adverse to the petitioner, is to be certified to the Associate Commissioner for review.