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U.S. Department of Justice

Immigration and Naturalization Service

identification 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: WAC 00 123 50532 Office: CALIFORNIA SERVICE CENTER Date: MAY 13 2002

IN RE: Petitioner:
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

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, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning and alteration establishment. It seeks to employ the beneficiary permanently in the United States as an alteration expert. 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 October 21, 1997. The beneficiary's salary as stated on the labor certification is $11.50 per hour or $23,920.00 per annum.

Counsel submitted copies of the petitioner's 1997, 1998, and 1999 Schedule C Form 1040. The 1997 tax return indicated gross receipts of $185,119; gross profit of $180,275; depreciation of $0; wages of $31,645; and a net profit of $23,043. The 1998 tax form indicated gross receipts of $179,922; gross profit of $165,438; depreciation of $0; wages of $29,046; and a net profit of $20,939. The 1999 tax form indicated gross receipts of $172,984; gross profit of $166,418; depreciation of $6,500; wages of $27,768; and a net profit of $21,291.

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, counsel submits a copy of the petitioner's 2000 Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit or Loss from Business. The Form 1040 reflects an adjusted gross income of $22,884. Schedule C reflects gross receipts of $159,083; gross profit of $158,547; depreciation of $6,500; wages of $26,762; and a net profit of $24,040.

Counsel asserts that the evidence submitted establishes that the petitioner has the ability to pay the proffered wage.

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 in 1997.

A review of the 1997 federal tax return shows that the net profit is $23,043. If one includes the depreciation, the total is still $23,043. When the beneficiary's wage is subtracted from the adjusted income, the result is -$877, less than the amount required to meet any expenses incurred by the petitioner and his family.

A review of the 1998 through 2000 federal tax returns continue to show an inability to pay the proffered wage.

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.