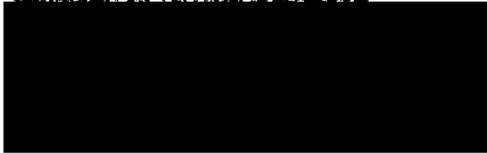




B6

U.S. Department of Justice
Immigration and Naturalization Service

restoration of status to
prevent death and
restoration of status to

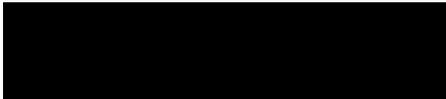


OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 01 005 50259 Office: Vermont Service Center

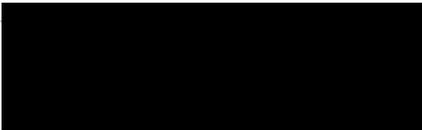
Date: MAY 14 2002

IN RE: Petitioner:
Beneficiary:



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:



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 gas and service station. It seeks to employ the beneficiary permanently in the United States as a manager, night operations. 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 December 26, 1997. The beneficiary's salary as stated on the labor certification is \$29.07 per hour or \$60,465.60 per annum.

Counsel initially submitted a copy of the petitioner's 1997 Form

1120S U.S. Income Tax Return for an S Corporation which reflected gross receipts of \$3,173,497; gross profit of \$385,027; compensation of officers of \$0; salaries and wages paid of \$92,292; depreciation of \$1,200; and an ordinary income (loss) from trade or business activities of \$32,035. Schedule L reflected total current assets of \$31,632 with \$2,796 in cash and total current liabilities of \$80,265.

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 June 14, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of December 26, 1997.

In response, counsel submitted copies of the petitioner's 1998, 1999, and 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The federal tax return for 1998 reflected gross receipts of \$3,428,655; gross profit of \$503,690; compensation of officers of \$0; salaries and wages paid of \$112,142; depreciation of \$4,366; and an ordinary income (loss) from trade or business activities of \$13,381. Schedule L reflected total current assets of \$41,390 with \$14,967 in cash and total current liabilities of \$48,588. The federal tax return for 1999 reflected gross receipts of \$4,265,304; gross profit of \$739,923; compensation of officers of \$0; salaries and wages paid of \$139,992; depreciation of \$9,910; and an ordinary income (loss) from trade or business activities of \$30,823. Schedule L reflected total current assets of \$23,866 with \$2,897 in cash and total current liabilities of \$51,415.

The federal tax return for 2000 reflected gross receipts of \$3,228,882; gross profit of \$610,605; compensation of officers of \$0; salaries and wages paid of \$112,658; depreciation of \$8,710; and an ordinary income (loss) from trade or business activities of \$54,223. Schedule L reflected total current assets of \$26,798 with \$9,974 in cash and total current liabilities of \$60,028.

Counsel also submitted a letter from the petitioner which states that it is eliminating a position which was costing them \$26,000 per year, and therefore, have a total of \$80,000.00 with which to pay the beneficiary's salary.

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 submits a letter from the petitioner's accountant who argues that the petitioner had the ability to pay

the wage offered because the management fee of \$57,000 on the 1997 tax return would be reduced by 50%, releasing an additional \$28,500 to pay the beneficiary's wage. Counsel further submits a letter from the petitioner which reiterates the argument that wages paid to another employee could be used to pay the beneficiary's wage. The petitioner also submits a copy of his personal income tax return to show his ability to "undertake the payment of salary to the beneficiary."

The petitioner's argument is not persuasive. The petitioning entity in this case is a corporation. Consequently, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See Matter of M, 8 I&N Dec. 24 (BIA 1958; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

A review of the 1997 federal tax return shows that when one adds the ordinary income and the depreciation, the result is \$33,235, less than the proffered wage.

A review of the 1998 and 1999 federal tax returns continue to show an inability to pay the proffered wage.

A review of the 2000 federal tax return shows that when one adds the ordinary income and the depreciation, the result is \$62,933, more than the proffered wage.

The petitioner, however, must show that it had the ability to pay the proffered wage at the time of filing of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. 204.5(g)(2).

Accordingly, after a review of the federal tax returns 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.

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.