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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

File: EAC 01 005 51653 Office: Vermont Service Center

Date: 23 MAY 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:



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 an interior designer. It seeks to employ the beneficiary permanently in the United States as a bilingual secretary. 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 26, 1997. The beneficiary's salary as stated on the labor certification is \$14.68 per hour or \$30,534.40 per annum.

Counsel initially submitted insufficient evidence of the

petitioner's ability to pay the proffered wage. On May 31, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of November 26, 1997, to include the petitioner's federal income tax returns for 1997 through 1999.

In response, counsel submitted copies of the petitioner's 1997, 1998, and 1999 Form 1120 U.S. Corporation Income Tax Return. The 1997 tax return reflected gross receipts of [REDACTED] gross profit of [REDACTED]; compensation of officers of [REDACTED] salaries and wages paid of \$0; depreciation of [REDACTED] and a taxable income before net operating loss deduction and special deductions of - [REDACTED]. Schedule L reflected total current assets of [REDACTED] of which [REDACTED] was in cash and total current liabilities of [REDACTED]. The 1998 tax return reflected gross receipts of [REDACTED] gross profit of [REDACTED] compensation of officers of [REDACTED] salaries and wages paid of \$0; depreciation of \$0; and a taxable income before net operating loss deduction and special deductions of [REDACTED]. Schedule L reflected total current assets of [REDACTED] of which [REDACTED] was in cash and total current liabilities of [REDACTED].

The 1999 tax return reflected gross receipts of [REDACTED] gross profit of [REDACTED] compensation of officers of [REDACTED] salaries and wages paid of \$0; depreciation of \$0; and a taxable income before net operating loss deduction and special deductions of - [REDACTED]. Schedule L reflected total current assets of [REDACTED] of which [REDACTED] was in cash and total current liabilities of [REDACTED].

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 appeal, counsel argues that:

Attached hereto and made part hereof is a copy of each and every check issued to the beneficiary in the year 1997, reflecting a weekly payment to her of [REDACTED]. Each of these checks contain a cancellation mark from the bank, authenticating their issue and deposit. In addition, are copies of two cash vouchers for an additional [REDACTED] that was paid to the beneficiary in cash during the course of the year. Obviously, the District Director has expressed his curiosity as to why this payment to the beneficiary was not listed as salary on the petitioner's tax return. Clearly, the payments have been made to her, as evidenced by the attached

cancelled checks and receipts. However, at that time and continuing until today, the beneficiary has been an undocumented alien and did not have a Social Security number to which the employer could attribute its payments for an illegal alien. The tax implications to the petitioner were obvious. Although the petitioner incontrovertibly paid the beneficiary the amount set forth, it chose not to attempt to obtain a deduction for her salary in light of her illegal status and inability to produce a viable Social Security number.

Counsel's argument is not persuasive. Even if the Service were to accept counsel's explanation that the beneficiary was paid the requisite salary in 1997, a review of the federal tax return for 1998 shows that when one adds the depreciation and the taxable income, the result is [REDACTED] less than the proffered wage.

A review of the 1999 federal tax return continues to show an inability to pay the proffered wage.

The petitioner 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, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered until the beneficiary obtained permanent residence.

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.