



B6

U.S. Department of Justice
Immigration and Naturalization Service

Immigration and Naturalization Service
Vermont Service Center
100 North Main Street
Montpelier, Vermont 05602

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



File: EAC 01 058 50789 Office: Vermont Service Center Date: 24 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:
[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 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 investment banker/producer. It seeks to employ the beneficiary permanently in the United States as a researcher. 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 October 29, 1999. The beneficiary's salary as stated on the labor certification is \$48,101 per annum.

Counsel initially submitted a copy of the petitioner's 1999 Form

1120S U.S. Income Tax Return for an S Corporation which reflected gross receipts of [REDACTED] gross profit of [REDACTED] compensation of officers of [REDACTED] salaries and wages paid of [REDACTED] and an ordinary income (loss) from trade or business activities 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 July 21, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage, to include the petitioner's 2000 federal tax return.

In response, counsel submitted a letter from the petitioner's accountant which requested consideration of the sole shareholder's personal funds and a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The federal tax return reflected gross receipts of [REDACTED] gross profit of [REDACTED] compensation of officers of [REDACTED] salaries and wages paid of [REDACTED] and an ordinary income (loss) from trade or business activities of [REDACTED]

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 general manager and payroll summaries for the petitioner for 1999 and 2000.

The petitioner's general manager states:

Consulting fees and services totaled [REDACTED] in 1999 and [REDACTED] in 2000. Of these fees, we spent a minimum of [REDACTED] a month for the last eight months of 1999 and all of 2000 for outside contractors to perform various services such as translations, economic and social research and travel assistance. If [the beneficiary] had been on our staff, [REDACTED] in expenses for 1999 and \$30,000 in expenses for 2000 would have been available for his salary.

This reasoning is not persuasive. The general manager's assertion that the funds paid to independent contractors could be used to pay the beneficiary's salary is not persuasive. These funds were not retained by the petitioner for future use. Instead, these monies were expended on compensating the contractor, and therefore, not readily available for payment of the beneficiary's salary in 1999.

Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2).

The petitioner's Form 1120S for the 1999 calendar year shows an ordinary income of [REDACTED]. The petitioner could not pay a proffered wage of [REDACTED] out of a negative income.

The petitioner's Form 1120S for the calendar year 2000 shows an ordinary income of [REDACTED]. The petitioner could not pay the proffered wage out of this figure.

Accordingly, after a review of the federal tax returns 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.