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U.S. Department of Justice
Immigration and Naturalization Service

NOTICE OF DECISION
REGARDING A DETERMINATION
OF PERSONAL PRIVACY

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



File: EAC 01 003 51358 Office: Vermont Service Center

Date: **MAY 30 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:



PHOTOCOPY

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 importer/exporter of sportswear. It seeks to employ the beneficiary permanently in the United States as an import/export manager. 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 3, 1996. The beneficiary's salary as stated on the labor certification is \$43,500.00 per annum.

Counsel initially submitted copies of the beneficiary's W-2 Wage and Tax Statement which showed he was paid \$9,500 in 1997, \$13,000 in 1998, and \$13,000 in 1999, and a copy of the petitioner's 1996 Form 1120 U.S. Corporation Income Tax Return which reflected gross receipts of \$2,834,398; gross profit of \$576,847; compensation of officers of \$55,000; salaries and wages paid of \$47,900; depreciation of \$0; and a taxable income before net operating loss deduction and special deductions of \$2,268. Schedule L reflected total current assets of \$478,248 of which \$30,006 was in cash and total current liabilities of \$939,761.

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 5, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of December 3, 1996.

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 \$1,784,781; gross profit of \$409,861; compensation of officers of \$48,750; salaries and wages paid of \$70,100; depreciation of \$0; and a taxable income before net operating loss deduction and special deductions of \$9,709. Schedule L reflected total current assets of \$223,091 of which \$32,591 was in cash and total current liabilities of \$913,968. The 1998 tax return reflected gross receipts of \$1,328,989; gross profit of \$367,495; compensation of officers of \$40,000; salaries and wages paid of \$67,424; depreciation of \$0; and a taxable income before net operating loss deduction and special deductions of \$13,038. Schedule L reflected total current assets of \$384,122 of which \$24,743 was in cash and total current liabilities of \$882,941.

The 1999 tax return reflected gross receipts of \$686,714; gross profit of \$231,708; compensation of officers of \$40,000; salaries and wages paid of \$55,091; depreciation of \$0; and a taxable income before net operating loss deduction and special deductions of -\$2,280. Schedule L reflected total current assets of \$33,052 of which \$14,178 was in cash and total current liabilities of \$669,272.

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 argues that:

The Tax Return in question, i.e. the fiscal year of 1996, ending September 30, 1997, annexed hereto as Tab 3, if read and interpreted clearly would have demonstrated that the Petitioner's business operations for that year generated a total income of \$576,847.00 with the annual gross receipts totaling \$2,832,636.00. The Petitioner as shown on the Tax Return paid a total in excess of \$100,000.00 in salaries and compensations. The Form W-2's for that year are annexed hereto as Tab 4. The Petitioner's business operations for that year generated a positive taxable income before net operating loss deduction.

Counsel's argument is not persuasive. A review of the 1996 federal tax return shows that when one adds the taxable income and the depreciation, the result is \$2,268, less than the proffered wage.

A review of the federal tax returns for 1997, 1998, and 1999, continue to show an inability to pay the proffered wage.

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 at the time of filing of the petition and continuing to present.

An issue not addressed by the director, however, is whether the petitioner had established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of import/export manager required a Bachelor's degree in Business Administration.

The record contains an educational evaluation from the Foreign Academic Credentials Service, Inc., which states that the beneficiary received a Bachelor of Arts degree with a major in English and a minor in Business Administration from Hankuk University of Foreign Studies in 1990. Therefore, the petitioner has not established that the beneficiary had the required degree in Business Administration on December 3, 1996. As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

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.