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U.S. Department of Justice
Immigration and Naturalization Service

PUBLIC COPY

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



File: EAC 01 230 58877 Office: VERMONT SERVICE CENTER Date: NOV - 4 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]

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 that 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 banquet services business. It seeks to employ the beneficiary permanently in the United States as an electrician apprentice. 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 continue to pay the beneficiary the proffered wage from the priority date of the visa petition to the present.

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 priority 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 priority date is September 15, 1999. The beneficiary's salary as stated on the labor certification is \$11.27 per hour or \$23,441.60 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the priority date of the petition. On September 16, 2001, the director requested additional evidence of the ability to pay the proffered wage from the priority date and continuing until the present.

In response on December 11, 2001, counsel submitted a copy of the petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return. The 1999 federal tax return reflected a taxable income before net operating loss deduction and special deductions of \$45,967. Counsel also submitted the 2000 federal tax return, but it showed a taxable income before net operating loss deduction and special deductions of (\$1048), a loss.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage from the priority date and continuing to the present. Also, the director determined that current assets exceeded current liabilities. The director denied the petition accordingly.

On appeal, counsel submits a "Preliminary Form Draft as of 6-22-01" and states that "...the petitioner is enclosing a copy of the 2001 Form 1120 U.S. Corporation Income Tax Return, which has just been completed." It does not appear to be either completed or filed.

Nonetheless, counsel states,

... This return shows a positive total income from which to pay the beneficiary. There are funds to provide for the beneficiary's salary or wages. Wages are paid as part of the petitioner's total deductions. The petitioner's income has increased from the gross of \$19,682.00 in 1999 to \$82,210.00 in 2000 to \$133,572.00 in 2001...

Counsel's arguments are not persuasive.

The 2001 draft tax return claims a taxable income before net operating loss deduction and special deductions of \$16,509. Counsel concedes that the ability to pay must take account of wages and other deductions. The statement of gross income alone does not fairly state financial condition without reference to expenses. On the whole, the 2001 offer of proof does not support the ability to pay the proffered wage, \$23,441.60.

Counsel also took exception that:

.... The Service relied upon parts of [the] 2000 return to show that the taxable income was minus \$1048 and that the depreciation was \$4,278.00. It is not true, however, that the petitioner's **current** liabilities exceed his **current** assets.... In the year 2000, the gross receipts or sales were \$82,210.00 as contrasted against the total deductions, which were \$83,258.00. The figures refer to cash.... The value of the building and tangible personal property is actually even higher than its depreciable use...

Schedule L, a balance sheet in the 2000 tax return, determines the net current assets, i.e., current assets minus current liabilities. At the end of the period, lines 1d-6d state current assets as \$7,331. In contrast, lines 16d-18d report current liabilities as \$53,981. Net current assets were a deficit, (\$46,650), and, therefore, inadequate to continue to pay the proffered wage, \$23,441.60. No rationale supported the inclusion of other items to compute net current assets.

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 as of the priority date of the petition and continuing until the beneficiary attains lawful permanent resident status. 8 C.F.R. 204.5(g)(2).

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.