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U.S. Department of Justice
Immigration and Naturalization Service

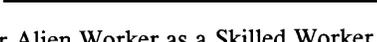
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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536

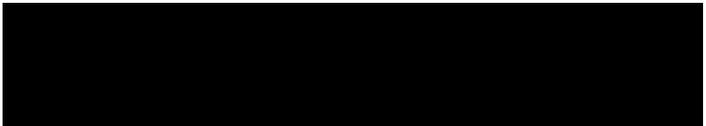
File:  Office: TEXAS SERVICE CENTER

Date: 19 SEP 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 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, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Texas Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The petition will be denied.

The petitioner is an upholstery and window treatment company. It seeks to employ the beneficiary permanently in the United States as a furniture upholsterer. 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 priority date of the visa petition. The Associate Commissioner affirmed this determination on appeal.

On motion, counsel submits a brief and additional documentation.

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 priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$16.09 per hour or \$33,467.20 per annum.

The Associate Commissioner affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence of its ability to pay the proffered wage as of the filing date of the petition.

On motion, counsel submits a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return which reflects gross receipts of \$366,119; gross profit of \$258,806; compensation of officers of \$0; salaries and wages paid of \$155,854; and a taxable income before net operating loss deduction and special deductions of \$5,169.

Counsel explains that due to a serious backlog of cases in the Texas Workforce Commission, the application was processed two years after the application and resulted in the proposed salary being increased from about \$15,829 a year to the prevailing wage of \$33,467.

Counsel further argues that it is unfair for the AAO to "focus on the taxable income in a particular tax year while the prevailing wage at that time could be much lower than the two-year later determination while ignoring the rest of the evidence which has demonstrated the petitioner's business viability.

Counsel's argument is not persuasive. The tax return for calendar year 1998 shows a taxable income of \$8,399. The petitioner could not pay a salary of \$33,467.20 from this figure.

In addition, the tax returns for 1999 and 2000 continue to show an inability to pay the proffered wage even if it were \$15,829 a year, the wage counsel argues would have been in effect at the time the application was submitted to the Texas Workforce Commission.

The petitioner must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage as of the priority date of the petition as required by 8 C.F.R. 204.5(g)(2). Therefore, the petition may not be approved.

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 sustained that burden.

ORDER: The Associate Commissioner's decision of July 11, 2001, is affirmed. The petition is denied.