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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



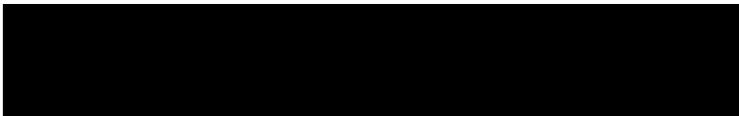
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Office: VERMONT SERVICE CENTER

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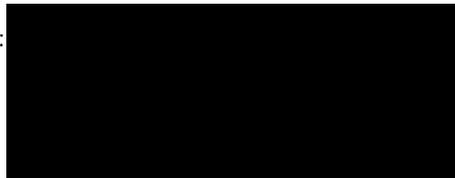
AUG 04 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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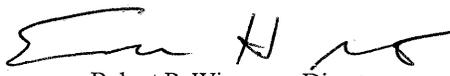
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.


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 Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant supplies distributor. It seeks to employ the beneficiary permanently in the United States as a warehouse supervisor. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a statement.

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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 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 Form ETA 750 was accepted on April 29, 1996. The proffered wage as stated on the Form ETA 750 is \$12.41 per hour, which equals \$25,812.80 per year.

With the petition counsel submitted a letter from a CPA stating that the petitioning company was established in 1982, had gross annual sales of \$20,650,780 and a net income of \$268,042 during 1996, and employed 12 workers.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on November 5, 2001, requested additional evidence pertinent to that ability.

In response, counsel submitted a letter, dated January 29, 2002, in which she stated that the beneficiary had not been issued a Form W-2 Wage and Tax Statement because she was paid in cash.

Counsel also submitted copies of the petitioner's 1996 and 1997 Form 940-EZ Payment Vouchers, copies of 1998 and 1999 Form W-2 Wage and Tax Statements purporting to show the total the petitioner paid in wages during those years, and a copy of the petitioner's 2000 Form W-3 Transmittal of Wage and Tax Statements.

The Form 1996 Form 940-EZ shows that the petitioner paid \$352,640.69 in wages during that year. The Form 1997 Form 940-EZ shows that the petitioner paid \$418,614.23 in wages during that year. The 1998 W-2 form purports to show that the petitioner paid \$452,071.31 in wages during that year. The 1999 W-2 form purports to show that the petitioner paid \$464,396.36 in wages during that year. The 2000 W-3 form shows that the petitioner paid \$496,624.61 in wages during that year.

Finally, counsel submitted another letter from the petitioner's accountant. This letter, dated January 28, 2002, states the petitioner's gross receipts for the years 1996 through 2000 and the petitioner's gross payroll for the years 1996 through 2001. The accountant also states that the figures are submitted in lieu of tax returns "due to the confidential nature of the information requested." Finally, the accountant stated that the petitioner has had the ability to pay the proffered wage since the priority date.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on July 29, 2002, denied the petition. The director stated that the ability to pay the proffered wage could not be based on the petitioner's gross receipts.

On appeal, counsel argues that the petitioner's gross receipts and gross payroll demonstrate the petitioner's ability to pay the proffered wage. Counsel noted that the accountant had stated in his letter that the petitioner's tax returns are confidential. Counsel stated that the petitioner must be profitable as it has been in business for over 20 years.

Showing that the petitioner's gross receipts were greater than the proffered wage is insufficient. Showing that the petitioner

paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses*, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's net income.

In determining the petitioner's ability to pay the proffered wage, the Service will first examine the net income. In *K.C.P. Food Co., Inc. v. Sava*, the court held the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Further, 8 C.F.R. § 204.5(g)(2) makes clear that only three types of documentation are competent to demonstrate the petitioner's ability to pay the proffered wage. Those three types of evidence annual reports, federal tax returns, and audited financial statements.

The petitioner has declined to provide copies of its federal tax returns and is not obliged to do so. The petitioner can select between any of those three optional types of evidence in demonstrating its ability to pay the proffered wage. Having submitted no annual reports, no federal tax returns, and no audited financial statements, however, the petitioner has provided no competent evidence of its ability to pay the proffered wage.

The petitioner failed to submit competent evidence of its ability to pay the proffered wage at any time. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.

* The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.