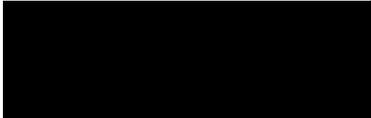


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Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536



File: EAC 02 093 53584 Office: VERMONT SERVICE CENTER

Date: DEC 11 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: SELF-REPRESENTED

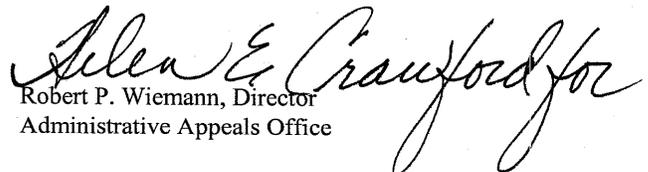
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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 appears to have retained representation. The petitioner's ostensible representative filed a Form G-28, Notice of Entry of Appearance in this matter. That notice does not state that the representative is an attorney. Further, that putative representative's name does not appear on the roster of accredited representatives. The record contains no indication that the petitioner's ostensible representative is authorized to represent the petitioner. All representations will be considered, but the decision will be furnished only to the petitioner.

The petitioner is a construction and restoration company. It seeks to employ the beneficiary permanently in the United States as a stone carver. 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, the petitioner's ostensible representative submits a brief.

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 March 7, 2001. The proffered wage as stated on the Form ETA 750 is \$19.50 per hour for 35 hours per week, which equals \$35,490 per year.

With the petition the petitioner's ostensible representative submitted a copy of the petitioner's nominal 2000 Form 1120 U.S. Corporation Income Tax Return covering the petitioner's fiscal year from June 1, 2000 to May 31, 2001. That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$0 during that year. The corresponding Schedule L shows that at the end of that fiscal year, the petitioner's current liabilities exceeded its current assets.

The apparent representative also submitted a letter from the petitioner's president, dated December 18, 2001. The letter states that during the 2000 tax year, the petitioner spent over \$450,000 for outside services, and that the president believes that the company can save money by having more employees. The president did not state that all of that \$450,000 was spent on stone cutters or carvers. The president did not state what portion, if any, of that amount was spent on stone cutters or carvers. The president, therefore, gave no indication that hiring the petitioner would result in any saving.

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 March 13, 2002, requested additional evidence pertinent to that ability. The Service Center also specifically requested that, if the petitioner employed the beneficiary during 2001, it submit a 2001 Form W-2 Wage and Tax Statement showing the amount the petitioner paid the beneficiary during that year.

In response, the supposed representative submitted a copy of the December 18, 2001 letter from the petitioner's president. In his own letter, dated March 25, 2002, the alleged representative stated that the letter demonstrates that the petitioner will save money by hiring the beneficiary, but provided no information from which those asserted savings might be calculated. The ostensible representative noted that the petitioner's tax return showed gross receipts of almost \$1,000,000. No W-2 form was submitted, apparently indicating that the petitioner did not employ the beneficiary during 2001.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on July 12, 2002, denied the petition.

On appeal, the petitioner's apparent representative argues that the evidence submitted demonstrates the ability to pay the proffered wage.

With the appeal, counsel provided a copy of the petitioner's nominal 2001 Form 1120 U.S. Corporation Income Tax Return, covering the petitioner's fiscal year from June 1, 2001 to May 30, 2002. The return shows that during that fiscal year, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,019. The corresponding Schedule L shows that at the end of that fiscal year, the petitioner's current liabilities exceeded its current assets.

The seeming representative also submitted a letter from the petitioner's president, dated August 10, 2002. The letter observed that from fiscal year 2000 to fiscal year 2001, the petitioner increased its profit margin by 4% while more than doubling salaries and increasing compensation of officers. The president asserts that, "This proves that the idea of keeping high profit margin projects "in house" versus using outside contractors saves us money." The president asserts that hiring the beneficiary would result in another increase in profits.

The petitioner's president did not specify whether he referred to gross profit margin or net profit margin. This office notes that the petitioner's net profit margin rose .4% and its gross profit margin rose 4%. This office infers that the petitioner's president referred to the gross profit margin, the less meaningful of the two statistics in the current context.

Whether or not the petitioner's increase in profits is a trend or an anomaly, however, and whether or not it is due to hiring more employees and utilizing less outside contractors does not dispose of the issue of the ability to pay the proffered wage. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner is obliged to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements.

This office makes exceptions to that general rule. If the petitioner already employed the beneficiary during a given year, and paid him the proffered wage, the petitioner would not need to rely on annual reports, tax returns, or financial statements to show the ability to pay. Having paid the wage, the petitioner would not be obliged to show the ability to pay it a second time. That scenario does not appear in this case.

Similarly, if the petitioner could demonstrate that hiring the beneficiary would result in a decrease in expenses, the savings could be shown to be sufficient to pay the proffered wage. This could be shown, for instance, if the beneficiary were going to

replace an existing employee, whose wages were greater than or equal to the proffered wage. Again, the savings occasioned by hiring the beneficiary could be shown, in that case, to be sufficient to pay the proffered wage.

Likewise, if the petitioner demonstrates that the beneficiary will replace contract labor, and that this arrangement will result in savings sufficient to pay the proffered wage, the petition might be approved.

In this case, the petitioner's president implied, in his letter of December 18, 2001, that the beneficiary would replace contractors, which would result in savings to the company. The petitioner, however, provided no evidence of the amount of those savings. The petitioner did not demonstrate, nor even state, what percentage of the amount it spent on contractors was spent on stone cutters or carvers. In fact, the petitioner has never demonstrated, nor even alleged, that it spent any money on contract stone cutters or carvers. Even if it had, it did not demonstrate, nor even state, what amount of that outside contract work the beneficiary would be able to replace. The record contains no evidence from which any prospective savings that would be occasioned by hiring the beneficiary can be calculated.

The petitioner must, therefore, show the ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. The petitioner has submitted no annual reports or financial statements, and must demonstrate its ability to pay the proffered wage, or fail to do so, based on its federal tax returns.

The reliance of the petitioner's president and the petitioner's asserted representative on the petitioner's gross receipts is misplaced. Showing that the petitioner's gross receipts were greater than the proffered wage is insufficient. 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 taxable income before net operating loss deduction and special deductions.

The proffered wage is \$35,490 per year. The priority date is March 7, 2001, which falls within the petitioner's fiscal year 2000. The petitioner declared a taxable income before net operating loss deduction and special deductions of \$0 during its fiscal year 2000 and ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage out of its income or its assets during its fiscal year 2000.

During its fiscal year 2001, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,019, an amount far short of the proffered wage. The Schedule L filed with that year's tax return also shows that the petitioner ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay the proffered wage during its 2001 fiscal year either out of its income or out of its assets.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during its 2000 and 2001 fiscal years. 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.