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U.S. Department of Homeland Security
Citizenship and Immigration Services

B6

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



File: WAC-02-189-50949 Office: California Service Center

Date: **DEC 15 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:



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 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental lab technician. 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 an appeal 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 or seasonal nature, for which qualified workers are not available in the United States.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 continuing ability to pay the wage offered beginning on the priority date, 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 request for labor certification was accepted for processing on October 11, 1995. The proffered salary as stated on the labor certification is \$550 per week which equals \$28,600 annually.

Counsel submitted a copy of the petitioner's 1995, 1996, 1997, 1998, 1999, 2000, and 2001 Form 1040 U.S. Individual Income Tax Returns including Schedule C, Profit and Loss from Business Statements.

The petitioner's Form 1040 for 1995 reflected an adjusted gross income of \$21,428. Schedule C reflected gross receipts of \$134,160; gross profit of \$96,706; wages of \$30,673; and a net profit of \$20,458.

The petitioner's Form 1040 for 1996 reflected an adjusted gross income of \$21,034. Schedule C reflected gross receipts of \$119,657; gross profit of \$119,657; wages of \$12,692; and a net profit of \$21,034.

The petitioner's Form 1040 for 1997 reflected an adjusted gross income of \$21,711. Schedule C reflected gross receipts of \$186,282; gross profit of \$186,282; wages of \$70,694; and a net profit of \$21,711.

The petitioner's Form 1040 for 1998 reflected an adjusted gross income of \$24,712. Schedule C reflected gross receipts of \$178,006; gross profit of \$136,228; wages of \$46,452; and a net profit of \$24,712.

The petitioner's Form 1040 for 1999 reflected an adjusted gross income of \$23,734. Schedule C reflected gross receipts of \$150,051; gross profit of \$150,051; wages of \$41,400; and a net profit of \$23,734.

The petitioner's Form 1040 for 2000 reflected an adjusted gross income of \$28,777. Schedule C reflected gross receipts of \$179,762; gross profit of \$179,762; wages of \$49,100; and a net profit of \$28,777.

The petitioner's Form 1040 for 2001 reflected an adjusted gross income of \$28,852. Schedule C reflected gross receipts of \$218,316; gross profit of \$218,316; wages of \$82,150; and a net profit of \$28,846.

On August 1, 2002, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage to include the beneficiary's Form W-2 Wage and Tax Statements for the years 1995 through 2001, inclusive.

In response, counsel submitted a statement from the petitioner of monthly expenses, a statement from the beneficiary, two separate affidavits verifying the beneficiary's employment, the petitioner's

2002 six-month financial statement, the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the first and second quarters of 2002, and the petitioner's payroll record for the first six months of 2002.

The petitioner's monthly expense statement indicated that after all expenses the petitioner had \$154.00 remaining from a monthly business income of \$2,980.00. The income statement for the six month period ending June 30, 2002, indicated that the petitioner had a net income of \$19,708.46

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director noted that the priority date of the petition was October 11, 1995.

On appeal, counsel argues that CIS failed to consider that the petitioner had an average annual payroll of \$50,000 during the period from 1995 to 2001. Counsel further argues that hiring the beneficiary would reduce the cost of "goods," thus increasing the petitioner's net income.

Counsel's argument is not persuasive. The conclusion that hiring the beneficiary would reduce the cost of goods is conjecture with no basis in demonstrated fact.

The petitioner's adjusted gross income for 1995 through 2001 was \$21,428, \$21,034, \$21,711, \$24,712, \$23,734, \$28,777, and \$28,852, respectively. The petitioner could not continually pay a salary of \$28,600 from these amounts. Furthermore, the petitioner's tax returns show that he has a spouse and two dependent children. In a similar case where the petitioner's adjusted gross income was \$20,000, his net taxable income was \$13,000, and the proffered wage was \$6,000 a year, the court agreed with INS (now CIS) finding it highly unlikely that the petitioner can, in fact, compensate the beneficiary in the amount which totals such a high percentage of his income. Clearly, the petitioner is unable to afford this rate of compensation." *Ubeda v. Palmer*, 539 F.Supp. 687 (N.D. Ill.1982) aff'd., 703 F 2d 571 (7th cir. 1983).

Accordingly, after a review of the record, 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 to the present.

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.