

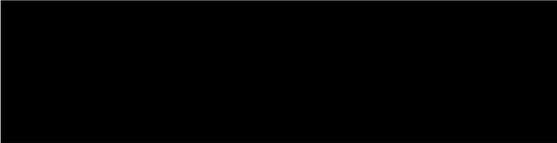
BAO

U.S. Department of Homeland Security

Citizenship and Immigration Services

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

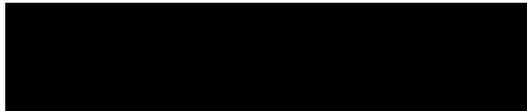


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Office: VERMONT SERVICE CENTER

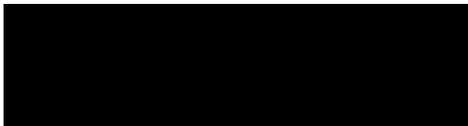
Date: DEC 16 2003

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:



Identifying data deleted to
prevent disclosure of unarranged
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 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 employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Administrative Appeals Office (AAO) on appeal and on motion. The matter is now before the AAO on a second motion to reopen. The motion will be granted. The petition will be denied.

The petitioner is a gas station. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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 AAO affirmed this determination on appeal and on motion.

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 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 February 12, 1996. The beneficiary's salary as stated on the labor certification is \$18.70 per hour which equates to \$38,896.00 per annum.

The AAO 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. The AAO determined that the petitioner had not submitted evidence that the amended tax return for 1996 was actually filed with the Internal Revenue Service (IRS).

On motion, counsel argues that:

In fact, in 2001, petitioner, through its accountant, did amend its tax returns for tax years 1996 and 1997, to more accurately reflect its income and expenses. However, due to clerical inadvertence, the amended 1996 and 1997 Forms 1120S U.S. Income Tax Returns were not properly filed with the IRS.

On February 5th 2003, petitioner properly refilled [sic] Forms 1120's with the IRS and had all forms stamped (Exhibit B & C). The 1996 Federal Statements, Page 1, Statement 2, reflects the amount of \$36,500 stated in Form 1120S, Schedule A, Line 5, which is the outside labor cost of [the beneficiary]. (Exhibit D).

Counsel's argument is not persuasive. The Forms 1120s are now in the record, stamped as received on February 5, 2003 by the IRS. As noted by the AAO, however, in its decision dated January 14, 2003:

The only difference in the Form 1120S submitted with the petition and the Form 1120S submitted on appeal is in the amount of gross receipts. The tax form submitted with the petition shows gross receipts of \$286,884, while the tax form submitted with the petition shows gross receipts of \$323,384.

The tax returns show ordinary incomes of -\$2,051 for 1996 and \$4,174 for 1997. These incomes are still insufficient to pay a proposed salary of \$38,896.00.

Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification 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 AAO's decisions of November 15, 2001 and January 14, 2003, are affirmed. The petition is denied.