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Bureau of Citizenship and Immigration Services

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

[REDACTED]

File: [REDACTED] Office: Texas Service Center

Date: JUL 11 2003

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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.

Helen E Crawford
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a manager. 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 director also determined that the petitioner had not established that the beneficiary had the requisite experience as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

8 C.F.R. § 204.5(1)(3) states, in pertinent part:

(ii) *Other documentation* -- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750), filed with the Department of Labor on January 2, 1998, indicates that the minimum requirement to perform the job duties of the proffered position of manager is four years of experience in the job offered.

The petitioner initially submitted a letter of employment from Subway stating that the beneficiary had worked as a manager from October 1991 to February 5, 2001. On September 13, 2001, the

petitioner was requested to submit evidence that the beneficiary had the requisite four years of experience, to include the beneficiary's W-2 Wage and Tax Statements. In response, counsel submitted copies of the beneficiary's W-2's for the years 1992 through 1995.

The director concluded that the evidence submitted was insufficient to establish the beneficiary's requisite training as a manager and denied the petition accordingly. The director noted that:

On 10/22/01, the petitioner submitted the following:

1. W-2 form for the beneficiary for 1992 for wages of \$4,330.
2. W-2 form for the beneficiary for 1993 for wages of \$3,250.
3. W-2 form for the beneficiary for 1994 for wages of \$6,920.
4. W-2 form for the beneficiary for 1995 for wages of \$5,600.

Evidence submitted casts doubt on the beneficiary's qualifications. The amount of the salary suggests that the beneficiary was unlikely to be working full-time as a manager for subway.

On appeal, counsel states that:

The alien worked in his brother's business many hours as an illegal alien without compensation and his W-2's clearly did not reflect the hours worked by the beneficiary. It has been generally accepted that the work experience is qualifying whether the alien obtained such experience in the proper manner or under the table.

Counsel's argument is not persuasive. The petitioner has failed to establish that the beneficiary had the requisite four years of experience as of January 2, 1998. Therefore, the petitioner has not overcome this portion of the director's decision, and the petitioner may not be approved.

The other issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage as of the priority date of the visa petition.

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 January 2, 1998. The beneficiary's salary as stated on the labor certification is \$7.00 per hour (35 hour week) or \$12,740.00 per annum.

Counsel initially submitted copies of the petitioner's 1998 and 1999 Form 1120S U.S. Income Tax Return for an S Corporation. The tax return for 1998 reflected gross receipts of \$1,547,007; gross profit of \$169,540; compensation of officers of \$0; salaries and wages paid of \$78,235; and an ordinary income (loss) from trade or business activities of -\$52,198. Net current assets for 1998 were \$51,460. The tax return for 1999 reflected gross receipts of \$2,351,903; gross profit of \$98,475; compensation of officers of \$0; salaries and wages paid of \$0; and an ordinary income (loss) from trade or business activities of -\$111,595. Net current assets for 1999 were \$763.

On September 13, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation which reflected gross receipts of \$2,892,895; gross profit of \$246,426; compensation of officers of \$0; salaries and wages paid of \$70,079;

and an ordinary income (loss) from trade or business activities of -\$5,640. Net current assets were \$14,323. Counsel also submitted copies of the beneficiary's 1993 through 1995 W-2 Wage and Tax Form.

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 "[t]he tax returns submitted by the petitioner do not establish the ability to pay the stated wage because the petitioner has been operating at a loss as of the priority date and continuing through at least 2000.

On appeal, counsel submits copies of the petitioner's bank statements and argues that:

The record already contains the Petitioner's IRS-1120 Corporate Tax Returns for 1998, 1999 and 2000 (attached for quick reference). The petitioner, incorporated in 1995, grew in sales from \$1,547,007 in 1998 to almost \$3,000,000 in the year 2000. This is dramatic sales growth. Additionally incorporated into the record with this statement are the corporate bank statements for this Petitioner reflecting available cash in the company's bank accounts of \$1,255,396 to pay the cumulative salary offered of \$38,304 during the period in question.

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel further states that the facts of this case are similar to an unpublished Service decision. It should be noted that while 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner's Form 1120S for calendar year 1998 shows an ordinary income of -\$52,198. The petitioner could not pay a proffered salary of \$12,740.00 out of this income. Net current assets for 1998, however, were \$51,460, more than the proffered wage.

The petitioner's Form 1120S for calendar year 1999 shows an

ordinary income of -\$111,595 and net current assets of \$763. The petitioner could not pay the proffered salary out of this income.

The petitioner's Form 1120S for calendar year 2000 shows an ordinary income of -\$5,640 and net current assets of \$14,323. The petitioner could pay the proffered wage from the net current assets. The petitioner, however, must establish the ability to pay the wage from the priority date until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). In this case, the petitioner was unable to pay the wage in 1999

Accordingly, after a review of the federal tax returns, 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 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.