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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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



File: EAC 02 086 51595 Office: Vermont Service Center

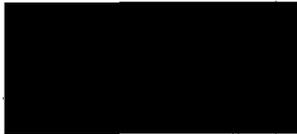
Date: JUL 16 2003

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:



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 construction contractor. It seeks to employ the beneficiary permanently in the United States as a construction equipment mechanic. 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 brief and additional evidence.

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 continuing ability to pay the proffered wage 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 February 5, 2001. The proffered salary as stated on the labor certification is \$25 per hour which equals \$52,000 annually.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120S U.S. income tax return of an S corporation and copies of 2000 and 2001 Form W-2 wage and tax statements showing that the petitioner employed the beneficiary during those years and the wages it paid to him.

Because the priority date of the instant petition is February 5, 2001, the amount paid to the beneficiary during 2000 and the income shown on the petitioner's 2000 tax return are not directly relevant to this matter. The 2001 W-2 form shows that the petitioner paid the beneficiary \$40,927.60 during that year.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on February 27, 2002, requested additional evidence pertinent to that ability. The director noted that the petitioner employed the beneficiary during 2001, but paid him less than the proffered wage. The Service Center requested that the petitioner demonstrate that it had the ability to pay the balance of the proffered wage during 2001.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120S U.S. tax return of an S corporation. That tax return shows that the petitioner declared a loss of \$205,703 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current assets included \$46,661 in cash, but that the petitioner's current liabilities exceeded its current assets.

On August 5, 2002, the Director, Vermont Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel submits the first page of a checking account statement showing the petitioner's account balance for each day during December 2001. That statement shows that on December 31, 2001, the petitioner's checking account balance was \$44,207.28. Counsel argues that this amount, plus the amount the petitioner actually paid the beneficiary during 2001, demonstrates that during 2001 the petitioner was able to pay the proffered wage in full.

8 C.F.R. § 204.5(g)(2) makes clear that evidence other than tax returns may be submitted and, in fact, enumerates the other acceptable types of evidence. Bank balances are not among the types of evidence enumerated. In any event, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the tax return. If the account

balance upon which counsel relies was included in Line 1 of the petitioner's Schedule L, cash, then that current asset, as was stated above, is exceeded by the petitioner's current liabilities.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2001. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary 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.