

PUBLIC COPY

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

Bl

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



JUL 16 2003

File: WAC 02 119 55526 Office: California Service Center

Date:

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
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 on appeal. The appeal will be dismissed.

On the Form I-290B appeal, counsel indicated that he represents the beneficiary in this matter. In support of that assertion, counsel filed a Form G-28 in which the beneficiary agreed to be represented by counsel. The beneficiary is not an affected party in this matter and has no standing to file an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). An appeal filed by or for someone other than an affected party is improperly filed, and an improperly filed appeal must be rejected. 8 C.F.R. § 103.3(a)(2)(v)(A). In this case, however, the petitioner previously filed a Form G-28 signed by the petitioner's owner. Counsel shall be recognized, therefore, as counsel for the petitioner, and the appeal treated as an appeal filed for the petitioner.

The petitioner is an auto body repair shop. It seeks to employ the beneficiary permanently in the United States as its manager. 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.

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 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 January 12, 1998. The proffered salary as stated on the labor certification is \$10.86 per hour which equals \$22,588.80 annually.

With the petition, counsel submitted unsigned copies of the petitioner's nominal 1998, 1999, and 2000 Form 1120 U.S. corporation tax returns. The 1998 tax return is for the petitioner's fiscal year ending October 31, 1999, the 1999 return is for the fiscal year ending October 31, 2000, and the 2000 return is for the fiscal year ending October 31, 2001.

The 1998 return shows that the petitioner's taxable income before net operating loss deduction and special deductions was -\$4,355 during that year. The accompanying Schedule L shows that the petitioner's current liabilities exceeded its current assets at the end of that year.

The 1999 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,319 during that year. The accompanying Schedule L shows that the petitioner's current liabilities exceeded its current assets at the end of that year.

The 2000 return shows that the petitioner's taxable income before net operating loss deduction and special deductions during that year was \$6,509. The accompanying Schedule L shows that at the end of that year the petitioner's current assets were \$4,176 and its current liabilities were \$2,798, which yields net current assets of \$1,378.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, the California Service Center, on April 8, 2002 requested additional evidence pertinent to that ability. The Service Center requested that the evidence be in the form of copies of annual reports, signed federal tax returns, or audited financial statements, and cover the entire period since the priority date. The Service Center also requested copies of the beneficiary's Form W-2 wage and tax statements for the years 1998 through 2001. Finally, the

Service Center requested the petitioner's Form DE-6 quarterly wage reports for the previous four quarters.

In response, counsel submitted Arizona Unemployment Tax and Wage Reports (UTW Reports) for all four quarters of 1998, 1999, and 2000, and for the first quarter of 2002. Counsel also submitted 1998, 1999, 2000 and 2001 Form W-2 wage and tax statements showing that during those years the petitioner paid \$16,640, \$20,060, \$22,568, and \$19,250 to the beneficiary, respectively.

In addition, counsel submitted an unaudited financial statement for the petitioner for its fiscal year ending October 31, 1999 and signed copies of the petitioner's 1998, 1999 and 2000 Form 1120 U.S. corporation income tax return.

On August 2, 2002, the Director, California 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 argued that the amounts actually paid to the beneficiary by the petitioner plus the amount of the petitioner's income demonstrates the ability to pay the proffered wage.

The petitioner's fiscal year ends on October 31 each year. The analysis of the funds available in this matter is complicated by that fact. The income shown on the petitioner's tax return for a given year was available to pay the proffered wage as was the amount of the petitioner's net current assets. However, those amounts must be added to the amount actually paid to the petitioner during that year to calculate the petitioner's ability to pay the proffered wage. Because the petitioner's fiscal year does not correspond to the calendar year, however, adding the petitioner's profits during its 2001 fiscal year, for instance, to the amount it paid to the beneficiary during the 2001 calendar year is not the most appropriate calculation available.

The UTW Reports provided by counsel break the amounts paid to the beneficiary into calendar quarters. Although, the petitioner's fiscal year does not end simultaneously with one of the calendar quarters, the best available calculation of the petitioner's ability to pay the proffered wage is reached by adding the petitioner's net profits during a given fiscal year, if any, to its net current assets during that same year, if any, and adding that amount to the wages paid to the petitioner during the four quarters most closely corresponding to the petitioner's fiscal year. The sum of those three amounts compared to the amount of the proffered wage shall determine the petitioner's ability to pay the proffered wage.

The priority date of this petition is January 12, 1998, which fell within the petitioner's 1997 fiscal year. Although the Service Center requested, on April 8, 2002, that the petitioner submit annual reports, tax returns, or audited financial statements demonstrating its ability to pay the proffered wage beginning on the priority date, the petitioner submitted no such evidence pertinent to its 1997 fiscal year.

The UTW Reports for the first three quarters of 1998 demonstrate that the petitioner paid the beneficiary \$3,840, \$4,160, and \$4,160, respectively, during those quarters, for a total of \$12,160. Those quarters fall within the petitioner's 1997 fiscal year. Counsel did not provide the petitioner's UTW Report for the last quarter of 1997, which also fell predominantly in the petitioner's 1997 fiscal year.

During its 1998 fiscal year, which ended October 31, 1999, the petitioner declared a loss rather than income. At the end of that year, the petitioner's current liabilities were greater than its current assets. The four calendar quarters which correspond most closely to the petitioner's 1998 fiscal year are the last quarter of 1998 and the first three quarters of 1999. The petitioner's UTW Reports show that the petitioner paid the beneficiary \$4,480, \$3,840, \$4,502, and \$6,076 during those quarters, respectively, for a total of \$18,898.

During its 1999 fiscal year, which ended October 31, 2000, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$4,319. Again, the petitioner's current liabilities exceeded its current assets at the end of that year. The four calendar quarters corresponding most closely to the petitioner's 1999 fiscal year are the last quarter of 1999 and the first three quarters of 2000. The petitioner's UTW Reports show that the petitioner paid the beneficiary \$5,642 during each of those four quarters, for a total of \$22,568.

During its 2000 fiscal year, which ended October 31, 2001, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$6,509. The accompanying Schedule L shows that at the end of that year the petitioner had current assets of \$4,376 and current liabilities of \$2,798, which equals \$1,578 in net current assets. The four calendar quarters corresponding most closely to the petitioner's 2000 fiscal year are the last quarter of 2000 and the first three quarters of 2001. The petitioner's UTW Reports show that the petitioner paid the beneficiary \$5,642, \$5,642, \$5,642, and \$6,236 during those quarters, respectively, for a total of \$23,162.

Although the Service Center requested evidence pertinent to the petitioner's 1997 fiscal year, the evidence submitted pertinent to that fiscal year consists of only three UTW Reports which show that the petitioner paid the beneficiary a total of \$12,160. That evidence is insufficient to demonstrate that the petitioner had the ability to pay the beneficiary \$22,588.80 during that year.

The evidence pertinent to the petitioner's 1998 fiscal year shows that the petitioner paid approximately \$18,898 to the beneficiary during that year, but not that it had any additional funds it could have used to pay the proffered wage, as it suffered a loss during that year and had negative net current assets at the end of that year. The evidence submitted is insufficient to demonstrate that the petitioner could have paid the beneficiary \$22,588.80 during that year.

The evidence pertinent to the petitioner's 1999 fiscal year shows that the petitioner paid approximately \$22,568 to the beneficiary during that fiscal year and could have increased that amount by \$4,319 using its income. The evidence demonstrates that the petitioner could have paid the proffered wage of \$22,588.80 during its 1999 fiscal year.

The evidence pertinent to the petitioner's 2000 fiscal year shows that the petitioner paid approximately \$23,162 to the petitioner during that year. As that amount exceeds the proffered wage of \$22,588.80, the petitioner has demonstrated that it had the ability to pay the proffered wage during that year. In addition, the petitioner had income and net current assets it could have used, if necessary, to increase the amount paid to the beneficiary.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during its 1997 and 1998 fiscal years. 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.