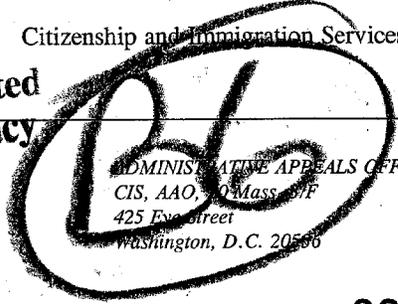


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U.S. Department of Homeland Security

Citizenship and Immigration Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 40 Mass. Ave.
425 Eye Street
Washington, D.C. 20566

OCT 02 2003



File: EAC 02 111 53845

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:

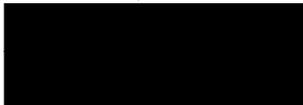


Beneficiary:



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 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 immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is an automotive repair and customizing firm. It seeks to employ the beneficiary permanently in the United States as an automotive custom painter. 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.

On appeal, counsel submits additional information and asserts that this documentation establishes the petitioner's ability to pay the beneficiary's proffered wage.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon 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 12, 1998. As noted by the director, the beneficiary's salary as stated on the labor certification is \$20.71 per hour or \$43,076.80 annually.

The petition initially included the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for the tax year 1998. It contains financial data indicating that the petitioner had gross receipts/sales of \$629,958; officers' compensation of \$24,000; salaries and wages of \$183,389, and an ordinary income of \$29,735. Schedule L of this tax return also reflected that the petitioner's net

current assets were -\$25,154.

The director instructed the petitioner to submit additional evidence of its ability to pay the proffered wage to the beneficiary as of the priority date and continuing to the present. The petitioner responded by submitting copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for the years 1999, 2000 and 2001. The 1999 return showed gross receipts or sales at \$273,757; no officers' compensation; salaries and wages at \$53,175; and an ordinary income of -\$3,296. The 2000 tax return showed \$586,885 in gross receipts or sales; no officers' compensation; \$155,800 in salaries and wages; and ordinary income of \$29,681. The tax return filed for the 2001 tax year showed \$661,010 in gross receipts or sales; no officers' compensation; salaries and wages at \$120,000, and an ordinary income of \$20,464. The petitioner failed to submit Schedule L with these tax returns.

The director denied the petition, noting that the evidence failed to establish that the petitioner had the ability to pay the proffered wage as of the priority date of the petition in 1998. The director stated that the petitioner's 1998 net income of \$29,735 was insufficient to cover the beneficiary's salary. The director added that Schedule L also reflected that the petitioner's assets were less than his current liabilities and failed to support its ability to pay the proffered wage. We agree. We would add that the petitioner's ordinary income of -\$3,296 in 1999, \$29,681 in 2000, and \$20,464 in 2001 also fails to meet the beneficiary's salary of \$43,076.80.

On appeal, counsel resubmits the petitioner's 1998 through 2001 corporate tax returns. Counsel also submits a letter from the petitioner and adopts it as his argument supporting the petitioner's ability to pay the offered wage of \$43,076.80. The petitioner's letter expresses the view that by hiring the beneficiary, it could reduce its "other costs" as reflected on line(s) 4 and 5 of schedule A of its tax returns. The petitioner states that these costs include amounts spent to refer airbrushing and other customizing work to other establishments. Generally these kinds of expenditures represent funds already disbursed and are not readily available to pay the wage of the beneficiary as of the filing date of the petition. Funds spent elsewhere may not be used as proof of the ability to pay the proffered wage. We further note that the petitioner's letter did not specifically identify amounts that the beneficiary would obviate by performing the same service. The petitioner did not state whether such a change in procedure would affect any other expenses. The petitioner's view that the business will grow as a result of hiring the beneficiary is essentially speculative. The ability to pay the proffered wage is not demonstrated by the speculative increase in profits or decrease in losses projected by the petitioner. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof. *Matter of Treasure Craft of California*, 14&N Dec. 190 (Reg. Comm. 1972).

In view of the foregoing, we cannot conclude that the petitioner has demonstrated its ability to pay the proffered wage in any of the tax years 1998 through 2001. As such, the petitioner has not established its ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status.

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.