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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

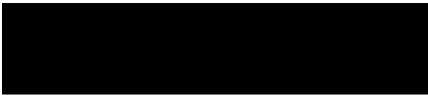


File: SRC 02 037 54285

Office: Vermont Service Center

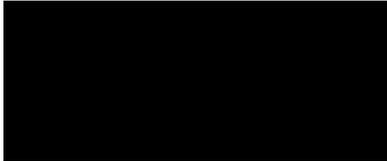
Date: OCT 16 2003

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:



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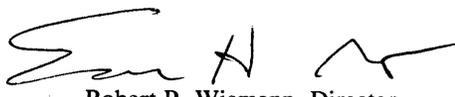
INSTRUCTIONS:

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 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 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 sustained.

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental lab 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.

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 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 October 12, 1999. The beneficiary's salary as stated on the labor certification is \$30,000.00 per annum.

In response to a request of the director for additional evidence, counsel submitted copies of the petitioner's Internal Revenue

Service (IRS) Form 1120. Form 1120 for the fiscal year from October 1, 1999 through September 30, 2000 showed a taxable income of -\$28,754. Form 1120 for the fiscal year from October 1, 2000 through September 30, 2001 showed a taxable income of \$9,268. Counsel also submitted copies of the beneficiary's 1999, 2000, and 2001 IRS Form W-2 Wage and Tax Statements which showed he was paid \$30,375.10, \$29,999.91, and \$29,999.91 respectively.

The director found the documentation submitted to be "contradictory and questionable as to validity" and that the petitioner had not demonstrated the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that the petitioner is "well able to pay the proposed salary to [the beneficiary]." With the appeal, counsel submits a letter from the petitioner's tax preparer, T.J. Middlebrook, who states that "salaries and wages are claimed as expenses on page 2, line 3, 'Cost of Labor' as well as page 1, line 12," of Form 1120.

Information found on the website of the Internal Revenue Service indicates that "Cost of Labor," line 3 of Schedule A, Form 1120, may include wages paid to production line workers, any part of supervisory salaries incurred for the actual production of goods, and 30% of salaries paid to officers. Compensation of officers (page 1, line 12 of Form 1120) may include only compensation for services rendered, not dividends.

The petitioner's 1120 for the tax year beginning October 1, 1999, shows compensation of officers as \$30,490 and cost of labor as \$8,871. Form 1120 for the tax year beginning October 1, 2000, shows compensation of officers as \$36,923 and cost of labor as \$10,110.

In the instant case, the explanation of the petitioner's tax preparer is plausible. From the documentation submitted, it would seem that the beneficiary's salary has been shown as compensation to an officer of the corporation.

After a review of the evidence submitted, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing.

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 met that burden.

ORDER: The appeal is sustained.