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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

**SEP 29 2003**

File: EAC 02 062 52426 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 (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 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 auto body repair firm. It seeks to employ the beneficiary permanently in the United States as an auto body repairer. 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 contends that the petitioner's 2000 corporate tax return demonstrates its ability to pay the offered wage to the beneficiary as of the priority date of the visa petition.

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 September 27, 2000. The beneficiary's salary as stated on the labor certification is \$21.51 per hour or \$44,740.80 annually. The information provided by the beneficiary on Form ETA 750-B indicates that the petitioner has employed the beneficiary as an auto body repairer since May 2000.

Along with the petition and copies of some of its incorporation documents, the petitioner initially submitted a copy of its Form 1120 U.S. Corporation Income Tax Return for the tax year of 2000. It

contained the following information:

Gross receipts or sales	\$ 229,038
Officers' compensation	(blank)
Salaries and Wages	111,400
Taxable income before	
Net operating loss deduction and special deductions	23,010

Schedule L of the petitioner's 2000 federal tax return reflected that the petitioner's net current assets were \$800.

On April 4, 2002, the director instructed the petitioner to submit additional evidence showing that it had the ability to pay the beneficiary's offered wage as of the priority date and continuing until the present. The director also requested that the petitioner provide a copy of the beneficiary's Form W-2 Wage and Tax Statement showing how much the beneficiary has been paid.

The petitioner responded by submitting a copy of its Form 7004 Application for Automatic Extension of Time To File Corporation Income Tax Return and a copy of a draft of its Form 1120 U.S. Corporation Income Tax Return for the tax year of 2001. This draft indicates that the petitioner had \$206,487 in gross receipts or sales, \$0- officers' compensation, \$62,000 in salaries and wages, and \$6336 in taxable income before net operating loss deduction. Schedule L of this document indicates that the petitioner's net current assets for the tax year 2001 were -\$47,253. The petitioner also stated that it had not issued a W-2 to the beneficiary and otherwise provided no evidence of any sums paid for his services.

The director concluded that the evidence failed to establish that the petitioner had the ability to pay the beneficiary's offered wage as of September 27, 2000, the visa priority date. The director noted that the petitioner's taxable income shown on its 2000 tax return was over \$20,000 less than the beneficiary's salary as set forth on the labor certification. We concur.

On appeal, counsel submits another copy of the petitioner's 2000 corporate tax return and asserts that having paid \$111,400 in salaries and wages, the petitioner still had a taxable net income of \$23,010. Counsel's argument is not persuasive. In determining the petitioner's ability to pay the proffered wage, the Bureau examines the net income figure set forth on the tax return. The tax return must reflect that the employer generates sufficient net income to cover the offered salary. *See, e.g., K.C.P. Food Co. v. Sava, 623 F. Supp. 1080 (S.D.N.Y. 1985)*. In this case, both the 2000 and draft 2001 tax returns fail to show that the petitioner's taxable income of \$23,010 and \$6336, respectively, covers the beneficiary's \$44,740.80 salary. The amount disbursed to others as salaries and wages is an expense and does not represent readily available funds to pay the beneficiary's proffered wage. We also note that the amounts equaling the petitioner's net current assets in both tax years fails to cover the beneficiary's offered wage.

Based on the financial data contained in the record, the petitioner has not demonstrated the 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.