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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: WAC 02 190 54956 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: SELF-REPRESENTED

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, California 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 mechanic. 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, the petitioner submits additional evidence and contends that the owner's other real and personal assets support the petitioner's ability to pay the 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 December 23, 1996. The beneficiary's salary as stated on the labor certification is \$734.40 per week or \$38,188.80 annually.

As evidence of its ability to pay the beneficiary's offered wage, the petitioner initially included a copy of the owner's Form 1040 U.S. Individual Income Tax Return for 2001. It shows an adjusted gross income of \$50,818. Schedule C attached to the tax return shows that the petitioning business had \$134,614 in gross receipts or sales, \$13,400 in wages, no labor costs, and a net profit of \$23,495.

On August 12, 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 noted that the petitioner's business is a sole proprietorship, and instructed the petitioner to submit a statement of monthly expenses for the petitioner's family.

The petitioner responded by submitting copies of its individual Form 1040 income tax returns for the years 1996 through 2000 and resubmitted the 2001 tax return. The information on the 1996 tax return shows an adjusted gross income of \$19,825, gross business receipts or sales of \$246,467, business wages of \$22,284, no labor costs, and a net business profit of \$26,766.

The 1997 return shows an adjusted gross income of \$21,472, gross business receipts or sales of \$287,853, wages at \$38,977, no labor costs, and a net profit of \$26,671.

The 1998 return shows an adjusted gross income of \$27,541, gross business receipts or sales of \$340,651, wages at \$37,288, no labor costs, and a net profit of \$34,008.

The 1999 tax return shows an adjusted gross income of \$24,810, gross business receipts or sales of \$211,581, wages at \$23,353, no labor costs, and a net profit of \$30,192.

The 2000 tax return shows an adjusted gross income of \$35,611, gross receipts or sales of \$54,452, wages at \$4,870, no labor costs, and a net profit of \$15,820.

The record fails to establish that the petitioning business' owner submitted a summary of monthly family expenses.

The director concluded that evidence failed to establish that the petitioner had the ability to pay the beneficiary's offered wage as of the priority date of December 23, 1996 and continuing until the present. The director noted that, excepting the 2001 tax return, the petitioner's returns all showed adjusted gross income figures far less than the beneficiary's offered wage. The director also noted that it would not be reasonable to assume that the petitioner's family of four could live off of the amount of income remaining after the beneficiary's proffered wage has been subtracted from the adjusted gross income.

On appeal, the petitioning business' owner asserts that the beneficiary will increase the income of the shop by allowing the owner to perform other duties. He also submits a copy of a letter from his accountant purporting to state that the personal net worth of the owners is more than one million dollars, taking into account projections of future income from the petitioner's auto repair business and real property owned. The petitioner additionally submits copies of documents related to real property appraisals and real estate transactions conducted by the owner of the petitioning business. It is noted that the owner's projections as to the beneficiary's future contribution to the business' income is essentially speculative. A petitioner must establish its ability to pay based on the requirements set forth in 8 C.F.R. § 204.5(g)(2) which states that annual reports, federal tax returns and audited financial statements are the forms of primary evidence that will be considered. It is also noted that real property is not representative of assets

that can easily be converted to cash. Taxable income and, in some cases, net current assets can properly be considered to constitute such funds that would readily be available to establish the petitioner's ability to pay the proffered wage. 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, as noted by the director, the petitioner's adjusted gross income for every year except 2001, fell well short of meeting the proffered 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.