

PUBLIC COPY

U.S. Department of Homeland Security

Citizenship and Immigration Services

Identification data deleted to
protect information warranted
invasion of personal privacy

B6

ADMINISTRATIVE APPEALS OFFICE
RIS, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536



File: EAC 02 143 52858 Office: Vermont Service Center

Date: **FEB 24 2004**

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a beauty parlor. It seeks to employ the beneficiary permanently in the United States as a hair stylist. 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 March 6, 2001. The proffered salary as stated on the labor certification is \$12.00 per hour which equals \$24,960 annually.

With the petition, counsel submitted a copy of the 2000 Schedule C of the Form 1040 individual income tax return of the petitioner's owner. Because the priority date of this petition is March 6, 2001, the income of the petitioner's owner during 2000 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, on June 19, 2002, the Vermont Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. Specifically, the petitioner was requested to provide a complete copy of the tax return of the petitioner's owner, a copy of any Form W-2 wage and tax statement showing wages paid to the beneficiary during 2001, and a statement of the petitioner's monthly budget.

In response, counsel submitted a copy of the 2001 Form 1040 individual income tax return of the petitioner's owner. The return states an adjusted gross income of \$19,510.

In addition, counsel submitted copies of statements pertinent to the petitioner's owner's investments. An IRA statement indicates a total investment value, on March 31, 2002, of \$22,690.44. A life insurance statement indicates a surrender value, on June 30, 2002, of \$4,323.06. Another insurance policy appears to indicate a total cash value, also on June 30, 2002, of \$3,101.43. An investment portfolio statement indicates a balance, on May 7, 2002, of \$3,220.94.

In a cover letter which accompanied the additional evidence, counsel noted that the Schedule C which was submitted with the petitioner's owner's tax return shows that the petitioner paid \$18,746 in wages and produced a net profit of \$33,154. Counsel stated that the evidence of the petitioner's owner's investments should be considered in evaluating the petitioner's ability to pay the proffered wage, thus implying that the value of those investments is available for that purpose.

On October 24, 2002, the Director, Vermont Service Center, denied the petition, finding that the petitioner had not demonstrated the continuing ability to pay the proffered wage beginning on the priority date. The director noted that the petitioner's income during 2001 was insufficient to pay the proffered wage. The director further noted that none of the balances of the petitioner's investments was sufficient, individually, to pay the proffered wage.

In that decision, the director did not address the issue of the wages allegedly paid to other employees, whom counsel implied the beneficiary would replace when she receives employment

authorization.

On appeal, counsel argues that the sum of the petitioner's net income of \$33,154, plus the amount of the wages paid to other employees, \$18,476, and the cash value of the petitioner's various investments, \$31,465.98, is available and adequate to pay the proffered wage. Counsel also argued that the petitioner would produce additional profit by hiring the beneficiary, and that the additional income would also be available to pay the proffered wage.

That the petitioner's profits would increase as a result of hiring the petitioner is speculative. No part of that anticipated increase in profits will be included in the calculation of the funds available to pay the proffered wage.

The petitioner's net income is not available to pay the proffered wage. The petitioner is a sole proprietorship. The petitioner must show, therefore, that the petitioner's owner would have the ability to pay the proffered wage while continuing to sustain himself. The amount available toward that calculation from the proceeds of the petitioner's business and the petitioner's owner's income is shown at line 33, adjusted gross income, of the petitioner's owner's tax return. In 2001, that amount was \$19,510.

The largest of the petitioner's investments is an IRA. The proceeds of an IRA account are not necessarily readily available. Counsel suggested that the IRA is available to pay the proffered wage, but presented no evidence in support of that implicit assertion. No part of that IRA account will be included in the calculation of the funds available to pay the proffered wage.

Although the statements of the petitioner's investment accounts and insurance policies pertain to various dates during 2002, no reason exists to believe that the balances were vastly different during 2001, and this office shall assume, arguendo, that they were the same. The balances shown on those statements, minus the IRA statement, total \$10,645.43.

Line 26 of the petitioner's owner's 2001 Schedule C states that the petitioner paid \$18,746 in wages during that year. Counsel states that the beneficiary would replace both of the part-time workers to whom those wages were paid.

Those three amounts, \$19,510, \$10,645.43, and \$18,746, total \$48,901.43. The proffered wage is \$24,960 which, subtracted from that total yields a difference of \$23,941.43. If the petitioner had demonstrated that the difference was sufficient to pay his

living expenses, the petition would be approvable.

In the June 19, 2002 Request for Evidence, the Vermont Service Center requested that the petitioner provide a copy of the petitioner's owner's monthly budget, "including rent or mortgage payments, food, utilities, clothing, transportation, insurance, medical costs, etc. for 2001." The petitioner did not provide that requested evidence. As such, we are unable to say whether the sum of the petitioner's profits, the petitioner's owner's liquid investments and savings, and the amount which would have been saved by releasing the petitioner's two part-time employees, would have been sufficient to pay the proffered wage and still yield enough to support the petitioner during 2001.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it 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.