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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



FEB 24 2004

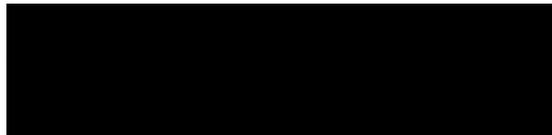
File: EAC 02 137 52455 Office: Vermont Service Center Date:

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 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 dismissed.

The petitioner is a masonry company. It seeks to employ the beneficiary permanently in the United States as a cement mason. 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 and continuing.

On appeal, counsel submits a brief and additional evidence. Although the record contains a Notice of Entry of Appearance as Attorney or Representative (Form G-28) signed by the petitioner, it has not been signed by counsel. Nevertheless, counsel's signature appears elsewhere in the record, including as the preparer of the petition form. It is also noted that the director did not bring this discrepancy to counsel's attention. For the sake of expediency, the appeal as filed by counsel will be accepted.

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, and continuing. Here, the petition's priority date is March 26, 2001. The beneficiary's salary as stated on the labor certification is \$22.33 per hour which equates to \$46,446.40 per annum.

As evidence of the ability to pay the proffered wage, the petitioner initially submitted a statement from its accountant which stated that the company had gross sales of \$425,000.00 and could accommodate a salary of \$48,000.

In response to a request by the director for additional evidence of the petitioner's ability to pay the wage offered, counsel submitted a copy of an Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement for the beneficiary which showed he was paid \$9,600 by the petitioner in 2001, and a copy of the petitioner's 2001 (IRS) Form 1040 which showed an adjusted gross income of \$43,212.00.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel re-submits the petitioner's 2001 tax return and submits a letter from the petitioner's accountant who asserts that by employing the beneficiary in accordance with the terms of the labor certification the petitioner could eliminate subcontractors and therefore pay the beneficiary's salary. The accountant also states that the petitioner has income from other sources as indicated on Form 1040. Counsel also submits bank statements for the petitioner's business checking account, and asserts that these statements show that the proffered wage could be met.

Schedule C, Profit and Loss from Business, Part 3 which is attached to the petitioner's 2001 Form 1040 shows \$81,125 for cost of labor. The accountant's letter mentioned above indicates that this total amount went to sub-contractors. There is nothing in the record to indicate how many sub-contractors were used and how much each was paid. The petition itself indicates that the petitioner has three employees. The record shows that the petitioner paid the beneficiary \$9,600 in 2001. Based on the evidence of record, the claim that the beneficiary would replace sub-contractors is without foundation.

The accountant's letter, submitted on appeal, also indicates that the petitioner's has other sources of income. Although the petitioner owns a rental property, the 2001 tax return shows a loss of (\$20,342) for that property. This argument is certainly not convincing.

Counsel's claim that the petitioner's business bank account shows sufficient cash flow to pay the proffered wage is also not convincing, since there is nothing in the record to establish that these monies somehow represent funds beyond those of the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's IRS Form 1040 for calendar year 2001 shows a taxable income of \$43,212.00. The petitioner could not pay a proffered wage of \$46,446.40 a year out of this income.

Accordingly, after a review of the record, it is concluded that the petitioner has not 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 not met that burden.

ORDER: The appeal is dismissed.