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U.S. Citizenship
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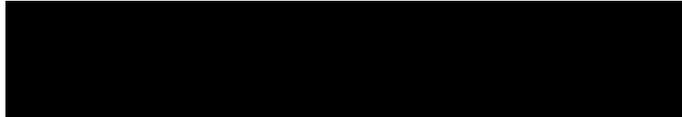


FILE: EAC 00 243 51427 Office: VERMONT SERVICE CENTER

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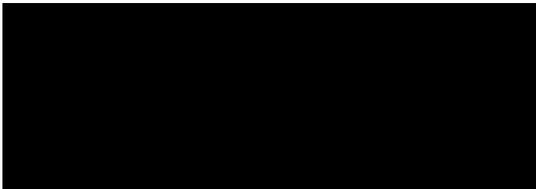
MAR 02 2004

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 of the Administrative Appeals Office 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.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based preference visa petition. The director's decision to deny the petition was affirmed by the Administrative Appeals Office (AAO) on appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted. The petition will be denied.

The petitioner is a car wash. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. As required by statute, the petition was 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. The AAO affirmed this determination on appeal.

On motion, counsel submits a statement.

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. Here, the petition's priority date is February 6, 1996. The beneficiary's salary as stated on the labor certification is \$17.13 per hour or \$35,630.40 per annum.

The AAO affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence of its ability to pay the proffered wage as of the priority date of the petition.

On motion, counsel argues:

As set forth in the previously submitted affidavit of Ruben Berenblatt (copy enclosed), these entities share a joint principal, director and sole shareholder, himself. Moreover, Mr. [REDACTED] is willing to pledge the ample assets of 124 to cover any liability to pay the beneficiary incurred by Junction. This is an expression of what, for him, represents a prudent business decision.

The petitioning entity in this case is a corporation. Consequently, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958;AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec.530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec.631 (Act. Assoc. Comm. 1980).

A review of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for fiscal year 1996 shows an ordinary income of -\$33,303, an amount less than the proffered wage. The petitioner cannot pay a proffered wage of \$35,630.40 per year from a negative income.

Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage as of the priority date of the application for alien employment certification as required by 8 C.F.R. § 204.5(g)(2). Therefore, the petition may not be approved.

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 AAO's decision of May 7, 2002 is affirmed. The petition is denied.