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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 00 231 50330 Office: VERMONT SERVICE CENTER Date: MAY 29 2002

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted] Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center. In response to a subsequent motion to reconsider, the director affirmed his decision to deny the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a firm which specializes in software development and consultancy. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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 filing date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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 filing 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 filing date is October 7, 1999. The beneficiary's salary as stated on the labor certification is $74,000.00 per annum.

The petitioner submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On November 8, 2000, the petitioner was requested to submit evidence of its ability to pay the proffered wage, to include the petitioner's 1999 tax return.

In response, counsel submitted a copy of the beneficiary's W-2 Wage and Tax Statement which showed he was paid $64,384.64 in 1999, a copy of an unaudited financial statement for the period ended December 31, 1999, and a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return. The federal tax return reflected gross receipts of $626,518; gross profit of $626,518; compensation of officers of $0; salaries and wages paid of $344,882; depreciation of $544; and a taxable income before net operating loss deduction and special deductions of $861. Schedule L reflected total current assets of $8,003 with $62 in cash and total current liabilities of $45,325.

The director determined that the documentation was insufficient to establish the ability to pay the proffered wage and denied the petition accordingly. The director noted that:

> You have again indicated outside consultants could have been avoided if the beneficiary was employed. You also indicated that you are owed money by clients. Speculation concerning possible funds can not be used to establish an ability to pay the proffered salary. Those funds were not available as of the date of filing. You also indicate that you only had to establish that you could pay the salary on a quarterly basis. The financial transactions of 1999 are all completed. Your company should, therefore, be able to show sufficient funds were available for paying the beneficiary's salary during that year.

On appeal, counsel reiterates his argument that "the INS Adjudicating Officer failed to factor in the amounts that the Employer had paid to independent consultants in/for the year 1999, amounts that would have been available to pay the proffered salary to a permanent employee, such as the Alien identified in the Labor Certification Application and the Preference Petition."

A review of the federal tax return for 1999 shows that when one adds the depreciation and the taxable income, the result is -$317, less than the proffered wage.

Accordingly, after a review of the federal tax return and additional documentation furnished, it is concluded that the petitioner has not established that it had sufficient available

funds to pay the salary offered at the time of filing of the petition and continuing to present.

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.