U.S. Department of Justice

Immigration and Naturalization Service

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

File: WAC 01 056 51955 Office: California Service Center Date: FEB 25 2003

IN RE: Petitioner: [redacted]
Beneficiary:

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]

PUBLIC 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, California Service Center. The Associate Commissioner for Examinations dismissed a subsequent appeal, affirming the director's decision. The matter is now before the Administrative Appeals Office on a motion to reconsider. The motion will be granted, the previous decisions of the director and Associate Commissioner will be affirmed, and the petition will be denied.

The petitioner is a medical supply and equipment company. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a bookkeeper. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of, June 10, 1997, the priority date of the visa petition. The Associate Commissioner affirmed that decision, dismissing the appeal.

On motion, counsel submits a brief and additional documentation.

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 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 petition's priority date is June 10, 1997. The beneficiary's

salary as stated on the labor certification is $11.21 per hour which equals $23,316.80 annually.

With the petition, counsel submitted a copy of the petitioner's 1999 Form 1120S U.S. Income Tax Return for an S Corporation covering that calendar year.

That return reflects gross receipts of $668,478; gross profit of $476,433; compensation of officers of $0; salaries and wages paid of $130,473; depreciation of $64,093; and an ordinary income (loss) from trade or business activities of -$28,352. Schedule L reflected total current assets of $218,747 and total current liabilities of $116,676. The value of the petitioner's net current assets, then, was $102,071.

On December 21, 2000, the California Service Center determined that the petitioner had submitted insufficient evidence of its ability to pay the proffered wage. The California Service Center issued a Request For Evidence asking that the petitioner provide evidence of its ability to pay the proffered wage and its 1997 and 1998 tax returns.

In response, counsel submitted copies of the petitioner's 1997 and 1998 Form 1120S U.S. Income Tax Returns for an S Corporation. The 1997 return reflects gross receipts of $327,614; gross profit of $210,435; compensation of officers of $0; salaries and wages paid of $98,069; depreciation of $25,788; and an ordinary income (loss) from trade or business activities of -$29,465. Schedule L reflected total current assets of $161,613 and total current liabilities of $180,672. The value of the petitioner's net current assets at the end of that year, then, was a loss of $19,059.

The 1998 return reflects gross receipts of $703,143; gross profit of $413,377; compensation of officers of $0; salaries and wages paid of $104,910; depreciation of $52,462; and an ordinary income (loss) from trade or business activities of -$36,260. Schedule L reflected total current assets of $264,215 and total current liabilities of $228,154. The value of the petitioner's net current assets at the end of that year was a loss of $36,061.

In a letter dated December 21, 2000, counsel argued that, despite its losses, the petitioner has the ability to pay the proffered wage. Counsel argued that the depreciation deduction claimed by the petitioner on its tax returns should be added to ordinary income in determining the petitioner's ability to pay the proffered wage.

On December 22, 2000, the Director, California Service Center,

issued a Notice of Intent to Deny the petition. The director noted that the petitioner had submitted insufficient evidence of its ability to pay the proffered wage. The petitioner was accorded an opportunity to provide additional evidence or argument.

On January 3, 2001, the Director, California Service Center, denied the petition. The petitioner appealed. In a statement submitted in support of that appeal, counsel stated that the evidence submitted clearly established that the petitioner had and continues to have sufficient income to pay the proffered wage.

On April 4, 2002, the Associate Commissioner for Examinations dismissed the appeal, noting that during 1997, the petitioner's ordinary income plus the petitioner's depreciation deduction equalled -$3,677, which is insufficient to pay the proffered wage.

On motion, counsel states that the Form ETA-750 in this matter was filed on November 13, 1998, and that the petitioner is obliged to demonstrate its ability to pay the proffered wage from that date forward. To demonstrate that ability, counsel submits banks statements from November 1998 and after.

However, the Form ETA-750 in this matter was filed on June 10, 1997. The Associate Commissioner correctly found that the petitioner's tax return from 1997 indicates that during that calendar year, neither the petitioner's profits, depreciation deduction, net current assets, nor any combination of them, was sufficient to pay the proffered wage. Counsel has submitted no evidence to counter that finding.

The documentation submitted does not establish that the petitioner had sufficient available funds during 1997 to pay the proffered wage. Therefore, the objection of the Associate Commissioner has not been overcome on the motion.

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. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of April 4, 2002 is affirmed. The petition is denied.