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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

B6

[redacted]

File: EAC 02 076 50770 Office: Vermont Service Center Date: FEB 02 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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 metal fabricating company. It seeks to employ the beneficiary permanently in the United States as a parts salvager. 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 statement and indicates that a separate brief and/or evidence would be submitted within thirty days. To date, however, no further documentation has been received. Therefore, a decision will be made based on the record as it is presently constituted.

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 January 14, 1998. The beneficiary's salary as stated on the labor certification is $18.63 per hour or $38,750.40 per annum.

Counsel submitted copies of the petitioner's 1998, 1999, and 2000 Form 1120S U.S. Income Tax Returns for an S Corporation. The tax return for 1998 showed an ordinary income from trade or business activities of $117,332. The tax return for 1999 showed a loss from trade or business activities of -$957,156. The tax return for 2000 showed a loss from trade or business activities of -$652,557.

The director determined that, although the proffered wage could have been met in 1998, the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that there are many companies who have annual losses but still continue operations. Counsel further argues that "the petitioner has been in business since 1980 and there are ups and downs during the economic cycle but that does not mean that the petitioner is not able to pay the proffered wage to the beneficiary."

As noted above, the petitioner's Form 1120S for 1998 shows an ordinary income of $117,332. The petitioner could pay a proffered salary of $38,750.40 out of this income.

In 1999, the petitioner Form 1120S showed a net income (loss) of -$957,156. An examination of Schedule L for that year showed that petitioner's liabilities exceeded its assets. The wage could not have been met in that year. The 2000 Form 1120S shows a net income (loss) of -$652,557; however, in 2000, the petitioner's assets exceeded liabilities by $50,403. The petitioner could have paid the annual salary of $38,750.40 out of that amount.

The record contains copies of Forms 1040 for the beneficiary for 1999 and 2000. The beneficiary shows wages of $22,806 in 1999, and $28,992 in 2000. The source or sources of these incomes is not given, and no W-2 Wage and Tax Statements for the beneficiary have been provided.

The petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. *See* 8 C.F.R. § 204.5(g)(2).

Accordingly, after a review of the federal tax returns, 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 to present.

Beyond the decision of the director, it is noted that the labor certification requires that the beneficiary have two years of experience in the job offered; however, the record contains no evidence of experience in the format required by 8 C.F.R § 204.5(g)(1).

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.