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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

[redacted]

File: WAC-02-129-50696 Office: California Service Center Date: MAR 18 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 the 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a printer. It seeks to employ the beneficiary permanently in the United States as an engrosser. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the petition because he determined the petitioner failed to establish its ability to pay the proffered wage.

On appeal, counsel argues that the petitioner has the ability to pay the proffered wage.

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.

The regulations at 8 C.F.R. § 204.5(g)(2) state 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. The petition's priority date in this instance is September 4, 1998. The beneficiary's salary as stated on the labor certification is $15.15 per hour or $31,512 per year.

With its initial petition, counsel submitted copies of the petitioner's 1998 through 2001 Form 1040 U.S. Individual Income Tax return and Schedule C, Profit and Loss From Business Statement. Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss From Business Statement for 1998 reflected an adjusted gross income of $99,794; Schedule C reflected gross receipts of $396,385; gross profit of $308,879; wages of $51,570; and a net profit of $90,029. Form 1040 U.S. Individual Income Tax Return for 1999 reflected an adjusted gross income of $87,453.

Schedule C reflected gross receipts of $371,876; gross profit of $281,661; wages of $54,750; and a net profit of $84,632. Form 1040 U.S. Individual Income Tax Return for 2000 reflected an adjusted gross income of $87,395. Schedule C reflected gross receipts of $425,250; gross profit of $319,773; wages of $56,000; and a net profit of $73,758. Form 1040 U.S. Individual Income Tax Return for 2001 reflected an adjusted gross income of $80,462. Schedule C reflected gross receipts of $432,758; gross profit of $328,904; wages of $56,980; and a net profit of $74,442.

The director concluded that the petitioner had submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated October 2, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted that the petitioner as a "sole Proprietorship" submit monthly expenses for the family.

Counsel submitted a statement reflecting that total monthly expenses for the petitioner and his wife were $2,732, which is $32,784 annually. The petitioner also submitted photocopied tax documents, previously submitted.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. The director noted that the petitioner's owner could have paid the proffered wage out of the petitioner's profits during 1998 through 2001, but would not then have had sufficient resources to support his family.

On appeal, counsel states that the applicable laws are outdated and do not reflect the extended period of time required to obtain labor certification approval. Counsel further states that Federal Poverty Guidelines are mere assumptions of what an average family of four might require and should not be used to mandate what amount of money a family may live on.

Counsel's assertions on appeal need not be considered as the director's decision is erroneous. The petitioner's Form 1040 for calendar years 1998, 1999, 2000 and 2001 shows an adjusted gross income of $99,794, $87,453, $87,395, and $80,462, respectively. The petitioner could pay a proffered salary of $31,512 out of the lowest of these amounts, even after reducing them by the petitioner's annual expenses of $32,784.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date 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 met that burden.

ORDER: The appeal is sustained.