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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC-01-109-53746 Office: VERMONT SERVICE CENTER Date: MAR 22 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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 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.

Helen E Crawford for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and came before the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed. The matter is again before the AAO on a motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a beauty salon firm. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. 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.

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 regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this matter turns, in part, 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 October 17, 1997. The beneficiary's salary as stated on the labor certification is $13.50 per hour or $24,570.00 per year (35 hour week).

The regulation at 8 C.F.R. § 103.5(a) states in part:

> Any motion to reconsider an action by [CIS] filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before [CIS] filed by an applicant or petitioner, 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 [CIS] where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

Three days are added to the permissible period when the notice of the decision is by mail. 8 C.F.R. § 103.5a(b).

The regulation at 8 C.F.R. § 103.5(a)(2) states as follows.

> *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decisions was in error because:

(i) The requested evidence was not material to the issue of eligibility;

(ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or

(iii) The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

The regulation at 8 C.F.R. § 103.5(a)(3) states as follows.

> *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application or law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel's motion was filed on August 7, 2002, a date less than thirty days after the July 8, 2002 decision on the petitioner's appeal. Therefore the motion is timely.

Counsel's motion contains additional evidence consisting of a letter from GreenPoint Bank dated July 29, 2002 stating a bank balance of the owner of $73,623.78 on July 29, 2002 and an average daily balance from October 1997 to July 29, 2002 in excess of $88,000.00. Because of the submission of additional evidence the motion will be considered as a motion to reopen.

Before the director issued his decision in the instant case, the director had issued a request for evidence (RFE) dated August 4, 2001 which requested additional evidence to establish the petitioner's ability to pay the proffered wage from the October 17, 1997 priority date through the present. The RFE contained the following statement, "If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business."

Notwithstanding this language in the RFE, the petitioner's response failed to include any copy of the owner's individual tax return for any of the years at issue. The petitioner also failed to submit copies of any tax documents for the year 1997.

The evidence in the record prior to the decision of the director which was relevant to the issue of the ability to pay the proffered wage consisted of Schedule C attachments to the tax returns of the owner of the petitioner for the years 1998, 1999 and 2000, and an undated letter from GreenPoint Bank, Brooklyn, New York, stating a bank balance of the owner of $27,000 in April 1997.

The Schedule C's show net profits on line 31 of $3,372 for 1998, $12,554 for 1999 and $11,948 for 2000.

The director's decision states that the director had received the petitioner's individual tax returns for 1998, 1999 and 2000. Nonetheless the record does not contain any Form 1040 individual tax returns, but only the Schedule C attachments for those years. The director referred to the figures shown on line 31 of each Schedule C as "total income" rather than "net profits." The director found that the amounts shown were insufficient to establish the petitioner's ability to pay the proffered wage of $24,570.00 during those years, and denied the petition.

On appeal counsel submitted new evidence consisting of a letter dated December 22, 2001 from GreenPoint Bank stating a bank balance of the owner of $56,388.64 on October 17, 1997.

In its decision on appeal the AAO identified the tax documents in evidence as copies of Schedule C, and correctly summarized the information therein. The AAO also noted the submission on appeal of the letter from the bank of the owner of the petitioner stating the owner's balance as $56,388.64 as of October 17, 1997. The AAO found that even with that amount of cash available as of the October 17, 1997 priority date, the net profits shown on the Schedule C's were insufficient to pay the proffered wage of $24,570 for each of the years at issue.

In his motion to reopen and reconsider counsel asserts that the reasoning in the AAO decision implies that evidence of the owner's bank balances may be added to the petitioner's net profits in order to establish the petitioner's ability to pay the proffered wage. Counsel asserts that the total profits of the business for 1998, 1999 and 2000 of $27,874 when combined with the owner's average savings during that period were more than sufficient to pay the petitioner's monthly compensation for the 40 months from the October 17, 1997 priority date until the January 22, 2001 date of the director's decision.

Counsel's assertions on appeal fail to address a more fundamental deficiency in the evidence which was not mentioned in the decision of the director or in the decision of the AAO on appeal. Since the petitioner is a sole proprietorship, the resources and the expenses of the petitioner's owner must be considered, not merely the resources and expenses of the business which is the petitioner. When evaluating a petitioner which is a sole proprietorship the AAO looks to the adjusted gross income of the owner as evidence of the petitioner's ability to pay the proffered wage. The AAO also considers the monthly household expenses of the owner, including the expenses of supporting any dependents of the owner. In the instant case, however, the record lacks any tax returns for the owner of the petitioner and the record also lacks any statements of monthly household expenses of the owner.

Notwithstanding the petitioner's submission of evidence pertaining to the bank balances in an account of the owner of the petitioner, the record therefore still lacks essential evidence pertaining to the owner. The record fails to establish that the owner had sufficient resources to allow the petitioner to pay the proffered wage from the priority date through the present while continuing to pay the monthly household expenses of the petitioner during that period. The additional evidence submitted with the motion therefore is insufficient to provide a basis for reopening the instant case. 8 C.F.R. § 103.5(a)(2).

The petitioner's motion also fails to satisfy the requirements for a motion to reconsider, since the motion fails to state reasons which establish that the decision of the AAO was incorrect based on the evidence in the record as of the date of the AAO's decision. 8 C.F.R. § 103.5(a)(3).

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 motion is dismissed.