

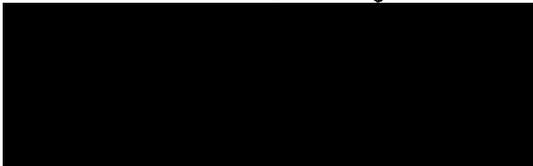


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U.S. Department of Justice  
Immigration and Naturalization Service

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



File: EAC-00-190-52251 Office: Vermont Service Center Date: OCT 18 2006

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:  
[Redacted]

**PUBLIC COPY**

**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 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 that 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 employment-based visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a traffic/transportation engineering business. It seeks to employ the beneficiary permanently in the United States as a transportation engineer at an annual salary of \$59,182. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, counsel argues that the director should consider information other than the petitioner's 1999 tax returns.

Section 203(b)(3)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(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 or unskilled labor, 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 priority date is July 26, 1999. The beneficiary's salary as stated on the labor certification is \$59,182 annually.

With the original petition, the petitioner submitted financial statements for 1998 and 1999. These statements reflect a net income of \$5,093 in 1999 and \$36,153 in 1998.

On November 21, 2000, the director requested evidence that the petitioner had the ability to pay the proffered wage as of July 26, 1999. The director noted that the financial statements

submitted initially were unaudited and requested the petitioner's 1999 tax return with all attachments. In response, the petitioner submitted the requested documentation prepared by the same accountant who prepared the financial statements. The information, however, differs significantly.

The financial statements reflect that as of December 31, 1998, the petitioner had \$203,655 in assets, including \$187,773 in accounts receivable. The statements further reflect that during 1999, the petitioner had \$672,622 in gross receipts and a net income of \$9,273.

The petitioner's Form 1120 U.S. Corporation Income Tax Return for the tax year ending 1999, however, contained the following information:

Assets	\$ 14,718.00 (no accounts receivable)
Officers compensation	\$112,000.00
Salaries	\$179,888.00
Depreciation	\$ 1,637.00
Net income (loss)	(\$24,942.00)
Current liabilities	\$ 41,138.00

The petitioner also submitted the beneficiary's Form W-2 wage and tax statement for 1999 reflecting that he earned \$39,230.92 that year, \$19,951.08 less than the proffered wage. The director determined that the petitioner's negative income, even when not considering depreciation and the petitioner's larger liabilities than assets, reflected that the petitioner did not have the ability to pay the beneficiary. Consequently, the director denied the petition.

Counsel asserts on appeal that the petitioner need not have already paid the beneficiary the proffered wage and that additional evidence reflects that the petitioner had the ability to pay the proffered wage in 1999. Counsel submits a \$100,000 line of credit issued to the petitioner on April 28, 1999, contracts between the petitioner and its clients, a list of "aged" accounts receivable for accounts not reflected on the petitioner's 1999 tax return because the company uses the "cash" accounting method, a receipt journal for 2000, a company profile, and a list of ongoing, new, and recently completed projects.

A line of credit does not change the company's net worth. Therefore, we will not consider the petitioner's credit line as evidence of its ability to pay the beneficiary the proffered wage in 1999. From the information received on appeal, it appears that the difference between the information on the financial statements and the tax returns results from a use of different accounting methods. Specifically, the financial statements, using the accrual method, include accounts receivable, while the taxes, using the cash method, do not. Even if we consider the financial statements, however, they show a net income of only \$5,093. The difference between the beneficiary's salary and the proffered wage that year, however, was \$19,951.08. While the petitioner need not show that it has already been paying the beneficiary the proffered wage, it must show that it had the ability to do so in 1999. Since its net income

could not cover the difference between the beneficiary's actual wage and the proffered wage in 1999 even using the accrual method, the petitioner cannot demonstrate that it had the ability to pay the petitioner the proffered wage in 1999.

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 sustained that burden. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

**ORDER:** The appeal is dismissed.