



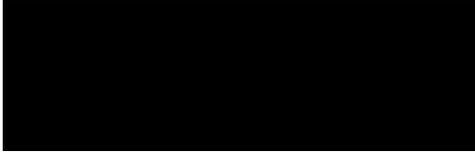
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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
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Washington, D.C. 20536



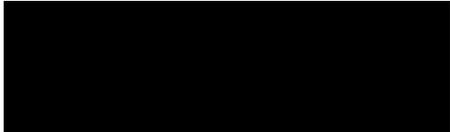
File: [Redacted] Office: NEBRASKA SERVICE CENTER

Date: 25 OCT 2002

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:



**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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 immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner engages in "international trade [and] information and technology exchange." It seeks to employ the beneficiary permanently in the United States as a business administrator at an annual salary of \$45,790. 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, the petitioner submits additional documentation, which counsel states was not submitted previously owing to confusion regarding the director's request for evidence.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), 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 filing date is January 3, 1997. The beneficiary's salary as stated on the labor certification is \$45,790 per year.

With the original petition, the petitioner submitted documentation regarding the beneficiary's background, as well as a "Statement of Receipts and Disbursements" for the year ending December 31, 1998, reflecting a net income of \$94,611. This document is not an annual report, federal tax return, or audited financial statement. Further, because it only covers calendar year 1998, it cannot establish the petitioner's ability to pay the proffered wage as of January 3, 1997.

Because the initial filing lacked the necessary evidence of ability to pay, the director instructed the petitioner to submit evidence of its ability to pay the proffered wage from January 3, 1997 onward. The director specified the types of evidence required by 8 C.F.R. 204.5(g)(2), and advised the

petitioner that it had the option of submitting other evidence in addition to (but not instead of) the defined types of evidence.

In response, the petitioner submitted a corporate income tax return for 1999 and other tax documents from the third quarter of 1997. Counsel states that the petitioner "only started paying wages during the last quarter of 1997, as prior to that the newly-formed company employed individuals as contractors, starting official payroll in October of 1997."

The director denied the petition, stating that the petitioner did not submit any "financial information for the first six months of 1997," and that the petitioner did not submit its 1997 corporate tax return.

On appeal, the petitioner submits copies of 1099-MISC forms reflecting payments to various contractors during 1997. Counsel states that the petitioner did not submit this evidence previously because the director "did not specifically ask for evidence of forms of payment other than payroll." Counsel states that the newly submitted documentation establishes the petitioner's ability to pay the proffered wage from January to September of 1997.

The submitted forms cannot suffice to meet the regulatory requirements concerning the petitioner's ability to pay. 8 C.F.R. 204.5(g)(2), cited above, states that the required evidence "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." The petitioner's failure to submit copies of annual reports, federal tax returns, or audited financial statements for 1997 means that the petitioner has not fulfilled the regulatory requirement. While the petitioner has the option of submitting other financial documentation in addition to the types listed in the regulation, such documentation may serve only as a supplement, rather than a replacement, for the required documentation. The director cited the pertinent regulation in full in the request for information, and again in the notice of decision, thus providing the petitioner ample opportunity to provide the evidence which, according to regulation "shall be" (and, therefore, must be) submitted. The petitioner has answered repeated requests for this documentation with materials that do not conform to the regulatory requirements.

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.