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U.S. Department of Homeland Security  
Citizenship and Immigration Services

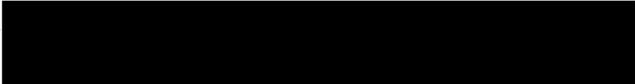
**B5**

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 Eye Street N.W.  
Washington, DC 20536



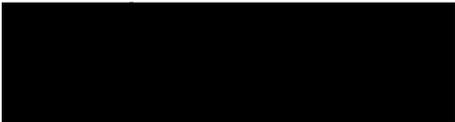
SEP 29 2003

File:  Office: Texas Service Center Date:

IN RE: Petitioner:   
Beneficiary:

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)

ON BEHALF OF PETITIONER:



**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, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a medical practice. It seeks to employ the beneficiary permanently in the United States as an internist at an annual salary of \$120,000. 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 evidence that it has been paying the beneficiary, but less than the proffered wage until 2001, and resubmits financial statements relating to a period of time after the priority date.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to members of the professions holding an advanced degree or aliens of exceptional ability.

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.

(Emphasis added.) In order to establish eligibility in this matter, the petitioner must demonstrate its 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 June 29, 1999. The beneficiary's salary as stated on the labor certification is \$120,000 annually.

With the original petition, the petitioner submitted no evidence relating to its ability to pay the beneficiary. On December 1, 2001, the director's requested evidence of the petitioner's ability to pay the beneficiary "as of the priority date, 6/29/99, and continuing until the beneficiary becomes a legal permanent resident." The director noted that acceptable evidence would include "copies of audited financial statements; copies of federal tax returns; or copies of annual reports." In response, the petitioner submitted an unaudited income statement for "the period from petition to November 30, 2001" and an unaudited balance sheet as of November 30, 2001. The coversheet for the financial statements reflect that in 2001 the petitioner was a "Debtor in Possession." According to Black's Law Dictionary 412 (7<sup>th</sup> ed. 1999) states that a debtor in possession is a "Chapter 11 or 12 debtor that continues to operate its business as a fiduciary to the bankruptcy estate."



The financial statements contained the following information:

Net income	\$226,065
Current assets	\$456,237.82
Current liabilities	\$1,584,645.48

The director denied the petition, noting that the financial statements were not audited and covered a period in 2001.

On appeal, counsel notes that the financial statements reflect revenues of \$5,681,284 and asserts that the language used by the accountant who prepared the financial statements is "industry standard wording." Counsel further notes that the petitioner has been paying the beneficiary since 1999.

The petitioner submitted Forms W-2 for the beneficiary reflecting that the petitioner paid her \$107,826.40 in 1999, less than the proffered wage of \$120,000. The petitioner also submitted Forms W-2 for 2000 and 2001. The petitioner earned \$108,303.89 in 2000 and \$120,403.16 in 2001. These documents are unrelated to the petitioner's ability to pay the proffered wage as of June 29, 1999.

When evaluating a petitioner's ability to pay the proffered wage, it is insufficient to look only at a company's revenues without taking into account the expenditures. The petitioner's net income is far less than the \$5,681,284 claimed by counsel, although we acknowledge that it is more than the difference between the proffered wage and the wage actually paid to the beneficiary in 1999. Nevertheless, the financial statements are inadequate for two reasons. First, while the language on the coversheet may be standard verbiage it is only standard for *unaudited* financial statements. It remains, the petitioner did not submit *audited* financial statements, tax returns, or annual reports as required by regulation. Second, the statements do not cover the priority date, June 29, 1999. Thus, they cannot establish the petitioner's ability to pay the beneficiary the proffered wage as of that date.

In summary, while the petitioner was paying the beneficiary as of June 29, 1999, that salary was \$12,173.60 less than the proffered wage. The petitioner has not demonstrated that it had sufficient net income or net current assets in 1999 to cover the difference. The fact that the petitioner's current liabilities were more than \$1,000,000 above its current assets and its status as a debtor in possession suggest that the petitioner may not have had positive net current assets or net income in 1999. Regardless, it is the petitioner's burden to demonstrate that it did have sufficient funds at that time.

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.