

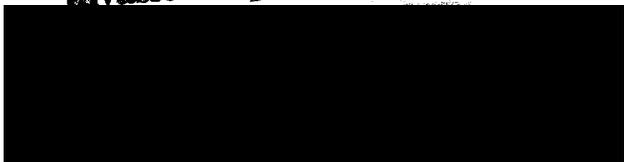


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U.S. Department of Justice  
Immigration and Naturalization Service

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



File: EAC 01 232 53568

Office: VERMONT SERVICE CENTER

Date: DEC 27 2002

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

**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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference 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 wood carpenter's shop. It seeks to employ the beneficiary permanently in the United States as a wood carver. As required by statute, the petition is accompanied by an individual labor certification 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.

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 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. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 12, 1998. The beneficiary's salary as stated on the labor certification is \$18 per hour or \$37,440 per annum.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage as of the priority date of the petition. On September 28, 2001, the director requested additional evidence of the ability to pay the proffered wage from the priority date and continuing until the present.

In response, the petitioner submitted calendar year 1997 and 1998 Form 1065 U.S. Partnership Return of Income. The petitioner, also, offered for the fiscal year beginning July 1, 1999, the 1999 and 2000 Form 1120 U.S. Corporation Income Tax Return. The 1997 and 1998 federal returns reflected, respectively, ordinary income from trade or business of \$12,040 and \$17,034. Corporate returns from 1999 and 2000 showed taxable income before net operating loss deduction and special deductions of \$1,602 and of (\$4,050), a loss.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage from the priority date and continuing to the present. Also, the director determined that the petitioner did not employ the beneficiary in 1997 or 1998. The director denied the petition accordingly.

On appeal, the petitioner submits a letter from an accountant. It restates gross sales and gross profits from all of the federal tax returns, as well as total labor costs from the 1999 and 2000 fiscal years.

The petitioner particularly contends that:

... The amount of money that any given company spends to cover it's [sic] manpower cost need [sic] to be considered in reaching ultimate decision whether or not given entity is or is not able to pay the salary to it's [sic] prospective employee...

... Our wages and salaries adjusted for depreciation-which is a non-cash item-and compensations paid are well over the amount the company would have to pay to a prospective employee...

The petitioner may claim more depreciation or amortization expense on its tax return than it paid during any given year. The petitioner argues that start-up and non-cash expenses, such as depreciation, should not be included in an assessment of its ability to pay the proffered wage. The petitioner further calculates that for 1998 net income of \$17,034 plus the cost of labor of \$29,633 equal \$46,667, more than enough to pay the proffered wage, \$37,440.

In fact, the petitioner has made the expenditures, and the funds are not readily available to pay the wage of the beneficiary as of the priority date of the petition. Funds spent elsewhere may not be used as proof of ability to pay the proffered wage. The petitioner conceded that it did not employ the beneficiary and had already expended the cost of labor on others. The remainder,

i.e., net income of \$17,034, does not support the proffered wage on the priority date.

The petitioner must demonstrate the ability to pay the proffered wage with particular reference to the established priority date of the petition. In addition, the petitioner must continue to demonstrate the ability to pay the proffered wage until the beneficiary obtains lawful permanent resident status. See Matter of Great Wall, 16 I & N Dec. 142, 145; Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); Chi-Feng Chang v. Thornburgh, 719 F. Supp. 532 (N.D. Texas 1989). The regulations require the same result. 8 CFR 204.5(g)(2), 8 CFR 103.2(b)(1), and 8 CFR 103.2(b)(12).

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. 8 CFR 204.5(g)(2).

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 appeal is dismissed.