



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

[Redacted]

File: [Redacted] Office: TEXAS SERVICE CENTER

Date: 28 JUN 2002

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

Petition: Immigrant 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)

IN BEHALF OF PETITIONER:

[Redacted]

**Public Copy**

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which 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, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a newspaper. It seeks to employ the beneficiary permanently as a newspaper columnist. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification as of the petition's filing date. The director also found that the petitioner had not established that it had the financial ability to pay the proffered wage as of the filing date of the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel also requests oral argument. Oral argument, however, is limited to cases where cause is shown. It must be shown a case involves unique facts or issues of law which cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Consequently, counsel's request for oral argument is denied.

The first issue is whether the petitioner has established its ability to pay the proffered wage as of the filing date of the petition.

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 May 4, 1998. The beneficiary's salary as stated on the labor certification is \$21,500 per annum.

Counsel submitted copies of the petitioner's 1998 and 1999 Form 1120 U.S. Corporation Income Tax Return and copies of the beneficiary's W-2 Wage and Tax Statement which showed he was paid [REDACTED] in 1998, \$19,200 in 1999, and \$19,200 in 2000.

The federal tax return for 1998 reflected gross receipts of [REDACTED] gross profit of [REDACTED] compensation of officers of [REDACTED] salaries and wages paid of [REDACTED]; and a taxable income before net operating loss deduction and special deductions of [REDACTED]. The 1999 federal tax return reflected gross receipts of [REDACTED] gross profit of [REDACTED] compensation of officers of \$0: salaries and wages paid of [REDACTED] and a taxable income before net operating loss deduction and special deductions of [REDACTED].

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel states that:

The employer acknowledges that their corporation tax returns previously submitted were copies of their draft which were not complete. Therefore, we are submitting a new complete corporation for 1998 and 1999 along with the company's CPA's letter with his signature verifying that these tax returns are true and complete. Combining the beneficiary's actual annual salary received, i.e., [REDACTED] each year and the company's cash flow that includes the depreciation, i.e., more than \$5,000 each year, the company is clearly able to pay the offered annual salary of [REDACTED] as approved by the DOL on ETA-750.

Counsel is correct. When the salary already paid to the beneficiary is added to the taxable income shown on the 1998 and 1999 tax returns, it is concluded that the petitioner had the ability to pay the wage offered. Therefore, the petitioner has overcome this portion of the director's decision.

The other issue in this proceeding is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification as of the petition's filing date.

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.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is May 4, 1998.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of newspaper columnist required a Bachelor's degree in Literature or Art and one year of experience in the job offered or one year of experience in the related occupation of editor or journalist.

The director determined that the petitioner had not established that the beneficiary had the required Bachelor's degree and denied the petition.

On appeal, counsel argues that:

This issue is a very simple one. As shown on the ETA-750, the educational requirement is "literature or art." [The beneficiary] has a bachelor's degree in music from Jeonju University. Since music is a form of art, [the beneficiary] does qualify. In addition, that is what the employer meant on their ETA-750, i.e., the newspaper company wants to hire someone with degree in literature or art including fine art or music. Since the newspaper always have cultural section featuring articles on art exhibits, music performances, and concerts, and the reader are demanding articles on those cultural issues more and more. The beneficiary also meets the experience qualification by having more than 1 year of experience as a journalist.

The record contains an educational evaluation from [REDACTED] which states that the beneficiary has the equivalent of a bachelor's degree in journalism. While this evaluation states that the beneficiary has attained the equivalency of a bachelor's degree, the petitioner had not indicated that a combination of education and experience can be accepted as meeting the minimum educational requirements stated on the labor certification.

The issue here is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a bachelor's degree in literature or art on May 4, 1998. Therefore, the petitioner has not overcome this portion of the director's decision.



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.