

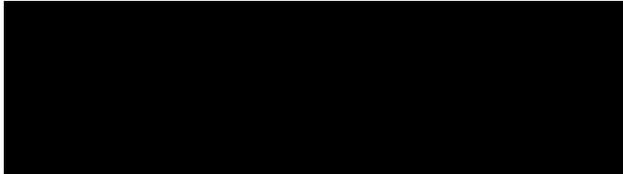


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U.S. Department of Justice  
Immigration and Naturalization Service

Immigration Law Center to  
provide clearly unwarranted  
duration of presence of...

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



File: [Redacted] Office: Nebraska Service Center

Date: 02 MAY 2002

IN RE: Petitioner:  
Beneficiary



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: 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, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, reopened and denied a second time. The Associate Commissioner for Examinations dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The decision of the Associate Commissioner will be withdrawn, and the petition will be approved.

The petitioner is a computer consultancy company and a successor in interest to the original petitioner. It seeks to employ the beneficiary permanently in the United States as vice president at an annual salary of \$50,000.00. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The petitioner checked the box "a member of the professions holding an advanced degree." The cover letter indicated that the beneficiary qualified as a "professional." In a decision dated July 27, 1998, the director determined that the requirements on the labor certification, a bachelor's degree plus two years of experience, did not amount to an advanced degree or the equivalent.

The petitioner filed an appeal from this decision, requesting an additional 30 days to submit a brief. Prior to receiving any additional information, the director reopened the case, concluding that the petitioner simply marked the wrong box on the Form I-140 and was actually seeking to classify the beneficiary as a "professional." The director determined that the requirements on the labor certification were sufficient for a professional and requested evidence that the petitioner's predecessor had the financial ability to pay the beneficiary on the priority date, September 22, 1992. The director specifically requested the petitioner's "latest" tax return and financial report but did not specifically request the petitioner's schedule L or the W-2 wage and tax statements reflecting the beneficiary's wages at that time or in 1992. In response, the petitioner submitted its 1997 tax return.

The director concluded that the petitioner had the current ability to pay the beneficiary, but had not demonstrated that its predecessor had the ability to pay the beneficiary in 1992. The director did not specifically identify what evidence was lacking.

On appeal, the petitioner submitted its predecessor's 1992 and 1993 balance sheets and tax returns. The Administrative Appeals Office (AAO), in behalf of the Associate Commissioner, dismissed the appeal, noting that the petitioner had not submitted schedules L from 1992 and 1993 and had also failed to submit the beneficiary's W-2 wage and tax statements.

On motion, the petitioner acknowledges that prior counsel submitted incomplete tax returns and submits the beneficiary's W-2 wage and tax statements from 1992 through 1998. These statements reflect that the petitioner's predecessor paid the beneficiary \$50,000 or more in 1992, 1993, 1994, 1995 and 1996, after which the petitioner paid the beneficiary an annual salary of \$54,000. The petitioner also submitted its predecessor's schedule L's.

§ 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 petitioner'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).

Based on the W-2 wage and tax statements submitted on appeal, it can be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2), and, in fact, did so. The record does not reflect that the Service previously put the petitioner on notice regarding the need to submit W-2 wage and tax statements prior to the AAO's decision. As such, Matter of Soriano, 19 I&N 764 (BIA 1988), does not preclude us from considering the evidence submitted on motion. Therefore, the petition may be approved.

The burden of proof in these proceedings rests solely with the petitioner. § 291 of the Act, 8 U.S.C. 1361. The petitioner has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The decision of February 14, 2000 is withdrawn, and the petition is approved.