



B60

U.S. Department of Justice  
Immigration and Naturalization Service

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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



File: [Redacted] Office: Texas Service Center

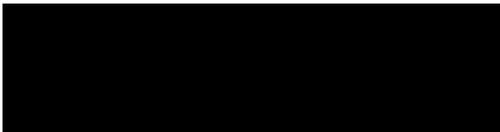
Date: NOV - 7 2002

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:



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, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a cleaning and maintenance company. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. 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 it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a statement and additional evidence.

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 15, 1998. The beneficiary's salary as stated on the labor certification is \$560.00 per week or \$29,120.00 per annum.

Counsel initially submitted insufficient evidence of the

petitioner's ability to pay the wage offered. On January 31, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted copies of the owner of the petitioning entity's Schedule C Profit and Loss from Business for 1999 and 2000, and a copy of the petitioner's 1998 Form 1120S U.S. Income Tax Return for an S Corporation. The federal tax return for 1998 reflected gross receipts of \$212,271; gross profit of \$212,271; compensation of officers of \$0; salaries and wages paid of \$0; and an ordinary income (loss) from trade or business activities of \$3,844.

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 submits a copy of the beneficiary's Form 1040-ES for 2001, copies of the beneficiary's Form 1040 for 1999 and 2000, and a copy of the beneficiary's 1099-MISC, Miscellaneous Income, which shows he was paid \$31,105.25 in 1998, \$41,940.78 in 1999 and \$26,570.32 in 2000. The petitioner argues that "[t]his is the way the Janitorial service works, the reason (sic): the janitors (sic) has to carry (sic) and supply (sic) own cleaning equipment and gas for equipment, they also pay (sic) taxes by self. I submitted copy of taxes (sic) and wages for [the beneficiary], his quarterly taxes for 1998, 1999, 2000 and 1-quarter 2001."

Counsel's argument is not persuasive. While the petitioner established that it paid more than the proffered wage in 1998 and 1999, it did not pay the proffered wage in 2000. The sum of the amount paid to the beneficiary and the net profit in 2000 are not enough to pay the proffered wage.

The petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. 204.5(g)(2).

Accordingly, after a review of the federal tax return, 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 to present.



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.