



B10

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



19 SEP 2002

File: WAC 00 033 51954 Office: California Service Center Date:

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

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

The petitioner is a drywall contractor. It seeks to employ the beneficiary permanently in the United States as a drywall installer. 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, the petitioner submits a brief.

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 May 21, 1996. The beneficiary's salary as stated on the labor certification is \$20.61 per hour or \$42,868.80 per annum.

Counsel initially submitted insufficient evidence of the

petitioner's ability to pay the proffered wage. On September 21, 2000, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage. The director noted that:

According to 8 CFR Section 204.5(g)(2), a statement from the petitioner or a financial representative of the petitioner concerning the financial status of the company is not sufficient proof of the ability to pay the proposed wages of the beneficiary of the petition. The INS **may** accept such a statement only if the company employs more than 100 workers, and even if this is the case, the INS is not required to accept such a statement as proof of the ability to pay the prospective employee but may in fact require additional proof in the form of annual reports, federal tax return, or audited financial statements.

In response, the petitioner submitted an Income Tax Declaration for Excel Contractors, Inc. for 1998.

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

On appeal, the petitioner submits a copy of its 1999 Form 1120 U.S. Corporation Income Tax Return which reflects 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 petitioner argues that:

In the I-797-C Form that was sent by the INS and was returned by Employer on December 21, 2000. We stated correct information on that day. As of the day of the response that we filed on 12-21-2000 we have 100 employees, on the day that we filed the I-140 on 11-05-99 we did have 60 employees. There is no conflicting statement. I do not understand where the INS adjudicator does not understand that companies can increase or decrease their workforce. This is a standard practice in employment world.

As stated in 8 C.F.R. 204.5(g)(2), the petitioner must demonstrate the ability to pay the proffered wage 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. Even though the petitioner established that it could pay the wage in 1999, the petitioner has submitted no evidence of its ability to pay the wage offered as of May 21, 1996, and continuing to present.

Accordingly, after a review of the evidence submitted, 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.

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.