

BP

U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

**PUBLIC COPY**

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



File: WAC 01 280 51650 Office: California Service Center

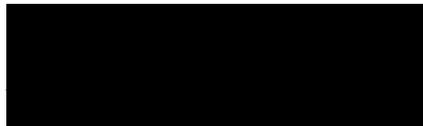
Date: **APR 09 2003**

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)

ON BEHALF OF PETITIONER:



*identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy*

**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 Bureau of Citizenship and Immigration Services 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.

*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 Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a computer graphic design company. It seeks to employ the beneficiary permanently in the United States as a software engineer/computer consultant. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment 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 brief 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 continuing ability to pay the wage offered beginning on the priority date, 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 request for labor certification was accepted for processing on January 31, 2001. The proffered salary as stated on the labor certification is \$42,250 per year.

With the petition, counsel submitted no evidence pertinent to the

ability of the petitioner to pay the proffered wage. Therefore, on March 8, 2001, the California Service Center requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date of the petition. Specifically, the petitioner was requested to provide the beneficiary's personal income tax returns for 2000 and 2001 with the associated W-2 forms or 1099 forms.

In response, counsel submitted the 2000 Form 1040 joint income tax return of the petitioner's owner and the petitioner's owner's wife. Counsel also submitted 2000 and 2001 Form 1099 miscellaneous income statements showing that the petitioner's owner paid the beneficiary \$9,000 during each of those years. Further still, counsel submitted another 2001 Form 1099 showing that the beneficiary received funds from another source. Finally, counsel submitted a 2001 Form W-2 wage and tax statement showing that the petitioner's owner paid the beneficiary \$26,250.03 in wages during that year.

On December 31, 2001, the California Service Center requested that the petitioner provide additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Specifically, the petitioner was requested to provide copies of its own income tax returns with all schedules and tables.

In response, counsel submitted the 2000 Form 1040 joint income tax return for the petitioner's owner and his wife. That return shows that their adjusted gross income during that year was \$19,293. Schedule C, Profit or Loss from a Business (Sole Proprietorship) shows that, during that year, the petitioner made a net profit of \$11,401.

In the Notice of Decision, issued June 12, 2002, the Director, California Service Center, noted that during 2000 neither the petitioner's profit nor the petitioner's owner's income was sufficient to pay the proffered wage, especially when reduced by the cost of supporting the petitioner's owner, the owner's wife, and two dependents during that year.

The director also noted that, although the record demonstrates that the petitioner paid the beneficiary \$26,250.03 during 2001, it contains no evidence that the petitioner was able to pay the difference between that amount and the proffered wage.

The director determined that the evidence submitted did not show that the petitioner was able to pay the proffered wage during 2000 and 2001, and that, therefore, the evidence did not establish that the petitioner had the ability to pay the proffered wage beginning

on the priority date and continuing to the present.

On appeal, counsel submits a copy of the 2001 Form 1040 joint tax return of the petitioner's owner and the owner's wife. That return shows an adjusted gross income of \$49,927. The accompanying Schedule C shows that during that year the petitioner realized a profit of \$46,553. Counsel also submitted an unaudited financial statement for January through May 2002. Counsel argues that those documents demonstrate the ability to pay the proffered wage.

The priority date of the petition is January 31, 2001. The petitioner must demonstrate the ability to pay the proffered wage during the period subsequent to that priority date. Information pertinent to the year 2000 is irrelevant to this matter.

A 2001 Form W-2 in the record indicates that the petitioner paid \$26,250.03 in wages to the beneficiary during that year. A 2001 Form 1099 shows that the petitioner paid the beneficiary an additional \$9,000 in nonemployee compensation. Those amounts total \$35,250.03. The petitioner is obliged to demonstrate the ability to pay the entire proffered wage. The proffered wage is \$42,250 per year. The difference between the proffered wage and the amount the petitioner actually paid the beneficiary during 2001 is \$6,999.97. The petitioner must show that it had the ability to pay that additional amount during that period.

During 2001, the adjusted gross income of the petitioner's owner and the owner's wife was \$49,927. The director correctly observed that not all of that amount was available to pay the proffered wage. In determining the amount of that income which might have been expended upon the proffered wage, that amount must be reduced by an amount sufficient to support the petitioner's owner, the owner's wife, and the other three dependents claimed on their tax return. Although the record contains no evidence pertinent to the expenses of the family of the petitioner's owner, this office is satisfied that the petitioner's owner might reasonably have contributed \$6,999.97 toward payment of the proffered wage.

Counsel submitted what purports to be the petitioner's unaudited financial statement for January through May of 2002. An unaudited financial statement is not among the acceptable types of evidence of ability to pay the proffered wage specified in 8 C.F.R. § 204.5(g)(2). However, the petitioner was not instructed to provide evidence of the ability to pay the proffered wage during that year, and the decision denying the petition was not based on the lack of evidence for 2002.

The petitioner has demonstrated the ability to pay the proffered

wage during 2001 and has overcome the grounds upon which denial of the petition was based. 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 met that burden.

**ORDER:** The appeal is sustained.

