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

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass. 3/F
Washington, D.C. 20536



File: WAC 02 065 51247 Office: California Service Center

Date: **AUG 07 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)

IN BEHALF OF PETITIONER:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

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 on appeal. The appeal will be sustained.

The petitioner is a dental clinic. It seeks to employ the beneficiary permanently in the United States as a dental technician. 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.

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 beginning on 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 14, 1998. The beneficiary's salary as stated on the labor certification is \$13 per hour which equals \$27,040 annually.

The petition was filed with no evidence of the petitioner's ability to pay the proffered wage. Therefore, on March 7, 2002, the California Service Center requested that the petitioner submit evidence of that ability in accordance with 8 C.F.R. § 204.5(g) (2).

In response to that Request for Evidence, counsel submitted the petitioner's Form 1040 Federal Tax Returns for 1998, 1999, 2000, and 2001. Those forms show business income or loss for those years of \$2,098, \$2,077, -\$15,901, and \$874, respectively.

In addition, counsel submitted Form 1099 statements of miscellaneous income for 1998, 1999, 2000, and 2001. Those forms show payments by the petitioner to the beneficiary during those years of \$20,800, \$27,100, \$27,100, and \$26,100, respectively.

On May 15, 2002, the Director, California Service Center, noted that the tax returns of the petitioner's owner do not show any wage payments during 1998, 1999, 2000, or 2001. The director also noted that the tax returns of the petitioner's owner do not show sufficient income to pay the proffered wage. The director denied the petition.

On appeal, counsel submits an affidavit from the petitioner's owner. The petitioner's owner states that the payments to the beneficiary, as shown on the Forms 1099, were included in the amounts shown on his tax returns as Other Costs at Item 39 of Schedule C. Consistent with that version of events, the amount shown as Other Costs on each of those four tax returns is greater than the amount shown on the associated Form 1099 as having been paid to the beneficiary.

In addition, counsel submits the beneficiary's Form 1040 tax returns for the years 1998, 1999, 2000, and 2001. On the 1998 return, the beneficiary claimed \$20,800 on Schedule C of his return as Gross Receipts or Sales. On the 1999 and 2000 returns, the beneficiary claimed \$27,100 as Gross Receipts or Sales. With the 2001 return, the beneficiary filed no Schedule C. On that Form 1040 return, the beneficiary claimed \$40,781 on Line 7, wages, salaries, tips, etc. That amount apparently includes the \$26,100 paid to the beneficiary by the petitioner.

Counsel argues that, contrary to the director's finding, the evidence demonstrates that the petitioner had made payments to the beneficiary as stated on the Forms 1099. Counsel further argues that those payments demonstrate the petitioner's ability to pay the proffered wage.

The evidence appears to indicate that the petitioner did pay to the

beneficiary the amounts indicated. In 1999, and 2000, those payments exceeded the proffered wage, which clearly indicates the petitioner's ability to pay during those years. During 1998 and 2001, the amount paid to the beneficiary is somewhat short of the proffered wage. In both of those years, the income of the petitioner's owner was insufficient to make up the difference.

However, the petitioner's owner has demonstrated an ability and willingness to sustain a loss and continue to pay the company's just debts in order to maintain the petitioner as a going concern. During 2000, for instance, the petitioner sustained a loss of almost \$16,000, and yet paid the beneficiary an amount greater than the proffered wage. To pay the proffered wage during 1998 and 2001 would have resulted in a slight loss. However, the petitioner's owner appears, based on the evidence in this matter, to have been able to pay that wage.

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.