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

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

File: WAC 02 125 50353 Office: California Service Center

Date: AUG 12 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:

PUBLIC COPY

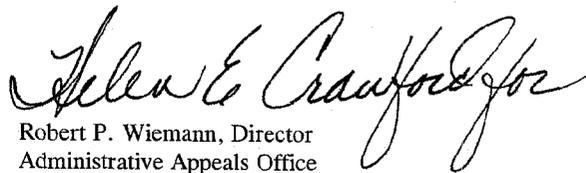
INSTRUCTIONS:

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 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 that 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a jeweler. It seeks to employ the beneficiary permanently in the United States as a diamond setter. 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 additional evidence and 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 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 12, 1998. The proffered salary as stated on the labor certification is \$12.00 per hour which equals \$24,960 annually.

With the petition, counsel submitted the petitioner's owner's Schedule C, Profit or Loss from Business (Sole Proprietorship). That form shows that the petitioner made a profit of \$5,941 during that year.

On April 15, 2002, the California Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. Specifically, the petitioner was requested to provide evidence of its ability to pay the proffered wage from the date the labor certification was submitted until the date of the Request for Evidence. That request stipulated that the evidence was to be either in the form of audited financial statements or tax returns. The petitioner was also requested to provide copies of its California Employment Development Department (EDD) Form DE-6 Quarterly Wage Reports for the most recent four quarters.

In response, counsel provided the petitioner's owner's 1998, 1999, and 2000 Form 1040 Individual Tax Returns. Each of those returns includes a Schedule C Profit or Loss from Business (Sole Proprietorship) statement. The returns show that during 1998, the petitioner made a net profit of \$7,187, and the petitioner's owner's adjusted gross income was a loss of \$7,092. During 1999, those returns indicate that the petitioner's net profit was \$12,870 and the owner's adjusted gross income was \$7,135. During 2000, the petitioner's net profit was \$5,941 and the owner's adjusted gross income was \$17,012.

The petitioner also provided California Form DE-6 Quarterly Wage Reports for the second, third, and fourth quarters of 2000. Those reports show that the petitioner did not employ the beneficiary during that period.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on July 9, 2002, denied the petition.

On appeal, counsel states that the petitioner does have the ability to pay the proffered wage. Counsel submits a copy of a deed, a copy of a real estate appraisal, and a copy of a loan statement, all pertinent to the same property.

The deed states that the property is owned by the petitioner's owner and his wife. The appraisal states the professional opinion of the appraiser that the property, on July 27, 2002, was worth \$550,000. The loan statement indicates that, on May 14, 2002, the petitioner's owner and his wife owed an outstanding balance of \$354,847.24 on that property.

Counsel argues that those documents, taken together, demonstrate that the petitioner has sufficient equity in his house that he could have paid the proffered wage during the entire period from the date the labor certification was submitted to the present, either by selling that property or by refinancing it.

The petitioner's owner could not sell or encumber that property, however, without the permission of his wife. The record contains no indication that the wife would agree to sell or encumber her home to pay for an employee for the petitioner which, according to the tax returns submitted, is only marginally profitable.

Further, the loan statement shows an amount owed to one particular lender, which amount is secured by the home of the petitioner's owner and his wife. The record contains no evidence demonstrating that the property is otherwise unencumbered. Counsel observes that the petitioner could have obtained a second mortgage secured by the equity in his property, but presents no evidence that he did not.

The petitioner submitted insufficient evidence that the petitioner had the ability to pay the proffered wage during 1998, 1999, and 2000. Further, the petitioner failed to submit any evidence pertinent to the ability to pay the proffered wage during 2001, although that information should have been available when it was requested, on April 15, 2002. Therefore, the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date and continuing to the 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.