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U.S. Department of Justice

Bureau of Citizenship and Immigration Services

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

[REDACTED]

File: EAC 00 283 52608

Office: Vermont Service Center

Date: **AUG 21 2003**

IN RE: Petitioner:  
Beneficiary:

[REDACTED]

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:

[REDACTED]

**PUBLIC COPY**

**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 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 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, Vermont Service Center. The Associate Commissioner for Examinations dismissed a subsequent appeal, affirming the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider. The motion will be granted, the previous decisions of the director and Associate Commissioner will be affirmed, and the petition will be denied.

The petitioner is a computer consulting, education, and counseling firm. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a Music, Education, and Media Specialist. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of March 13, 1998, the priority date of the visa petition. The Associate Commissioner affirmed that decision, dismissing the appeal.

On motion, counsel submits a brief.

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 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 filed on March 13, 1998. The proffered salary as stated on the labor certification is \$60,842 per year.

With the petition, the petitioner submitted an unaudited balance sheet for the quarter ending March 31, 1998. The petitioner also submitted its 1998 Form 1120S U.S. Income Tax Return for an S

Corporation. That tax return reflects an ordinary income from trade or business activities of \$16,763 during that year.

In response to a Request for Evidence, issued May 18, 2001, counsel submitted the petitioner's 1999 and 2000 Form 1120S tax returns. The 1999 return reflects a loss of \$35,585. The 2000 return reflects sufficient income to pay the proffered wage during that year. With those returns, counsel submitted an unaudited balance sheet for May 24, 2001 and the petitioner's bank statements.

Counsel also submitted a letter, dated June 18, 2001. In that letter, the petitioner's president and chief financial officer stated that the petitioner has been paying \$85,000 annually to an employee and a contractor to accomplish the job for which the petitioner wishes to hire the beneficiary. As such, the president and CFO states, the petitioner had an additional \$85,000 in March of 1998 to pay the proffered wage.

On December 5, 2001, the Director, Eastern Service Center, denied the petition, finding that the petitioner had submitted insufficient evidence of its ability to pay the proffered wage at the time the petition was filed.

On appeal, counsel submitted additional bank statements and evidence of a line of credit extended to it by a bank. Counsel submitted photocopies of check stubs showing payments to various individuals and companies. Counsel submitted two 1998 Federal W-2 Wage and Tax Statements showing payments to two people during that year.

In a letter, dated December 18, 2001, submitted with those statements, the petitioner's president and chief financial officer noted that the labor certification was submitted approximately ten weeks into 1998. As such, the petitioner, if able to hire the beneficiary on that date, the president continued, would have been obliged to pay the beneficiary only approximately \$47,500.

The president points out that the petitioner's profit during 1998, plus the amount of the depreciation deduction the petitioner claimed during that year, plus the amount of the petitioner's line of credit, plus the amounts of each month's bank balance would have been sufficient to pay that portion of the proffered wage.

Further, the president stated that the petitioner retained consultants during 1998 to perform the tasks the beneficiary would have performed if hired. The president stated that the photocopies of check stubs, mentioned above, are for those services, and noted that the payments total over \$42,000. The president stated that

most, if not all, of that amount would have been available to pay the proffered wage.

In another letter, also dated December 18, 2001, the president and CFO stated that \$61,662 paid to both contractors and employees would have been available to pay the proffered wage had the petitioner been able to hire the beneficiary. The president and CFO notes that the amount which would have been saved, according to this estimate, exceeds the proffered wage.

In a brief filed in support of the appeal, counsel made the same arguments as the petitioner's CFO.

On July 8, 2001, the Associate Commissioner for Examinations dismissed the appeal, finding that the evidence did not establish that the petitioner had the ability, during either 1998 or 1999, to pay the proffered wage.

On motion, counsel reiterated the previous arguments pertinent to the petitioner's ability to pay the proffered wage.

The proffered wage is \$60,842. The labor certification was filed ten weeks into 1998. A year consists of 52 weeks. If the petitioner had been able to hire the beneficiary when the labor certification was filed, the petitioner would have been obliged to pay \$49,141.62 for the beneficiary's services during the balance of that year.

The petitioner's profit during 1998 was \$16,763, which is clearly insufficient, in itself, to pay the proffered wage. Counsel urges that the amount of the petitioner's depreciation deduction should be added to that profit as one step in calculating the funds available to pay the proffered wage.

However, a depreciation deduction, while not a cash expenditure in the year claimed, represents value lost as buildings and equipment deteriorate. Although buildings and equipment are depreciated, rather than expensed, this represents the expense of buildings and equipment spread out over a number of years. The diminution in value of buildings and equipment is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. The deduction expense is an accumulation of funds necessary to replace perishable equipment and buildings, and is not available to pay wages.

Counsel further urges that the amount of the petitioner's line of credit should be added to profit in determining the funds available to pay the beneficiary. However, a line of credit, or any other

indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Counsel also argues that the amount of each month's bank balance should be added to the sum available to pay the proffered wage. However, the record contains no indication that those balances represent additional funds which were unreported on the petitioner's income tax returns.

The petitioner's president and CFO has stated that money has been spent since March of 1998 to accomplish the job for which the petitioner wishes to hire the beneficiary. In a letter dated June 18, 2001, the CFO stated that \$85,000 was expended annually to accomplish the job for which the petitioner wishes to hire the beneficiary. The CFO concludes that, had the petitioner been permitted to hire the beneficiary, an additional \$85,000 would have been available, beginning on the priority date, to pay the proffered wage.

In a letter dated December 18, 2001, the CFO stated that the petitioner paid more than \$42,000 during 1998 to consultants hired to do the job for which the petitioner wishes to hire the beneficiary, and that most, if not all, of that amount would have been available to pay the proffered wage.

In a third letter, also dated December 18, 2001, the CFO stated that the petitioner paid \$61,662 to contractors and employees to do the job for which the petitioner wishes to hire the beneficiary, and that, had the petitioner been permitted to hire the beneficiary, those funds would have been available to pay the proffered wage.

Counsel has submitted evidence that the petitioner made payments to contractors and employees. However, counsel has submitted no evidence that those contractors and employees were doing the job for which the petitioner wishes to hire the beneficiary. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). That the petitioner made those payments is insufficient evidence that those funds would have been available to pay the proffered wage, especially in view of the waxy nature of the estimates of the amount the petitioner has paid to other employees and contractors in order to accomplish the work of the proffered position.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 1998 and 1999. Therefore, the objection of the Associate Commissioner has not been overcome on the motion.

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. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

**ORDER:** The Associate Commissioner's decision of is affirmed.  
The petition is denied.