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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 01 284 54010 Office: California Service Center

Date: **AUG 27 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**

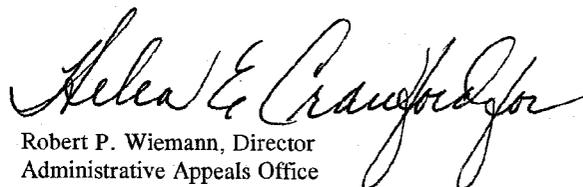
**INSTRUCTIONS:**

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 on appeal. The appeal will be sustained.

The petitioner is a computer installation company. It seeks to employ the beneficiary permanently in the United States as a technical support specialist. 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 continuing ability to pay the beneficiary the proffered wage beginning on 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 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 April 18, 2001. The proffered salary as stated on the labor certification is \$15.00 per hour which equals \$31,200 annually.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, the California Service Center, on February 6, 2002, requested evidence pertinent to that ability. Specifically, the Service Center requested copies of the petitioner's Form DE-6 for the last four quarters, and copies of the petitioner's payroll summary and W-2 and W-3 forms for the year 2000.

In response, counsel submitted a letter from the petitioner's owner stating that the petitioner did not have a Form DE-6 quarterly wage report, payroll summary, or W-2 or W-3 forms as it had no employees.

Counsel also submitted a copy of the 2001 Form 1040 individual tax return of the petitioner's owner. That return shows that the petitioner's owner had an adjusted gross income of \$32,500 during that year. The accompanying Schedule C, income or loss from business (sole proprietorship) stated that during that year, the petitioning business reported a loss of \$2,567.

In addition, counsel submitted a Form 1096 and three 1099 forms showing that during 2001 the petitioner paid a total of \$31,558 to three contractors. Finally, counsel submitted the sworn declaration of the petitioner's owner that the beneficiary will replace the contract employees and that money which would otherwise be paid to them will then be available to pay the beneficiary.

On May 9, 2002, the California Service Center issued another Request for Evidence. The Service Center stated that the petitioner's owner appeared to have insufficient funds to pay the proffered wage and support himself and his family. The Service Center requested that the petitioner's owner submit a detailed personal budget and information pertinent to any other funds, in addition to his income, which are available to pay the proffered wage.

In response, counsel submitted the petitioner's budget, the petitioner's wife's Form 1040 personal income tax returns for 1999, 2000, and 2001, and the wife's W-2 forms for those same years.

On August 14, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. Initially, the director noted that because the priority date in this matter is April 18, 2001, financial information pertinent to previous years is not directly relevant. Further, the director noted that although the petitioner's owner claimed that he and his wife live in the same household, they used different addresses in

filing their tax returns. For that reason, the director declined to include the wife's income in the calculation of the petitioner's ability to pay the proffered wage. Without the wife's income, the director noted that the petitioner's owner does not have the ability to pay the proffered wage and support his household, according to the budget he submitted.

Further, the director noted that even if the petitioner's wife's income were included in the calculation, the petitioner's owner would still be unable to pay the proffered wage and support his household, based on the budget he submitted.

On appeal, counsel noted that the director had neglected to include the funds which would be available as a result of replacing contractors with the beneficiary. Counsel observed that the amount paid to the three contractors during 2001 was \$31,558 which is sufficient to cover the proffered wage of \$31,200 per year.

Counsel is correct. This office is unable to find any reason in the record to doubt the statement of the petitioner's owner that the beneficiary will replace the three contractors when hired. Counsel is also correct that the amount which was paid to those contractors during 2001 was equal to more than the amount of the proffered annual wage.

The evidence submitted demonstrates that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date. 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.