

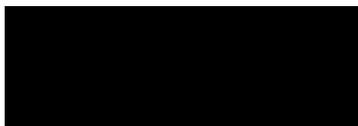
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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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



File: WAC 02 064 56423 Office: CALIFORNIA SERVICE CENTER

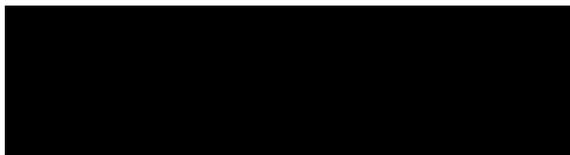
Date: DEC 05 2002

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:



**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 Citizenship and Immigration Services (CIS) 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 employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional. The petitioner is a private householder. He seeks to employ the beneficiary permanently in the United States as a tutor. As required by statute, the petition is accompanied by an individual labor 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, current counsel submits additional evidence and asserts that the petitioner has demonstrated its ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), further provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g) additionally provides in pertinent part:

(2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The issue on appeal in this case is whether the petitioner has established that he has the ability to pay the proffered wage. Eligibility rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The priority date is 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 petition's priority date is February 14, 1997. The beneficiary's salary as stated on the labor certification is \$750 per week or \$39,000 annually.

The petitioner initially submitted an unsigned Form 1040 U.S. Individual Income Tax Return for the year 2000 as evidence of his ability to pay the proffered wage. The petitioner is the sole proprietor of an accounting and business services firm. His business-related income and expenses are reported on Schedule C of Form 1040 and are carried forward to the first page of the tax return. The 2000 tax return indicates that the petitioner claimed an adjusted gross income of \$153,140, including a business income of \$72,359 as set forth on Schedule C.

On March 5, 2002, the director requested additional evidence to support the petitioner's ability to pay including signed federal tax returns, annual reports or audited financial statements representing his financial status from 1997 to the present. In response, the petitioner submitted a copy of a Form 4868 Application for Automatic Extension of Time to File U.S. Individual Income Tax Return for the year 2001 and signed copies of his 1999 and 2000 Form 1040 U.S. Individual Income Tax Returns. The 2000 copy showed different balances from the unsigned copy submitted with the petition. It indicates that the petitioner's adjusted gross income for that year was \$56,858, including a business income of \$8,941 as set forth on Schedule C. The 1999 individual tax return shows that the petitioner claimed \$28,311 in adjusted gross income, including a Schedule C business income of \$14,673.

In denying the petition, the director noted the absence of evidence relating to 1997 and 1998, and found that the petitioner's 1999 income of \$28,311 could not meet the beneficiary's offered wage.

On appeal, current counsel resubmits copies of the petitioner's individual tax returns for 1999 and 2000. Counsel also provides copies of the petitioner's tax returns for 1998 and 2001. No explanation is offered why the 1998 tax return was not provided earlier or why 1997 financial data was not submitted. The petitioner's 1998 individual tax return shows an adjusted gross income of \$75,399 including a business income of \$45,880. The 2001 individual tax return shows an adjusted gross income of \$76,953 including a business income of \$11,850.

Counsel contends that the petitioner's depreciation should be added back to his adjusted gross income, and that as a sole proprietor, he could change the allocation of expenses to cover the proffered wage of \$39,000. As noted above, the business net income is carried forward and is already included in the calculation of the sole proprietor's adjusted gross income as shown on the first page of the individual tax return. The ability to pay the proffered wage is generally not established by the speculative increase in growth or decrease in losses projected by a petitioner. We note that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after a beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). It is further noted that there is no precedent that would allow the petitioner to add depreciation back to net income. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986).

Pursuant to the regulatory requirements of 8 C.F.R. § 204.5(g)(2), this petitioner must show his ability to pay the offered wage as of the priority date of February 14, 1997 and continuing until the beneficiary obtains lawful permanent residence status. Here, the record contains no evidence of the petitioner's financial status in 1997. Moreover, his adjusted gross income of \$28,311 in 1999 was

insufficient to meet the offered wage of \$39,000.

In view of the foregoing, we cannot conclude that the petitioner has established that he had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until 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.