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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  
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Washington, D.C. 20536



File: WAC 02 142 50962 Office: CALIFORNIA SERVICE CENTER

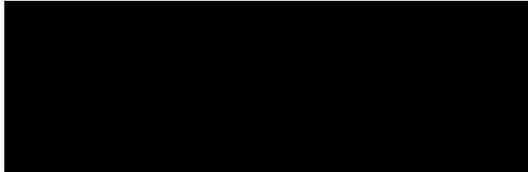
Date: **DEC 13 2003**

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:



**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 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 dismissed.

The petitioner is an electrical engineering consulting firm. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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 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 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 day 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 on April 25, 2001. The proffered salary as stated on the labor certification is \$14.22 per hour, which equals \$29,577.60 per year.

With the petition, counsel submitted the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. Because the priority

date is April 25, 2001, that return is not directly relevant to any issue in this case.

Counsel also submitted photocopies of checks made payable to the petitioner by various companies. The proposition in support of which counsel submitted those checks is unclear.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on May 10, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner was able to pay the proffered wage during 2001. The Service Center emphasized that financial statements are acceptable only if they were produced pursuant to an audit, rather than a compilation or review.

In response, counsel submitted an accountant's compilation of the petitioner's balance sheet as of December 31, 2001 and income statement for the preceding year. Counsel also submitted the petitioner's California Form DE-6 Quarterly Wage Reports for all four quarters of 2001 and the first quarter of 2002. Those reports show that the petitioner did not employ the beneficiary during those quarters. Finally, counsel submitted a Form 7004 Application for Automatic Extension of Time to file its 2001 corporate tax return.

On September 11, 2002, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return indicates that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$1,084 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage during 2001 and, on January 22, 2003, denied the petition.

On appeal, counsel argues (1) that the petitioner's 2001 income tax return does not accurately reflect its financial condition, (2) that the petitioner's financial strength is indicated by the fact that it is utilizing contract labor, and (3) that the petitioner's financial strength may not fairly be gauged by a single year's performance.

Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely upon tax

returns to demonstrate its ability to pay the proffered wage, but chose to. The petitioner might, in the alternative, have provided annual reports or audited financial statements, but chose not to. Having made this election, the petitioner shall not now be heard to argue that its tax returns, with which it chose to demonstrate its ability to pay the proffered wage, are a poor indicator of that ability.

Counsel asserts that the petitioner is employing contract labor to clear a backlog of work, and that this fact establishes the ability to pay the proffered wage. Proving that a petitioner employs contract labor is not among the three alternative ways of demonstrating the ability to pay the proffered wage which are set out in 8 C.F.R. § 204.5(g)(2). Evidence that the petitioner is employing contractors is not evidence that it had the ability to pay the proffered wage during 2001.

Counsel's assertion that the petitioner's ability to pay the proffered wage cannot be judged based upon one single year's performance is unconvincing. The priority date of the petition is April 25, 2001. Ordinarily, the petitioner would be obliged to show, with copies of annual reports, federal tax returns, or audited financial statements, that it was able to pay the proffered wage during 2001.

Counsel is correct that if the petitioner's poor performance during 2001 was uncharacteristic and occurred within a framework of profitable or successful years, then those losses might be overlooked in determining ability to pay the proffered wage. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In this case, however, counsel has submitted no evidence that the petitioner has ever produced a large profit.

If the petitioner's poor performance during 2001 was uncharacteristic, then evidence of the petitioner's financial condition during previous and subsequent years might be used to illustrate that fact. The only other competent evidence of the petitioner's financial condition is the petitioner's 2000 income tax return. Although it contains no information directly relevant to the petitioner's ability to pay the proffered wage since the priority date, it might be used to demonstrate that the petitioner's poor performance during 2001 was uncharacteristic.

The petitioner's 2000 income tax return, however, shows that the petitioner declared a taxable income before net operating loss deductions and special deductions of \$94 for that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. That tax return does not support the contention that the petitioner's poor performance during 2001 was uncharacteristic.

Counsel attributes the petitioner's poor performance during 2001 to

the economic effects of the terrorist attacks of September 11, 2001, and implied that the petitioner has since rebounded. The petitioner's 2000 tax return does not support the position that the petitioner's poor performance was a result of events that occurred late during 2001.

Finally, counsel argues that ". . . due consideration should have been given to the soundness and solidity of the corporate structures already in place within the organization."

Counsel appears to equate the petitioner's soundness and solidity with its ability to pay the proffered wage. As was noted above, 8 C.F.R. § 204.5(g)(2) recognizes three types of documentation as competent evidence of that ability. Counsel submitted the petitioner's income tax returns. The 2001 return shows that the petitioner declared an income of \$1,084 and ended the year with negative net current assets. The competent evidence of record does not show that the petitioner could have paid the proffered wage of \$29,577.60 out of either its income or its assets during that year.

Counsel failed to submit sufficient competent evidence that the petitioner had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it 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 not met that burden.

**ORDER:** The appeal is dismissed.