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U.S. Department of Homeland Security

Bureau of Citizenship Services 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-02-168-52696 Office: California Service Center

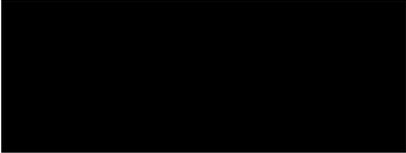
Date: DEC 15 2003

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:



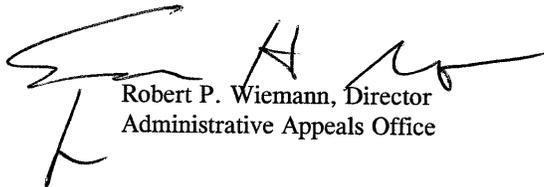
**INSTRUCTIONS:**

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

The petitioner is a software consulting service. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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 additional evidence.

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.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 19, 2000. The proffered salary as stated on the labor certification is \$85,000 annually.

With the petition, counsel did not submit any evidence to establish

the petitioner's ability to pay the proffered wage beginning on the priority date. Counsel merely submitted documentation to establish the beneficiary's qualifications.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on July 23, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested, consistent with the requirements of 8 C.F.R. § 204.5(g)(2), that the petitioner prove its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements. The Service Center requested that the petitioner demonstrate the ability to pay the proffered wage during both 2000 and 2001.

In response, counsel submitted the petitioner's Form 1120 U.S. Corporation Income Tax Return for the years 2000 and 2001. The 2000 return reflected gross receipts of \$8,852,872; gross profit of \$8,852,872; compensation of officers of \$75,000; salaries and wages paid of \$5,104,220; and a taxable income before net operating loss deduction and special deductions of a negative (-) \$825,232.

The petitioner's tax return for calendar year 2001 reflected gross receipts of \$16,740,764; gross profit of \$16,740,764; compensation of officers of \$641,480; salaries and wages paid of \$10,102,002; and a taxable income before net operating loss deduction and special deductions of (-) \$524,653.

On November 13, 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.

On appeal, counsel states that additional evidence substantiating the petitioner's ability to pay is being submitted.

Counsel submits the beneficiary's Form W-2 Wage and Tax Statements for the years 2000 and 2001. One W-2 reflects that the beneficiary had \$13,462 earnings for another company during 2000. On appeal, counsel states that the beneficiary did not begin employment for the petitioner until June 2000. The beneficiary's 2000 W-2 reflecting employment for the petitioner indicates that the beneficiary earned \$32,906.15 during 2000. The beneficiary's 2001 W-2 indicates that the petitioner paid the beneficiary \$60,484.72.

Counsel submits several pay statements as well as the petitioner's bank statements for the period June 1, 2002 through October 31, 2002.

The proffered wage is \$85,000 per year. The 2000 W-2 form establishes that the petitioner paid the beneficiary \$39,906.15 during that year. The petitioner is obliged to demonstrate that it was able to pay the beneficiary the additional four months pay of \$28,332 which is the balance of the proffered wage beginning January 19, 2000. During that year, the petitioner declared an adjusted gross income, including all of the petitioner's net profits, of (-) \$825,232, which was not sufficient to pay the balance of the proffered wage. The 2001 W-2 form establishes that the petitioner paid the beneficiary \$60,484.72. during that year. This amount is \$24,515.25 less than the proffered wage. During 2001, the petitioner declared an adjusted gross income, including all of the petitioner's net profits, of (-) \$526,653, which was insufficient to pay the balance of the proffered wage.

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage during 2000, or 2001. Additionally, the beneficiary's pay statements for 2002 show that the petitioner was paying the beneficiary at a rate inconsistent with the annual salary of \$85,000. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary 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.