

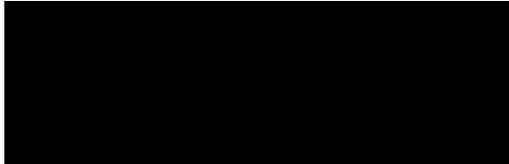
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U.S. Department of Homeland Security  
Bureau of Citizenship Services and Immigration Services

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invasion of personal privacy**

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



File: WAC-02-053-58480 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 an air conditioning and refrigeration services company permanently in the United States as a refrigeration mechanic. 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 argues that the petitioner has the ability to pay the proffered wage.

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 ability to pay the wage offered as of the petition's priority date, which 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 January 9, 1998. The beneficiary's salary as stated on the labor certification is \$16.62 per hour or \$34,570 per annum.

Counsel initially submitted the petitioner's 1998, 1999, and 2000 Form 1040 U.S. Individual Income Tax Return as evidence of the petitioner's ability to pay the wage offered. On March 15, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage.

In response, counsel submitted evidence of the petitioner's conducting business, a list of an undated monthly household expenses summary totalling \$6,122.00 per month, the petitioner's 2001 and 2002 bank statements indicating a positive bank balance for 2001 and the first four months of 2002, and a copy of the petitioner's 2000 Form 1040.

On June 12, 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. The director noted that the petitioner's owner could have paid the proffered wage based on the adjusted gross income, but, since he has a spouse and five dependent children, he would not then have had sufficient resources to support his family.

On appeal, counsel states that the director erred because when the petitioner submitted his Statement of Monthly Expenses, he had already included the beneficiary's salary under the heading of Business and Office Expense. Counsel further concludes that the petitioner has the ability to pay because it has maintained a positive bank balance. Counsel resubmits the petitioner's Form 1040 U.S. Individual Income Tax Return for the years 1998, 1999, and 2000, bank statements for 2001 and the first six months of 2002 indicating positive monthly bank balances ranging from \$11,557.10 to \$18,572.41.

The copies of the petitioner's 1998, 1999, and 2000 Form 1040, Schedule C, Profit and Loss from Business Statement, submitted on appeal, reflect 1998 gross receipts of \$37,805; gross profit of \$17,669; wages of \$0; and a net profit of \$908. Schedule C for 1999 reflected gross receipts of \$50,736; gross profit of \$28,308; wages of \$5,439; and a net profit of \$1,861. Schedule C for 2000 reflected gross receipts of \$89,029; gross profit of \$38,193; wages of \$3,469; and a net profit of \$1,742.

Counsel's assertions that the beneficiary's wages were included in the business and office expense section of the petitioner's monthly expense statement is not supported by the record of proceeding. The record indicates that the petitioner claimed \$1,500 per month as business expense. However, this figure calculates to \$18,000 per year which is significantly below the beneficiary's \$34,570 proffered wage. Further, the petitioner's bank account does not

contain sufficient funds to make up the salary difference based on the accounts average monthly balance.

Accordingly, after a review of the federal tax returns, the petitioner's bank statements and a schedule of his average monthly expenses, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to 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.