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ADMINISTRATIVE APPEALS OFFICE
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Washington, D. C. 20536



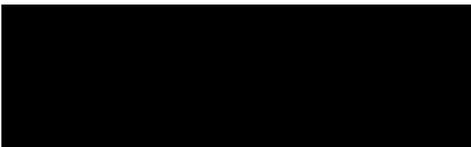
File: WAC 02 161 50404 Office: California Service Center

Date: DEC 16 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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 a distributor of recorded music. It seeks to employ the beneficiary permanently in the United States as a sales manager. 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, counsel submits a brief and 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.

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 2, 1998. The beneficiary's salary as stated on the labor certification is \$33,904.00 per annum.

Counsel submitted copies of the petitioner's audited financial statements for the fiscal years ending June 30 for 1999 through 2001.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director noted that the company reported a net loss of \$998,681 for the 1999 fiscal year and a net loss of \$598,867 in 2000. The director further noted that no financial statement for 1998 was submitted.

On appeal, counsel submits copies of the petitioner's bank account statements for the period from July 2000 through August 30, 2002, a copy of the petitioner's 2001 audited financial statement, copies of Internal Revenue Service (IRS) Form 1040 for the beneficiary for the years 1998 through 2001, and copies of the beneficiary's W-2 Wage and Tax Statements. The W-2s showed the petitioner paid the beneficiary \$21,478.42 in 1997, \$30,815.15 in 1998, \$35,610.54 in 2000, and \$38,204.49 in 2001.

On appeal, counsel argues that:

A & A Music filed a Petition for Labor Certification on behalf of [the beneficiary], the company has been is (sic) business for 16 years. As stated by Mr. Velle B. Easons's letter no audited financial statements were in existence in 1998. As per his own words to undersigned counsel on a telephonic conversation held on September 16, 2002: **"When I was hired by Mr. Hernandez, no documents at all were found, which included bank statements, files, checks or any other financial paper that could help to trace what had happened to the company before I came."**

The petitioner employed the beneficiary at a salary in excess of the proffered wage in 2000 and 2001 and has demonstrated its ability to pay during that period. However, it must establish the ability to pay beginning at the visa priority date. It elected to submit audited financial statements that covered a period beginning six months past the priority date of January 2, 1998. During 1998 and 1999, the petitioner employed the beneficiary at a salary approximately \$3,800 less than the proffered wage as set forth on the labor certification. It cannot be concluded that the petitioner has established a continuing ability to pay the beneficiary's offered salary relevant to this period.

As noted on the accountant's statement contained in the record pertaining to the financial statement for the period ending June 30, 1999, "the company's current liabilities exceed current assets by \$1,378,124." As previously noted, the petitioner also reported a net loss of \$998,681 in the 1999 fiscal year.

Although the petitioner appears to be a viable business, it cannot be concluded that the evidence submitted establishes that it has demonstrated its continuing ability to pay the offered salary beginning on January 2, 1998.

Accordingly, after a review of the evidence submitted, 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.

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.