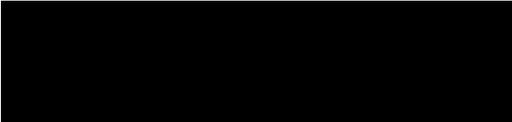


Blo

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

PUBLIC COPY

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



File: EAC 01 258 54965 Office: VERMONT SERVICE CENTER

Date: DEC 16 2003

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Other Worker pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER:



Identifying data deleted to  
prevent unauthorized  
invasion of personal privacy

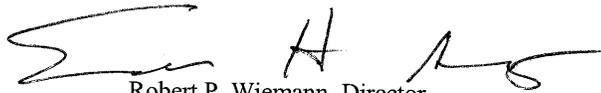
INSTRUCTIONS:

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, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a painting contractor. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a foreman. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition, and the AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return and states that the dismissal of the appeal was based on the petitioner's failure to provide that return previously.

Section 203(B)(3)(a)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are not available.

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 continuing ability to pay the wage offered beginning on the 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 request for labor certification was filed on December 22, 2000. The beneficiary's salary as stated on the labor certification is \$24.50 per hour, which equals \$50,960 annually.

With the petition, counsel submitted copies of 1999 and 2000 Form W-2 Wage and Tax Statements showing that the petitioner paid \$31,216.36 and \$29,510.11 in wages to the beneficiary during those years, respectively. Because the priority date is December 22, 2000, the amount the petitioner paid the beneficiary during 1999 is not directly relevant and will not be addressed further.

Because the evidence submitted did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on October 25, 2001, requested additional evidence pertinent to that ability.

In addition to requesting that the petitioner demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the Service Center specifically requested copies of the petitioner's 2000 federal tax returns. The notice specified that, if the petitioner were organized as a corporation, the corporate tax return should be submitted.

In response, counsel submitted copies of the petitioner's Form 941, Employer's Quarterly Federal Tax Return for the first quarter of 2001. That return shows that the petitioner paid the beneficiary \$6,750 during that quarter of that year.

Counsel also submitted a copy of the petitioner's financial statements for the first three quarters of 2001. The accountant's report did not accompany those financial statements. Because that report is missing, the record contains no indication that they were produced pursuant to an audit, rather than a compilation or a review. Because those statements do not contain any indication that they were produced pursuant to an audit, they are not competent primary evidence pursuant to 8 C.F.R. § 204.5(g)(2), and will not be considered.

Finally, counsel submitted a copy of the beneficiary's Form 1040 U.S. Individual Tax Return, rather than the petitioner's tax return, although the Service Center, on October 25, 2001, had specifically and clearly requested a copy of the petitioner's return.

On March 4, 2002, the Director, Vermont Service Center, found that

the petitioner had failed to demonstrate the continuing ability to pay the proffered wage beginning on the priority date and denied the petition.

On appeal, counsel stated that the petitioner had misunderstood the request for evidence and had mistakenly submitted the beneficiary's tax return. With the appeal, counsel submitted a copy of the petitioner's 2001 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 \$0. The accompanying Schedule L shows that at the end of that year the petitioner had current assets of \$57,505 and current liabilities of \$20,017, which yields net current assets of \$37,488.

On February 11, 2003, the AAO dismissed the appeal, finding that the evidence submitted still did not demonstrate the petitioner's continuing ability to pay the proffered wage.

With the motion, counsel submits a copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return. That return states that the petitioner declared a loss of \$26,295 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had \$76,453 in current assets and \$30,552 in current liabilities, which yields \$45,901 in net current assets. On the motion, counsel states that the appeal was apparently dismissed based on the failure to provide the 2000 tax return previously.

The priority date of the petition is December 22, 2000. The proffered wage is \$50,960 annually. The petitioner must demonstrate the ability to pay the proffered wage beginning on the priority date and during each ensuing year.

The 2000 W-2 form submitted shows that the petitioner paid the beneficiary \$29,510.11 during that year. The petitioner has thereby demonstrated that it had the ability to pay that amount during that year, and must show the ability to pay the balance of the proffered wage, \$21,449.89, during that year.

During 2000, the petitioner declared a loss rather than taxable income, and had net current assets of \$45,901. The petitioner was able to pay the balance of the proffered wage, \$21,449.89, out of its assets.

Counsel submitted a quarterly return for the first quarter of 2001 showing that petitioner paid the beneficiary \$6,750 during that quarter of that year. Counsel submitted no other evidence

of any wages the petitioner paid the beneficiary during that year. The petitioner is obliged to show the ability to pay the balance of the proffered wage, \$44,221.

During 2001, the petitioner had no taxable income and had net current assets \$37,488. The petitioner was unable to pay the \$44,221 balance of the proffered wage either out of income or assets.

The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered during 2001. Therefore, the objections of the director as subsequently affirmed by the AAO have not been overcome on the motion.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

**ORDER:** The decision of the AAO of February 11, 2003 is affirmed. The petition is denied.